



# Non-Compete Agreements:

## Essentials for Enforcement

By Kristin Rowell, Esq.

**N**on-compete agreements can be a powerful tool to protect your customer relationships and confidential information. Well-written non-compete agreements are routinely enforced by Minnesota courts despite recent legislative proposals seeking to eliminate them.

Given the enforceability of non-compete agreements in Minnesota, companies who seek to enforce them often wind up in litigation against their former employee and the employee's new employer. While litigating non-competes can be somewhat unpredictable and expensive, enforcing non-compete agreements is much easier and in turn, less costly if they are well-written from the outset.

There are several issues to consider when creating enforceable non-compete agreements. If you do not currently use non-compete agreements, or if you use them and have been thinking it may be time to update your agreements, consider these 10 essential issues.

**1. Consideration:** Non-compete agreements must be supported by independent consideration. The easiest way to do this is to offer new employees non-compete agreements before their first day on the job. Contracts are formed through an offer, acceptance and consideration, so the offer is the written agreement presented to the candidate, acceptance happens when the candidate signs the agreement and the consideration for the agreement is the job. "Consideration" is what the employee received in exchange for agreeing not to compete following the end of the employee's employment.

Business reasons sometimes dictate that employers obtain non-compete agreements from an employee after the employee has already worked at the company for a period of time. In such cases, it is important that the employer provide the employee with some form of independent consideration, such as a promotion where the employee will take on increased job responsibilities or customer relationships, a lump sum dollar amount, a company vehicle, or some other benefit that the employee did not have before entering into the agreement.

**2. Time/Duration of Restriction:** The time/duration component refers to the length of the non-compete period. The key here is to balance your company's need to protect its confidential information and customer relationships with the employee's right to work and earn a living. As a general rule, the shorter the duration of the restriction, the more likely the restriction will be enforced. Between six months and two years may be reasonable depending on the position. In Minnesota, most enforceable non-competes prohibit the former employee from competing with his or her former employer for somewhere between one and two years.

**3. Restricted Activities:** It is important to be somewhat specific about what the employee cannot do during the period of the restrictive covenant (i.e., non-compete). Many non-compete agreements contain prohibitions on soliciting customers and employees. Most non-compete agreements prohibit the former employee from activities, such as "competing, soliciting, offering, selling," etc. Often the lan-

guage is broadly worded, however, prohibiting the activities "directly or indirectly." This prevents the employee from doing an end-run around the agreement by competing through someone else.

**4. Geographic Restriction:** Although our digital world means that non-competes are often enforced even when they prohibit competition anywhere in the country, the safer approach is to limit the geographic scope of the non-compete to the employee's designated sales region. If the employee's designated region is national or even worldwide, then it is wise to restrict the scope of the non-compete to a particular product category, sales channel, or customer list. Courts much prefer to enforce reasonable restrictions.

**5. Governing Law and Venue:** You should state that the agreement is governed by Minnesota law and specify your county court. If your business is located in Hennepin County, state that any disputes must be brought in Hennepin County District Court. If for some business reason you want to rely on state law other than Minnesota, check to make sure the other state enforces non-compete agreements. Some states, such as North Dakota, have passed laws rendering non-compete agreements void.

**6. Colleagues Should Have Same Agreement:** An important way to ensure enforceability of your non-compete agreements is to ensure that all employees in the same position have the same agreement. The more similar the terms are between the agreements of employees in the same position, the easier it will be for you to enforce the agreement.

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**7. Consistent Enforcement:** Businesses can run into trouble when they seek to enforce a non-compete agreement against a departed employee if the company did not enforce the same agreement against a different former employee. If you are going to use non-compete agreements in your business, enforce them consistently for all employees when they depart the company or don't have them.

**8. Attorneys' Fees and Costs:** Include a provision stating that the employee agrees to pay the attorneys' fees and costs incurred by the employer to enforce the agreement. That provision should incentivize even the most risk-taking employee not to breach his or her contract.

**9. Injunctive Relief:** It is often necessary to have a procedure to immediately stop the departed employee from competing with your company. Include a provision regarding injunctive relief. State that the employee agrees that the employer's damages may be impossible to measure and therefore, the employer is entitled to injunctive relief in the event of a breach of the agreement.

**10. Be Reasonable:** Enforcement of non-compete agreements boils down to a matter of reasonableness. Obtain restrictions of time, activities and scope that are necessary to protect your business, but try not to overreach. You'll be glad you did so when it comes time to enforce the agreement.

Kristin Rowell is a trial lawyer and shareholder of the business litigation boutique law firm of Anthony Ostlund Baer & Louwagie P.A. in Minneapolis. Kristin represents companies and individuals in complex real estate disputes, closely-held company shareholder disputes, contract, and employment matters. Kristin regularly appears on behalf of her clients in state and federal courts in Minnesota and North Dakota, as well as other states. When she is not helping her clients solve their legal problems, you can usually find her running, strength training, spending time with family and friends, or volunteering for the University of Minnesota Masonic Children's Hospital.



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