

## General and Corporate Business

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## The Basics of Non-Competition Agreements

Non-competition agreements ("Noncompetes") are formal agreements which restrict employees from performing similar work within a designated geographic area for a specified period of time after the employee leaves his/her original employment. Often times, the language of a Noncompete will also contain terms and conditions which prohibit the employee from performing similar work during the employment term (anti-moonlighting clauses). A Noncompete is contained within the body of an employee's formal written employment agreement.

### Q: When are Noncompetes typically utilized by an employer?

A: Noncompetes are typically utilized by a company when it (i) recruits a skilled employee; (ii) invests a significant amount of time and money into training an employee, and/or (iii) an employee develops a working knowledge of the company's product line, trade secrets or other sensitive confidential company information. In these situations, the company has legitimate business interest in ensuring that the employee does not use the acquired skills or information for the benefit of a competitor.

### Q: Are Noncompetes considered to be illegal restraints of trade if they prohibit an individual from earning a livelihood?

A: The general public policy is that an individual cannot be completely prohibited from carrying on a trade in which he/she has been trained except to the extent that the restraint is necessary to protect an employer. Despite the public policy, most Courts generally uphold Noncompetes and find them to be legally binding so long as the restrictions are "reasonable" in geographic scope and in duration. What is "reasonable" is subjective and is open to a wide range of interpretation by the Courts.

### Q: What is meant by the geographic scope of a Noncompete?

A: The geographic scope of a Noncompete is typically defined as that territory in which the employee is prohibited from rendering similar services after their employment ceases. The geographic scope is usually defined by either naming specific counties, cities or states, where the employer currently conducts business, or defining the geographic scope in terms of miles from a specific site where services have been rendered by the employee.

For example: *"During the restricted period, Employee shall not render any service to, for, or on behalf of any competitor (as defined herein) within Lorain, Erie or Cuyahoga County, Ohio (constituting that geographic area in which the company presently conducts a substantial amount of its business activities)."*

### Q: What is meant by the duration of a Noncompete?

A: The duration of a Noncompete restriction is the length of time after employment ceases during which a Noncompete prohibits the employee from providing similar services to a competitor. Again, this length of time must be "reasonable" in order to be legally enforceable. Noncompetes which have indefinite durations are typically invalidated by the Courts.

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*For example: "Employee promises and agrees for a period of two (2) years after the termination of the Employment Term (for any reason), Employee shall not render any service, for or on the behalf of a competitor within..."*

**Q: What are the typical items contained within a Noncompete?**

A: (i) a prohibition on providing similar services to a competitor within a specified period of time within a specified geographic region; (ii) a confidentiality provision which prohibits the former employee from using the company's trade secrets and other confidential information; and (iii) an anti-raiding clause, which prohibits the former employee from recruiting other employees of the company to the new place of employment.

**Q: Does the Company have to give the Employee something in return for signing a Noncompete?**

A: General contract law states that in order for a contract to be enforceable it must be supported by adequate consideration, which means that the promising party (the employee in this instance) must receive something of value in exchange for their promise. If a Noncompete is executed before the employee commences employment, the promise of future employment is itself considered to be adequate consideration. If a Noncompete is executed after employment has commenced, it is recommended that a bonus be given to the employee in exchange for executing the Noncompete (Courts are split as to whether continued employment of an at-will employee is sufficient consideration to support a Noncompete).

**Q: Are the laws in various states the same in this area?**

A: Each state has its own very distinctive sets of laws in the area of Noncompetes. California, for example, invalidates all Noncompetes except for those which are imposed upon equity stakeholders in companies. It is, therefore, very important to determine which state's laws will control the enforcement and interpretation of the Noncompete with which you are dealing.

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