

Barbara Weltman

Big Ideas for Small Business Newsletter

Featured topics

LEGAL

Non-Compete Agreements: When to Use them; How to Enforce Them

Your company has many valuable property interests that you can't see, feel, smell, or taste, such as your customer lists, trade secrets, and upcoming product launches. The best way to protect these and other interests from being used by employees after they leave your company is to have them sign a non-compete agreement (sometimes referred to as a covenant not to compete). Before you begin, you have to know what interests can be protected, where you're going to protect them, and how to enforce the agreement.

For this article I interviewed Nicholas Fortuna, an attorney and principal in the NYC law firm of Allyn Fortuna who litigates employment-related matters.

What Are Non-Compete Agreements?

These are contracts between an employee and the company that bars the employee after leaving employment from working for a competitor, and/or using protected company information on a new job, or setting up a competing business.

Most states will enforce non-compete agreements that are not overly broad. California and a couple of other states will not, viewing all non-compete agreements for employees as void.

What interests can be protected?

The reason why you want to prevent employees from certain actions after they leave your company is to keep them from actions that could undermine or destroy your business. Whether and to what extent you can keep a former employee from working with a competitor, starting a competing business, or using your business information to his or her advantage depends on the facts and circumstances.

For example, if a factory worker leaves your employment to work for your competitor, there's

probably no risk to you and no need for a non-compete agreement in this case. But if your company is in fashion design, you'd likely want to restrict the post-employment actions of your head designer.

Some interests that you can try to protect:

- **Customers.** If key sales personnel go to work for competitors, you don't want them to solicit business from your existing customers or clients.
- **Trade secrets.** How you do things in your business, including pricing, is something you don't want to share with competitors.
- **Confidential information,** such as an upcoming marketing campaign to launch a new product or service.

What is the extent of protection that can be obtained?

The scope of protection you can obtain depends upon what you're trying to protect. Usually, you can't prevent an employee from going to work for a competitor for more than a year or so. You probably can bar an employee from directly approaching your current customers and clients for a longer period. And you may be able to bar disclosure of confidential information indefinitely.

The key to creating an enforceable non-compete agreement is clearly defining the interests you're trying to protect and the reasons for doing so. The more specific you can be, the more likely your interests can be protected. The clearer your non-compete agreement, the better chances you have that a court will uphold it in case of litigation.

If your business operates in more than one state and you have employees in more than one state, make sure your agreement addresses the issue of which state's law will be used to enforce the agreement.



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Are there special considerations for sellers?

When a small business owner sells the company, he/she may be required to sign a non-compete agreement.

Such an agreement made in conjunction with the sale of a business can be broader than one for employees. For the most part, courts have a more liberal enforcement policy in this case because the owner is transferring goodwill to the new owner and any breach of a non-compete agreement would compromise or undermine the interests of the new owner.

Conclusion

Don't assume that a template for a non-compete

agreement will provide you with the protection your business needs. Spend the money upfront to have an attorney who specializes in this area of law prepare an agreement that will protect your interests and be upheld in case of litigation. For example, a good lawyer will make sure you have a "tolling provision" in your agreement so that if an employee with a one-year ban violates the agreement, the period of time that the employee is in violation can be added to the ban (even if it takes longer than one year to resolve the matter in your favor).