Dealing with

Know the laws in your state to avoid violating clauses.

**BEFORE ACCEPTING A GREAT JOB OFFER,** have you ever worried about a non-compete agreement with a current or recent employer? Have you ever been concerned with signing a non-compete agreement with a new employer? How about signing a new or revised non-compete agreement with your current employer? The answer is likely yes to at least one of these questions.

Non-compete agreements follow us throughout our careers in one form or another. Most employers have a written employment agreement with their employees, mainly consisting of non-disclosure, non-solicitation and non-compete clauses. This article will focus on non-compete clauses. Individuals are usually most concerned with what they can and cannot do in order to avoid violating a non-compete clause.

I promise to not give legal advice since I am not an attorney. However, I have reviewed countless non-compete agreements and encountered many situations in which individuals questioned effects of non-competes on their employment status or ability to work for a competitor. Even for an attorney, providing clear-cut answers is often difficult regarding non-compete violations.

To further complicate the process, laws vary from state to state. For example, non-competes in California are not legal, except in the case of a business equity partner. Other states with big restrictions against non-competes are Louisiana, Alabama, Florida, Oregon and Michigan. Many states restrict enforceability of these agreements in order to promote a person’s ability to make a living. If a provision of an agreement is found to be unenforceable, some states will invalidate the entire agreement, while others will “blue pencil” the agreement to reform the otherwise unenforceable provision. As you can see, it is critical to review specific laws in your state.
THE PROCESS

Below are four questions to ask yourself when evaluating a non-compete agreement at a new employer.

1. What are the agreement terms, and will it be difficult someday to leave this employer and stay in your field, while avoiding violation of the non-compete? Study three areas of the agreement to determine if restrictions are reasonable: (1.) time duration, (2.) geographical scope and (3.) business scope.

2. Is this employer likely to take legal action upon violation of agreement terms? Look at company history and management style to assess chances of this employer taking legal action for even minor agreement violations.

3. What does the nature of the agreement tell you about company culture? How a non-compete agreement is written says a lot about company management style and culture. If you have a job offer from a company with a highly restrictive agreement, look carefully at signs that this employer may have top management that can be intimidating, vindictive, dictatorial or unreasonable.

4. Are you able to negotiate any terms? It is difficult to negotiate terms of a non-compete agreement when joining a new employer. However, if upon review with your attorney you find provisions in the agreement to be of questionable legality or enforceability, you may be able to negotiate changes that will make the agreement a reasonable one.

NEW & REVISED AGREEMENTS

The same four questions listed above need to be answered when your current employer decides to implement a new or revised non-compete agreement. In addition, you need to ask the following:

1. Are you being given financial consideration for signing the agreement? For a non-compete agreement to be enforceable, most courts state that financial consideration needs to be given to an existing employee. This can be in forms such as a bonus, perk, salary raise or severance agreement. This is the perfect opportunity to negotiate agreement terms or financial consideration since your non-compete may be invalid if you are coerced to sign without such consideration. Sometimes an employer will even pay an employee’s salary for an extended time period to stay out of competition. Financial consideration is not a factor in enforceability of agreements with a new employer because the offer of employment is sufficient consideration.

2. What has triggered your employer to implement a new or revised agreement? Look at the reason behind a new agreement being implemented. If your company was acquired, it is understandable that a new agreement may be put on the table. In this case, you will evaluate the agreement in the same way as with a new employer. If your employer presents a new agreement that is more restrictive because of too many employees moving to competitors, you may want to consider changing employers because of other underlying problems.

I will share a first-hand experience related to this topic. I worked for eight years after college with a recruitment firm that was restructuring after dropping from 60 employees to eight, and from three offices to one. The company founder and I were formulating a rebuilding strategy and he wanted to institute what I thought was a highly restrictive and overly penalizing non-compete agreement. My belief was that individuals would view this agreement as intimidating and would view the company as attempting to hold this agreement over them so they wouldn’t leave. I did not sign this agreement. This issue was symbolic of reasons that I left the company and started my own search firm 28 years ago.

EVALUATING A COMPETING JOB OFFER

Following are four questions to ask yourself about your non-compete agreement when evaluating a job offer with a competitor.
1. **What is the legality and enforceability of the agreement?** Generally the less restrictive the agreement, the more likely it is to be legal and enforceable. Most courts enforce non-competes when an employer has legitimate interests to protect, although these interests are balanced against potential monetary effect on the employee. Depending upon the state, a non-compete is usually enforceable if:

- Restrictions are reasonable in terms of geography, business scope and time duration (typically six months to two years) and will not interfere with the employee’s ability to make a living.
- The employee leaves voluntarily or is terminated with cause.
- Financial consideration is given as fair exchange (in the case of existing employees).
- The employee is given reasonable time to consider signing.
- The employer has not undermined its enforcement ability (e.g., “selective enforcement,” overly broad use of non-competes, asking an employee to conduct illegal activities, breaching a separate contract or payment obligation with the employee, not telling a new employee about the agreement until after he quits a job).
- The employee’s role has not changed materially since signing the agreement.
- There is a proper assignment clause to the acquirer when a business is acquired.
- It is consistent with public interest.
- It is signed by employer and employee.

2. **Will you be in violation of any agreement terms?** Consult an attorney when considering joining a new employer, and it is unclear if you will be in violation of a non-compete. Minimize risk exposure by “walking a fine line” and avoiding blatant violation of agreement terms.

3. **Is your current/recent employer likely to take legal action?** Employers begin in your exit interview by reminding you about employment restrictions in your non-compete. If you join a competitor and your past employer sees significant monetary damages as a result, they will start with cease and desist letters, possibly followed by filing a lawsuit beginning with a preliminary injunction request. Your past employer will likely pursue legal action only if (1.) all other avenues for relief are exhausted and (2.) there is a good chance of winning in court. Employers ideally want to avoid spending time and money involved in a lawsuit.

4. **Are you able to negotiate agreement terms with your current/recent employer?** If you are on good terms with the employer for which you possess a current non-compete agreement, you should, at least, be able to clarify what this employer is restricting you from doing (e.g., companies you can work for, customers you can call on, products you can sell). Ideally negotiate such agreement terms and get approval to perform desired duties with a new employer. Have specific approved competitors and duties listed, and get everything in writing.

During my 36 years in the search profession, I have seen only a few cases involving non-compete agreement violations go to court. Any disagreements are normally settled directly between two parties. Don’t let a non-compete agreement stand in the way of fair competition and you making a successful living.

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