

# Noncompete Agreements: How to Create an Agreement You Can Enforce

**Use a noncompete agreement to prevent losing valuable trade secrets and employees.**

After losing scores of valuable employees (and trade secrets) to competitors, a growing number of employers are asking, or requiring, employees to sign noncompete agreements. By signing a noncompete agreement, an employee promises not to work for a direct competitor for a specified period of time after he leaves the company. Here's the lowdown on whether it's worth asking your employees to sign one, and how to create an agreement that will pass muster with a judge.

## How Noncompete Agreements Protect Your Business

Obviously, a noncompete agreement can keep your business from losing employees, but it can also protect your company's confidential information. If one of your employees has access to sensitive business information or trade secrets, you'll obviously want to prevent this employee from disclosing this information to your competitors.

A trade secret is information that gives your company a competitive advantage because it is not generally known and cannot be readily learned by other people who could benefit from it. It can be a formula, pattern, compilation, program, device, method, technique or process that you have made reasonable efforts to keep secret.

When an employee with access to trade secrets leaves -- either because the employee quit or has been fired -- he could take this information and use it to his personal advantage (and at your expense). For example, a former employee may open a competing business or may go to work for a competitor and unwittingly or deliberately divulge your hard-won keys to success. A properly drafted noncompete agreement can keep this from happening.

**Note: Noncompete agreements are not enforceable against employees in California.** Since a California statute invalidates noncompete agreements except in very limited circumstances, California judges won't enforce a noncompete agreement against an employee. However, California employers can use nonsolicitation agreements and nondisclosure agreements to protect their trade secrets, client lists and employees when an employee leaves.

## Common Sense Considerations

While noncompete agreements are a very effective way to protect your business's trade secrets, you should know that the legal system puts a high value on a person's right to earn a living. If your noncompete agreement ends up under a legal microscope, it will have to pass some legal hurdles.

## **Have a Good Business Reason**

First and foremost, you need a good business reason for asking an employee to sign the agreement -- the agreement shouldn't simply punish an employee for leaving your company. Usually, your business reason will be to protect your trade secrets or a customer base you've worked long and hard to develop.

If you're selective about the employees who sign noncompete agreements, you'll up your chances of success, because judges are much more likely to enforce noncompete agreements against employees who truly possess inside information.

## **Provide a Benefit to the Employee**

Next, you must provide a benefit to the employee in exchange for his or her promise not to compete against you. Making a job offer contingent on signing a noncompete agreement probably satisfies this requirement, since the employee is receiving a benefit (a job) in exchange for the promise. It's more difficult to provide an existing employee with a benefit, but generally, coupling the agreement with a promotion or a raise will do the trick.

## **Noncompete Agreements Must Be Reasonable**

A noncompete agreement must also be "reasonable." What's reasonable? One that can't:

- last too long
- cover too wide a geographic area, or
- prohibit a former employee from engaging in too many types of businesses.

Generally, the biggest issue with noncompete agreements is how long the noncompete agreement lasts. While there's no set rule, noncompetes ranging from six months to two years are generally considered "reasonable," while anything longer than that will receive closer scrutiny. Outside of the employment context, longer noncompete agreements will often be enforced, such as in connection with the sale of a business.

## **Creating a Noncompete Agreement**

To sum up, when you're putting together your agreement, here are a few things to think about:

- When you're deciding whether to ask an employee to sign a noncompete agreement, think about your goals. Is the employee so valuable, and have you spent so much money training the employee, that losing him or her to a competitor would damage your business? Does the employee have access to important information you don't want revealed to a competitor? Make sure you can come up with a valid business reason for asking an employee to sign a noncompete agreement.

- As tempting as it might be to create a "tough" agreement, it doesn't pay to be overreaching; remember, most courts will not enforce an unreasonable noncompete agreement, and it won't be worth the paper it's written on. Instead, try to create an agreement that's meaningful to you, but doesn't simply punish the employee for leaving your company.

While these rules might seem discouraging, they exist for a reason -- to protect employees from unscrupulous employees. As long as you're reasonable, the law will be on your side. For a fill-in-the-blank agreement, you can download Nolo's *Noncompete Agreement* eForm, which includes instructions on completing the agreement.

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