

NON-COMPETITION AGREEMENTS

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We routinely receive calls from employers who want to create a non-competition agreement with an employee or enforce a non-competition agreement against a former employee. Unfortunately, many employers do not put the appropriate effort into creating a non-competition agreement with an employee. Therefore, it becomes difficult, and often impossible, to enforce a non-competition agreement when an employee leaves.

As a general rule, our courts do not like non-competition agreements as a matter of public policy because you are limiting the ability of your employee find another job. However, if a non-competition agreement is drafted with several key factors in mind, it is possible to have the agreement enforced by our courts.

1. **Consideration:** The first and perhaps most important component to well-drafted non-competition agreement is that the employee received adequate consideration for signing the agreement. The best way to prove adequate consideration is to have an employee sign a non-competition agreement at the time he is hired. Since signing the agreement was a condition or employment, the consideration for the non-competition agreement is his new job. If someone already works for you and you would like for them to sign a non-competition agreement, adequate consideration is often more difficult to establish. The courts have held that continued employment in exchange for a non-competition agreement is not adequate consideration. You will have to give the employee something to which he or she is not otherwise entitled, such as a bonus, a salary raise, or some other discretionary compensation.

2. **Limited Geographic Territory:** Another important component of an enforceable non-competition agreement is to make sure that you have limited the geographic territory of your restriction to an area which you legitimately need to protect. For example, if you have an employee that works with clients solely in eastern North Carolina, it would not be reasonable to ask them to sign an agreement which prohibits them from working anywhere in the State of North Carolina. It would be best to limit the geographic territory to the eastern North Carolina counties where they will work for you because there is a legitimate business reason for prohibiting them from working in that territory.

3. **Limited Work Activities:** In order to enforce a non-competition agreement it is also important to insure that the agreement prohibits only the specific work activities which the employee performed for you. For example, if you employ a salesperson in your business, then any non-competition agreement you prepare should prohibit the employee from selling the product or products distributed by your company. It would not be reasonable to prohibit the employee from having another sales job in a completely different industry.

4. **Limited Duration:** Since our courts do not want to place unreasonable restraints on the right of an employee to find another job, a non-competition agreement cannot last forever. The purpose of a non-competition agreement is to give the employer time to replace the employee and preserve the customer relationship which had been handled by the former employee. As a result, it is important to evaluate each position to see how long it would realistically take to hire and train a replacement and have that person get up to speed with your customers. While there is no bright-line rule, a non-competition agreement which expires twelve (12) months after the termination of employment would be reasonable in most cases, and there may be some circumstances where that time period could be extended even longer.

Employers do not need non-competition agreements with every employee. There are some employees, however, which are a key part of your business. In those instances, a non-competition agreement can be a valuable tool to protect your legitimate business interests. If you choose to use a non-competition agreement, it is important to spend the appropriate amount of time on the agreement at the beginning of the process to insure that each agreement meets your needs. Spending time on these matters at the beginning will greatly increase the chances of a court upholding your non-competition agreement if it is challenged by your employee at a later date.