



Keep Your Edge

Non-compete Agreements Protect Business Assets

Protecting your company's assets, including its goodwill, intellectual property and customer relationships, is vital to success and requires careful planning and execution. Non-compete agreements can accomplish those goals and can be a key component in an overall plan to keep your competitive edge sharp.

Non-compete agreements are, generally speaking, written agreements between an employer and employee wherein the employee agrees that if his or her current employment is terminated, he or she will refrain from competing against the former employer in certain ways specified in the agreement. For example, a software engineer may agree that upon termination of his employment he will not use his former employer's confidential information, solicit his former employer's customers or otherwise compete against his former employer in any way for a period of two years.

What good is a non-compete agreement?

A prudent employer should consider non-compete agreements as part of an overall plan to protect valuable business assets. Other components of the plan often include patent and trademark protection of intellectual property, appropriate human resources policies and procedures and internal safeguards and protocols for access and use of sensitive business information. As a general matter, a non-compete agreement can help safeguard an employer's interest in confidential information, specialized training given to employees, key customer relationships and intangible (but very valuable) goodwill.

It is common for employers to have new employees sign non-compete agreements at the outset of their employment. But employers can ask employees to sign non-compete agreements at any point during their employment, and even

after their employment has terminated. Also, severance packages can be given conditional upon execution of a non-compete agreement and release and waiver of any claims against the company.

Are non-compete agreements enforceable?

This is the \$64,000 question. The short answer: It depends on the particular circumstances. Because they are a restraint on trade and can prohibit productive members of society from earning a livelihood in their chosen field, courts review these agreements carefully before enforcing them. The good news for employers, though, is Utah courts have upheld and enforced non-compete agreements on a number of occasions, so beware of those who dismiss them out of hand as not "worth the paper they are written on."

In these difficult economic times, many employers wonder whether it is possible to enforce a non-compete agreement against an employee who has been laid off or terminated without cause. While Utah law does not provide clear guidance on this question, there is nothing to prevent an employer from at least attempting to enforce a non-compete agreement under these circumstances.

How do you enforce a non-compete agreement?

Enforcement options range from simply reminding a departing employee about the non-compete agreement in the exit interview to full-scale litigation. Oftentimes having your attorney send the departing employee a letter enclosing the non-compete agreement and reiterating that your company takes these matters seriously suffices to ensure compliance. If sterner measures are needed, you may need to file a lawsuit and request that a restraining order be issued preventing your former employee from violating the terms of his or her agreement. If you

go the litigation route, you should: 1) act quickly, as the law disfavors those who sleep on their rights and 2) be prepared to explain to the judge precisely why you need the protection of a non-compete agreement and how you will be harmed if it is not enforced.

Finally, if your former employees are unfairly competing against you (at least in your estimation), but you do not have a non-compete agreement in place, you should consider whether there are statutory and/or common law protections that apply regardless of whether an agreement is in place. For example, your trade secrets and sensitive business information may be protected from use or disclosure under Utah's trade secrets protection act, U.C.A. 13-24-1 et seq. Next, you should consult with an attorney to carefully consider whether pursuing claims for unfair competition may wind up doing your business more harm than good. Even setting aside attorneys' fees and time spent in litigation, both of which can be substantial, in "proving up" a case for unfair competition, it is not uncommon for a company's valuable customers and business contacts to get dragged into the legal quagmire. To state the obvious, this can be bad for business.

In summary, employers are well-advised to obtain non-compete agreements to help protect their valuable business assets. Legal counsel can help craft agreements to meet individual business circumstances and provide the best chance of success should the agreement need enforcing in court. **UB**

Lyle Fuller is a partner at the law firm of Smith Hartvigsen, PLLC, where he practices business litigation with an emphasis on unfair competition, agreements not to compete and trades secrets. The author thanks Kyle Fielding, an associate attorney at Smith Hartvigsen, for his assistance with this article.