



A Case for the Non-Compete Agreement: Contractually Protecting Key Employees & Proprietary Information

Today's increasingly mobile workforce requires employers to think seriously about protecting confidential company information against misuse or outright theft by key employees. Contrary to popular belief, New York courts often enforce restrictive covenants designed to protect an employer from unfair competition by former employees, particularly when a well drafted agreement demonstrates necessity and is reasonable in scope. To that end, employers should consider requiring key employees to sign "non-compete" agreements.

If your business is like most, your most valuable resources are your employees, particularly after you impart knowledge regarding your operations to them. In a competitive arena where intellectual property is your most significant differentiator, the risks associated with proprietary knowledge rise in importance. No employer wants to invest time and money training an employee only to have that individual later present the fruits of your labor to your competitor. When that happens, the damage to your company is greater than the loss of that valued employee; having a key individual defect to a competitor can result in irreparable harm to your company's goodwill and bottom line.

Faced with this scenario, an increasing number of companies are protecting themselves against such loss by having employees sign non-compete agreements. A non-compete agreement is typically signed by a new employee as a condition of employment, either before or during that employee's orientation. When drafted carefully by an experienced attorney, with critical input from the employer, a narrowly tailored non-competition agreement will prevent a key employee from participating in harmful post-separation activities such as competing with the company, recruiting other employees, or providing confidential information to your competitors or their customers. Non-compete agreements are critical in

employment situations involving key employees with access to information unique to your particular business. Employees typically gain access to such information either directly through job responsibility, through social interactions with owners or high-level executives, or by obtaining access to encrypted or otherwise password protected company information.



Continued on page 2



A Case for the Non-Compete Agreement: Contractually Protecting Key Employees & Proprietary Information

Page 2

Jaeckle | FLEISCHMANN
& MUGEL, LLP

Buffalo

12 Fountain Plaza, Suite 800
Buffalo, New York 14202-2292
Phone: 716.856.0600
Fax: 716.856.0432

Amherst

400 Essjay Road, Suite 320
Amherst, New York 14221-8228
Phone: 716.250.1800
Fax: 716.250.1806



For more information regarding non-compete agreements and their enforcement, please contact Kevin Burke at 716.843.3854 or kburke@jaeckle.com.

This "FYI" has been prepared by the attorneys at Jaeckle Fleischmann & Mugal, LLP and is intended for general information purposes only and should not be considered legal advice. You are urged to contact an attorney concerning any specific questions you have relating to your own situation.

Although it is true that New York courts tend to disfavor agreements restricting or otherwise impairing the post-separation mobility of employees, most courts understand that employers have a substantial investment in hiring, training and compensating employees. Additionally, the courts recognize that such employers have a right to protect their legitimate business interests.

In general, a New York court will enforce a non-compete agreement where an employer can establish that the agreement: (1) is necessary to protect a legitimate business interest of the employer; (2) is not overbroad in terms of geographic scope; and (3) is reasonable in duration. The circumstances affecting each of these three factors will obviously vary depending on the nature of your business and the relationship your employee has with your business. It is crucial, therefore, that your non-competition agreement be as narrowly tailored as possible by an attorney with intimate knowledge of both your present business and your future ambitions for your business.

In addition to drafting a tightly constructed, tailor-made non-compete agreement, offering additional consideration to an employee for entering into such an agreement increases the likelihood of court enforcement of your agreement, should court action become necessary. Like all other contracts, non-compete agreements must be supported by consideration. Although New York courts occasionally find that the mere continuation of an employee's employment constitutes "adequate consideration" for purposes of analyzing the enforceability of a non-compete agreement, it is advisable

to offer the employee additional consideration in connection with the employee's recognition and acceptance of the terms and conditions of the agreement. This is particularly important when an employer asks a key employee to sign a non-compete agreement after that key employee has already begun his or her employment. The more you give the employee, the more likely the court is to enforce your agreement with that employee. Again, the circumstances will vary based on your company's business and the scope and nature of the prospective employee's job duties.

Even if you have already endeavored to protect your company by requiring your key employees to sign non-compete agreements, as a best practice agreements should be updated and revised periodically. This is particularly true where an employee has received promotions or has otherwise experienced changes to his or her job duties and responsibilities.

Should a key employee leave your company with your company's proprietary information, you should promptly contact an attorney. A tightly crafted non-compete agreement that is reasonable in geographic scope and duration and is necessary to protect your company's proprietary interests will be upheld if you act quickly. The prompt filing of a request for immediate judicial intervention may prevent your competitor from obtaining your most important assets: your key employees and the vital information you have imparted to them. In extreme cases, this may be the difference between your company's survival and its eventual, if not immediate, demise at the hands of your competitors.