

# Non-Competition Agreements

When an employment relationship ends, how does the employer protect itself against the former employee's use of all the knowledge and skill he or she acquired while on the job? How does the employer ensure that its investment of trust does not prove to become the means of the employer's undoing? Or, when someone buys a business, how does the buyer protect itself from the seller opening another competing business in the same territory? How does the buyer prevent its customer base from migrating to the new location of the seller? By using a non-competition agreement.

The non-competition agreement provides that when the employee leaves the employer, or when the business seller leaves the business, that they will not directly or indirectly go into competition. Non-competition agreements typically prevent the former employee or former business owner from engaging in the same business; from soliciting the old customers; and from revealing the company's confidential information for personal benefit or for the benefit of a new employer. Non-competition agreements can be used either alone or in conjunction with other contracts, such as employment agreements or business sales agreements.

The law of non-competition agreements varies from state to state, and the degree to which they will be enforced is

dependant upon many factors. Therefore, to the extent that your business operates in multiple states, it is best to consult each states' laws before crafting the agreement. However, as a general rule of public policy, the law prefers to let people work without any hindrances. Therefore, in those states that will uphold non-competition agreements, it is commonly required that the non-competition agreement be crafted to uphold a legitimate interest of the company and that it be reasonable as to overall scope, geographic scope and duration. It is also common that the party seeking the restriction give something of value in exchange for the promise, such as money. And, yes, Arizona does recognize the enforceability of non-competition agreements.

So what is protectable? An employer or business can contract to keep an employee or former business owner (1) from using its trade or business secrets or other confidential information in competition against it; and (2) from using for a business purpose relationships or the knowledge that was gained solely by reason of their employment with the company.

How does the employer or business buyer use the non-competition agreement to protect themselves? First by having one (in a signed writing). Next, by reminding the signer of their obligations. Third, by notifying any new

employer of the existence of the covenant.

Fourth, assuming a violation has occurred, by promptly filing a lawsuit. The promptness requirement of filing suit cannot be sufficiently underscored, as if enforcement was not of imminent importance to you, it certainly won't be to a court. Even nominal delay can cost a business owner an enforcement case.

Should a lawsuit prove necessary, money damages and injunctive relief may be available, and possibly both. Available remedies will be dependant upon the content of the written agreement, as well as upon the law of the jurisdiction in which the agreement was drafted (and in which it is sought to be enforced). Those reasons, as well as the public policy disfavoring non-competition agreements, are why careful drafting is essential. Courts will look to invalidate the agreement, and the burden of proof on enforceability is always on the party seeking to enforce the agreement. If injunction is sought, the court may be able to order the offending party to cease their business operations. If damages are sought, the court may be able to award disgorgement of all profits derived from violation of the agreement. If the former



Gary Michael Smith, Esq.

employee has gone to work for a competitor in violation of the agreement, the court order might even extend to the new employer.

Defenses to enforcement may include failure to provide sufficient consideration, as well as unreasonableness in the agreement's overall scope, geographic scope or duration, as previously discussed. Additionally, common law contract defenses such as fraud or promissory estoppel also may apply.

Although by no means an absolute protection, the non-competition agreement can be an excellent tool to protect business investments and assets. If you are interested in implementing these in your business, know that it is never too late to ask current employees to enter into non-competition agreements. However, getting a former employee or business owner to agree not to compete with you after their departure is arduous at best. Regardless of the timing, it is always a good idea to consult your lawyer before executing a non-competition agreement.

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Gary Michael Smith, Esq., is a published author, judge pro tempore and a principal of Smith & Craven, P.L.L.C., a law firm whose primary practice focus is businesses and the construction industry. Smith & Craven, P.L.L.C., is based in the Scottsdale Airpark. To contact Gary Michael Smith, call (480) 222-2225, or visit [www.smithcraven.com](http://www.smithcraven.com).

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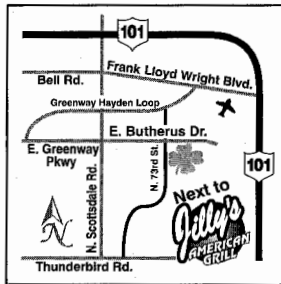
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