

## MORE THINGS YOU SHOULD KNOW ABOUT NONCOMPETES, NONSOLICITATION, AND NONDISCLOSURE AGREEMENTS



### What Does “Compete” Mean?

A standard non compete prohibits you from being an employee, consultant, officer, director, owner, lender, principal, agent, dealer, partner, distributor, representative, contractor, broker, or trustee of a competing firm. Some even prohibit you from investing in a competitor.

### Reasons For a Noncompete

In an employment agreement, a noncompete is added to prevent the employee from leaving the company and stealing customers (and company information) for his or her new business.

A non compete in a business sale is primarily designed to prevent the former owner or key executives from opening up a competing business down the street and taking the business customers. A non compete would also be included in a partnership for the same reason—to keep a former partner from opening a competing business.

### Restrictions in a Noncompete

A noncompete agreement imposes three types of restrictions:

1. **Time**—a noncompete restricts someone from opening a competing business within a certain time period.
2. **Distance**—a noncompete also restricts someone from opening a competing business within a certain distance from the original business.
3. **Type of Business**—noncompetes also restrict businesses of similar types from competing with former businesses.

Often, noncompete agreements are difficult to enforce because they may unduly restrict an individual from legitimately going into business and earning a living. Reasonableness is decided by a court of law, or through mediation or arbitration. What’s more, a decision is always made according to the laws of a specific state. And since state laws vary, the outcome may not always be certain.

### Noncompetes vs. Nonsolicitation and Nondisclosure Agreements

If you don’t want anyone walking out with valuable information about your company’s business, you can protect yourself with nondisclosure and nonsolicitation agreements, which courts

generally favor. Compared to a non compete, a nonsolicitation agreement is an attempt to prevent a former employee, partner, or owner from soliciting customers and employees of the former company. Nondisclosure agreements prevent present or past employees from disclosing commercially sensitive information belonging to the employer. Many contracts combine non compete, nonsolicitation, and nondisclosure agreements.

### **Enforceability of Noncompete Agreements Differs From State to State**

Whether a court will enforce an agreement restricting a former employee's right to seek employment with a competing company depends on which state's law applies.

For example, in California, noncompete agreements are illegal—there is a statute that says that employers cannot enforce them. In Ohio and New York, they are routinely enforced. Georgia is “somewhere in the middle,” holding noncompetes to a stricter standard than in many states.

And in Texas, such agreements were not enforced for years, but since October 2006, they will be enforced “if done right,” the same article adds.

### **One Size Does Not Fit All**

Non compete agreements must be “distinguishable” from standard business contracts, which, in the absence of fraud or undue influence, will usually be enforced as written.

The most important thing you need to do when drafting non compete agreements is to think strategically about the particular employee. What are you concerned about this person doing when he or she leaves? Whatever you're thinking, it's in your company's best interests to write a reasonable and enforceable non compete.

### **Ask Questions When Hiring**

In addition to an increase in litigation by companies seeking to enforce these agreements, there has also been an increase in companies being sued for hiring employees in violation of agreements drafted by their former employers.

It's critical to ask the people that you are thinking of hiring if they are subject to any kind of noncompete restrictions. (It's something we always ask candidates on behalf of our client companies.) You need to know if hiring an individual will subject you to a potential lawsuit.

### **Protect Your Assets**

A lawyer-drawn agreement tailored to the law and the specifics of your business will have the best chance of being binding. To protect you and your company's assets, consult an employment law attorney when considering an agreement not to compete.