

Our mission is to shepherd as many business owners as possible to fulfillment of their goals and their ideal lifestyle.

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Avoid a Hostage Crisis With a Non-Compete

by

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True Stories

I once found myself in a meeting where the potential buyer of a company would not buy unless a key employee signed a non-compete. The employee would not sign the non-compete unless the seller agreed not to sell **and** agreed to give him a generous equity stake. If the seller would not agree to his terms, the employee was threatening to leave and take his employer's customers with him. This move would have crippled the business, and all but destroyed the seller's personal net worth. The discussion got so heated that the attorney had to separate the parties and sit them in separate rooms. Neither party was my client, but I recall that the parties never did come to an agreement.

On another occasion, there were two owners of a very lucrative business. One salesman was treated "like a partner," according to the two owners. He was responsible for bringing in 75% of the business. When I asked to see his employment agreement, I was told there was none and that the employee was a 1099 worker. I also discovered there was no non-compete or non-solicitation of customers agreement. Turns out, the owners planned to sell the business and then "the buyer would negotiate separately with the salesperson." As a result of our discussion, the owners realized that they had a serious issue to address and that the "employee" was holding all the cards.

The Benefits are Obvious

These are just two examples of what can happen when an employer does not include a non-compete, or a more narrow non-solicitation, agreement in the initial employment package. Your goal, as the business owner, is to protect your assets. Without an appropriate and well-drafted agreement, your employees can walk out the door and take proprietary information, customers, and other key assets that drive the value of your business. The attorney's fee to draft a well-crafted document is money well-spent to protect what is probably your largest single asset.

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A non-compete generally is a broad agreement restricting competitive activity. Sometimes a narrower non-solicitation agreement is acceptable to the employee candidate and will serve your needs just fine. Business owners often tell me that non-competes and non-solicitation agreements are worthless and unenforceable, especially in Texas. This is not necessarily true. Check with an employment law attorney about whether provisions can be crafted to protect your business and which type of agreement would be best for your situation. Before we check in with a legal opinion, let's look at this from a practical standpoint.

Practical Reasons to Have a Non-Compete or Non-Solicitation Agreement

- Asking a new hire to sign a non-compete or solicitation agreement as a requirement of employment is an excellent way to flush out any misconceptions or lack of commitment on the prospective employee's part about his proposed service to your company. If a potential new hire signals that he will not sign, you might want to keep looking for someone to fill the position.
- Buyers assign more risk to a business where the employees have not signed a properly drafted non-compete or non-solicitation agreement. That risk translates into a lower offer, or no offer at all, for the seller.
- An agreement makes the employee stop and think about what he can and cannot do when he is planning to leave.
- When you decide to put your business in play is not a good time to ask an employee to sign an agreement. Your timing has placed you in a poor negotiating position, and it raises suspicion that you will be selling, long before you are ready to reveal your plans to employees, customers, and vendors.

When Should You Have a Non-Compete or Non-Solicitation Agreement

There are several instances when you and your employee should have a non-compete or non-solicitation agreement. A few examples are when an employee:

- has access to confidential information,
- drives sales, or
- is an integral part of client or customer relationships.

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The best time to enter into a non-compete or non-solicitation agreement is at hire or when the employee is given access to confidential information. The Texas Supreme Court is reviewing other circumstances that may allow for a valid non-compete.

How Enforceable are Non-Competes and Non-Solicitation Agreements

Documents that are carefully crafted and not overly restrictive can be enforceable. When an employee leaves, a thoughtful attorney will not tell an employee to blow off the agreement he has entered into. However, a document that has already been signed by employer and employee can be reformed and agreed to by both parties so that the terms are more acceptable or more reasonable. When dealing with non-competes, scope of restricted activity, geographical scope and time period for enforcement are sometimes renegotiated. Both non-competes and non-solicitation agreements need to be drafted with an eye toward the person's position in the company. An employer needs to ask himself, "what is it I don't want the employee to do when he leaves?" Often a non-solicitation agreement, which is narrower in scope, is sufficient to restrict the employee from soliciting existing clients or customers that your company has performed services for (and also from soliciting your other employees). When selling your business, buyers almost always want to see a well-drafted non-compete or non-solicitation agreement for key people, and, will **require** the business owner to enter into a non-compete with the acquirer.

Take Steps to Protect Your Asset Now

Now would be a good time to find out if your employees should sign an agreement. Call us today for an introduction to an experienced employment attorney to see how you can protect what is probably your single largest asset, your business.

Joan M. Ridley is president of Business Wealth Solutions, a Dallas-based advisory firm that consults with business owners about how to successfully leave their business. Visit our website at www.businesswealthsolutions.net. Call us today at 214.692.9192 for a complimentary meeting to learn how we can help you get where you want to go. Ask for our complimentary brochure.

The author wishes to thank Rebecca Siegel Singer for her contribution to this article...

Rebecca Siegel Singer is Senior Counsel with Underwood Perkins, PC, a Dallas law firm. Her area of practice is Employment and Labor Law Counseling and Litigation. Becky frequently advises companies and executives concerning employment contracts, non-compete clauses, and severance negotiations. Formerly, she was attorney at the Solicitor's Office of the U.S. Department of Labor and partner in the Employment & Labor Dept. of Fulbright & Jaworski, L.L.P. Visit the firm's website at www.uplawtx.com.

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