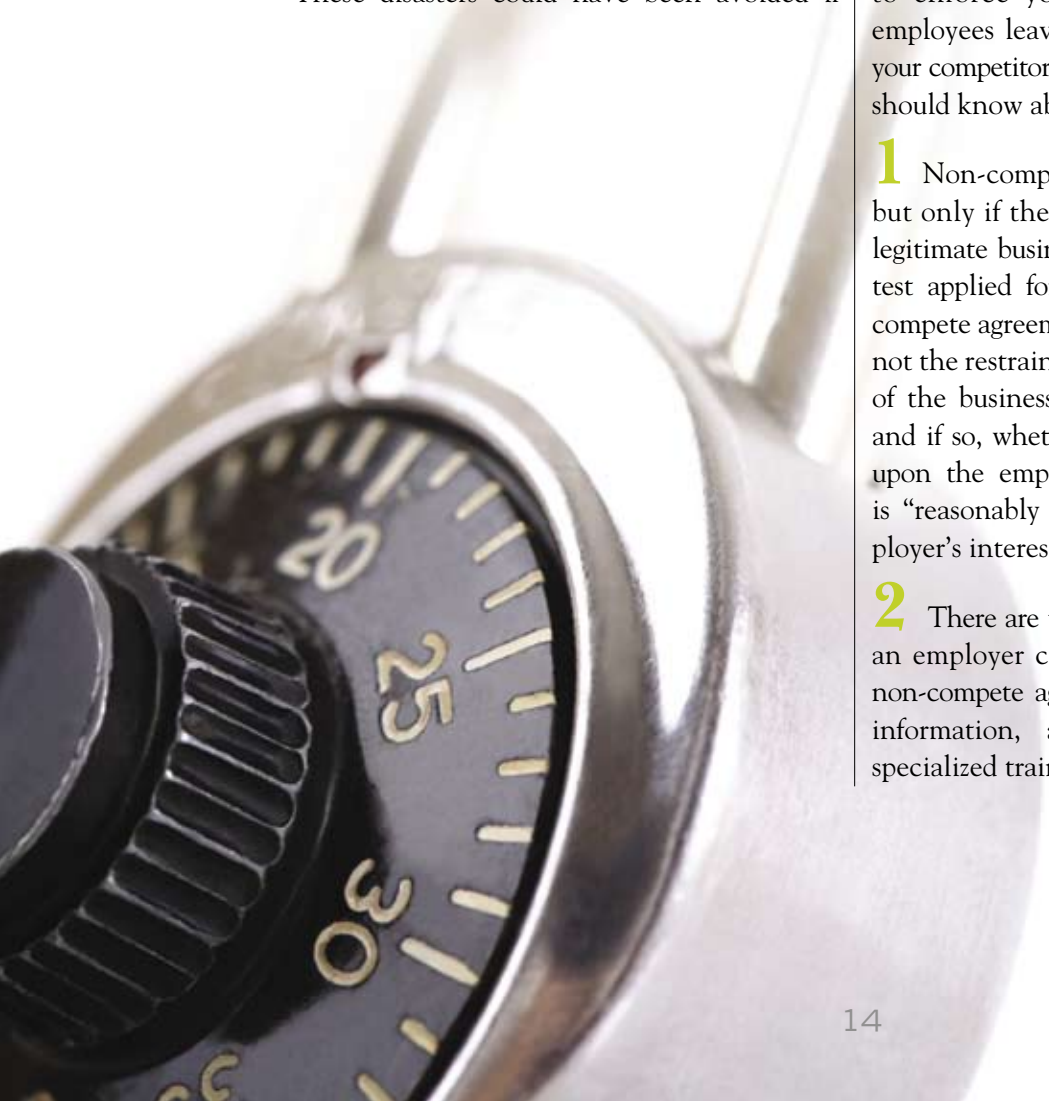
Lock it up: The non-compete agreement top ten list

Your key sales representatives in Oregon and Louisiana, responsible for over $10 million in annual sales, defect to a competitor. Thankfully, you have a non-compete that prohibits them from competing with your company for the next year. You start two lawsuits and are shocked when a court in Oregon finds your non-compete unenforceable because you failed to advise the employee in writing about the requirement that he/she sign a non-compete, and a court in Louisiana finds it unenforceable because it failed to specify each parish ("county" to the rest of us) subject to the non-compete. These disasters could have been avoided if you had paid attention to variations between the non-compete laws in states where your employees are located.



