

Employment Agreements-Some Things You Need to Consider Before You Sign or Before You Change Employment

by Roger Manning

Non-compete agreements are generally designed to keep an employee from going to work for a direct competitor. Non-compete agreements are not necessarily given to all employee classifications within a company. Generally a non-compete agreement is given to an employee that has exposure to or access to confidential or proprietary information that can be taken to a direct competitor. Your employer/potential employer is concerned about protecting their trade secrets, patent information, database information, customer lists, customer relationships, pricing grids, contract information or anything that an employer could take that would directly hurt or hinder them through a competitive situation.

Q. What is a non-compete clause?

A. A non-compete clause can be: a) a paragraph contained in an employment agreement, or b) a separate non-compete agreement. It usually tries to prevent former/current employees from working for competitors of the employer for a specified period of time, in specific or similar positions within a specified geographic area.

Q. Is a non-compete agreement the same as an employment agreement?

A. Not necessarily but it is a very good bet that a non-compete clause will be contained within the employment agreement. It is a very good idea to closely read the employment agreement and gain clarification on any paragraph or clause that implies a non-compete.

Q. Are non-compete clauses legal?

A. Yes. The legality of a non-compete is a state-by-state issue. Some states through out non-competes due to their nature of preventing an employee from making a living within their trade. Other states rule that a non-compete is a legally binding agreement between two adults. Even within those states where a non-compete is considered legally binding, there may be room for interpretation from one courtroom/judge to another. Sometimes the non-compete clauses that employees are forced to sign are not considered legally enforceable by the court.

Q. How do I know if my non-compete clause is enforceable?

A. The best way to know if the non-compete clause that you signed is enforceable is to consult with an attorney who has experience with employment law or business law. One referral source for finding employment lawyers is the [National Employment Lawyers Association](#). Be sure to ask your attorney as to their experience with defending or prosecuting non-competes. Generally, courts in all

states will enforce clauses that are reasonable and will not enforce clauses that are unreasonable. Certain factors determine if the clause is reasonable, such as the nature of the job -- the more senior the job, or the closer the person was to trade secrets, the more likely the clause will be considered enforceable. Other factors that affect its enforceability include: the time period that you are prevented from working with a competitor and whether the clause specifically prevents you from working in a specialized area where you can give a competitor the advantage over your former employer. Generally speaking, the more time that you are asked to non-compete, the judge will rule unreasonable. It is generally considered one year or less in most states. Also the larger the geographic area, the more likely the non-compete will be non-enforceable. Generally speaking, a 100 mile radius of the business location is considered reasonable. Again, speak with attorney as to what has been considered reasonable within your state of employment. My best advice though is not to make a decision based upon your interpretation of the clause or that of a recruiter, friend, family member or generalist lawyer.

Q. I approached my direct supervisor about the non-compete clause and expressed my interest in leaving the company. I was told that I was an employee in good standing and they would not enforce the non-compete agreement if I went with a competitor. Am I OK in this situation?

A. I can't say that you are OK in this situation. The best bet would be to get your supervisor's word in writing. Be specific by getting his/her approval for not enforcing the non-compete for the specific position and the new employer that you will be gaining employment. You may even want your attorney to draft a simple one-page document that you take to your employer for their authorization/signature.

Otherwise, you certainly want to review how your employer has handled past similar situations. Did they enforce the non-compete agreements with employees who went with direct competitors? Did they enforce the non-compete agreement only if the employee was a behavior problem or poor employee? How did they attempt to enforce the non-compete agreement? Sometimes the employer attempts to enforce the non-compete by simply sending a letter to the new employer with the hopes the new employer will discharge the employee. Sometimes a "cease & desist" order is sent to the new employer if it appears that there has been a trend of prior hires and there is an intention to take legal action.

Additionally, you will want to discuss your non-compete with your potential new employer up-front. You will want to know the new employer's interpretation of the non-compete from their legal department's view. Is it enforceable? If it is questionable but worthy of risk, will the new employer legally support you if challenged?