The law of non-competition agreements is complicated and varies significantly from state to state. If your company has employees in multiple states, it is prudent to have a lawyer experienced in the area of non-competition law help your business draft its agreements, taking into account the laws of the various states where your employees are located. Otherwise, you run the very real risk of not being able to enforce your non-competes when key employees leave your company and defect to your competitor. Here are ten important tips you should know about non-compete agreements:

1 Non-compete agreements are enforceable, but only if they are reasonable and protect a legitimate business interest. In Minnesota, the test applied for determining whether a non-compete agreement is enforceable is whether or not the restraint is necessary for the protection of the business or goodwill of the employer, and if so, whether the agreement has imposed upon the employee a greater restraint than is "reasonably necessary" to protect the employer's interests.

2 There are three "protectable interests" that an employer can legitimately protect with a non-compete agreement: goodwill, confidential information, and the benefits of highly specialized training.

3 A non-compete agreement traditionally applies to a certain geographic territory. The validity of a geographic restriction depends on the nature of the employer's business, the geography in which the employee actually worked and whether the restrictions would cause an employee undue hardship.

4 Courts look favorably on customer-specific restrictions in lieu of geographic restrictions. Customer-specific prohibitions usually can only prohibit doing business with customers with which an employee directly, or through those the employee supervised, did business while an employee.

5 Courts will also enforce subject-specific restrictions to protect confidential information in lieu of geographic restrictions or customer-specific restrictions. Subject-specific restrictions are most readily upheld as to scientific, technical and managerial employees performing services in connection with the same type of product the employee was involved with for the employer.

6 Under Minnesota law a court has the "sound discretion" to reform "unreasonable" non-compete provisions by rewriting them to make them reasonable. However, this rule, called the "blue pencil" doctrine, is not the law in most other states. In other states, such as Nebraska, if the non-compete is even slightly overbroad, then it is completely unenforceable.

7 A non-compete agreement signed prior to inception of an employment relationship does not require independent consideration.

8 In Minnesota and many states, a non-compete agreement signed after the inception of an employment relationship must be supported by adequate consideration; continued employment is not adequate consideration. In other states continued employment may be adequate consideration.

9 If you think that a confidentiality agreement is all you need to protect your valuable information, think again. Confidentiality agreements and trade secret statutes do not provide the same level of protection as non-compete agreements.

10 If you are a Minnesota employer with employees in other states, it is very important for your non-compete agreements to provide that Minnesota law governs and that any disputes will be resolved in the state courts of Minnesota. You should also make sure that your non-competes comply, to the extent possible, with the laws of the states where your employees work. Without such a provision, you may be forced to litigate in another state and/or have another state's law applied to test the validity of your non-compete, often with unpleasant results.[1] In some cases, even if your forum selection clause will allow you to litigate the dispute in Minnesota, the Minnesota court will still apply the law of the employee's home state if it reflects a fundamental public policy of that state.

By Bill Pentelovitch |

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[1]For example, in California non-competes are void as against public policy unless necessary to protect trade secrets. In Oregon, a non-compete agreement signed after January 1, 2008, is void unless, among other things, (1) the new employee is advised in writing at least 2 weeks before the start of his employment that a non-compete is a condition of employment; (2) the annual gross salary and commission, at the time of termination, must exceed the median family income for a family of four (currently $62,000).