Another area of discussion with your new employer could be employment in a different position or geographic area as a possible "waiting period". Your new employer may be willing to hire you and give you a special training period in a non-competing position or in a geographic location that does not compete with your prior employment. You work in this capacity until the non-compete expires. Again, you will certainly want to discuss this creative option with your own attorney to make sure that you are not violating the non-compete.

Q. I'm unhappy at my job and my education and training is very specific in the same industry. Since I signed a non-compete clause, does this mean that I can't work in my field of expertise?

A. Not necessarily. You may be able to get another job in the same industry -- even the same type of job without violating the clause. Make sure you understand *what the clause really means* before you start job hunting. Get the advice of a lawyer about what kinds of companies would be considered competitors and what types would not. Additionally, make sure you are an employee in good standing. Sometimes your employer will let you make the move as long as there is no evidence of taking proprietary information, trade secrets, database lists, and transfer of healthcare patients to new employer's service, libelous or slanderous comments, etc.

Q. I haven't signed the clause yet. If I do not sign the clause, can they refuse to hire me?

A. Generally, yes. An employer can legally make it a condition of hiring you. But before you panic, take the clause to an attorney to see if it is enforceable and get advice from your attorney about what companies you may be able to work for without violating the clause.

Q. I just had a great job offer by a big company in the same industry as my current employer. Do I break the news that I signed a non-compete clause? Does this mean that the company will renege on their offer?

A. Be honest and let the company know that you have signed the non-compete agreement. This advice applies to working with Search Consultants or recruiters as well. If you don't, your new employer may find out the hard way -- from being sued by your former employer. If that happens, you could lose the new job anyway. Your new employer may consider your failure to inform them a falsification of your employment application. Also, you do not want to waste your time interviewing to the final stages of gaining a job offer only to have the offer pulled for non-disclosure. It is not a good idea to alienate Search Consultants or employers who have expertise within your industry i.e.: don't "burn bridges".

Keep in mind that in these situations timing is everything. Before you tell, make sure that the company is *extremely* interested in hiring you. By this statement, I mean inform the potential new employer at the end of the first interview. I did not mean wait until you are at the job-offer stage. If your new boss is anxious to hire you, you may stand a greater chance of overcoming the non-compete. First, consult a lawyer about what the clause means. Make sure that working at the new company would not violate the clause and when you are ready to accept the offer, you can let the company know about the non-compete clause and explain the reasons that the clause will not apply.

Q. I signed a non-compete and accepted a financial stipend for signing the agreement. Someone told me that this is a tactic that better enforces the non-compete?

Yes. This is a new trend because employers have been advised that this tactic will generally enforce the agreement. Many courts have ruled that the money exchanged binds the deal and you have already gained financially for accepting the employment. Additionally, you may become involved with a corporate buy-out of your employer/company where your new employer asks you to sign their non-compete employment agreement. Again, the trend in America is to offer a sum of money for your signature to sign the agreement and as a contingency for remaining employed with the new employer/acquiring company. If you don't sign the agreement, you do not remain employed. The new non-compete in this case supercedes the older non-compete and is more enforceable in many cases due to the financial stipend that you received.

In those states where non-compete agreements are in closer scrutiny, the sum of money received for signing the agreement could be itself, the loophole. If a judge determines that the value received is not in proportion to what you are being deprived of in future employment, he/she may rule to not enforce. You, however, should discuss this whole issue with your attorney again looking for what precedence has been set in your state of employment.

Q. If I tell a prospective employer I have a non-compete agreement with my current employer will I lose out on the job I want?

A. Not necessarily. Consider the fact that non-compete clauses are becoming more common -- especially in the computer industry. Employers know that many qualified candidates come to them having signed non-compete clauses. To hire the best candidates and to avoid litigation, some employers will negotiate with the former employer to find a way for candidate to work for them. You should deal directly with your former employer to avoid a lawsuit. Once the employer is satisfied that you won't use inside information to compete, they are a lot less likely to sue to enforce your non-compete clause. Since non-compete clauses are becoming more common, more employers are open to taking this step to avoid litigation.

The lesson here is to be prepared when you plan to change jobs and you have signed a non-compete. Preparation and openness with your Search Consultant and potential new employer is the best way to avoid wasted time, loss of your job and/or litigation.

Other non-compete, employment agreement resources: