

I'd like to know how many members have employees, specifically sales reps, sign non-compete agreements. We currently do not have one in place, but are considering one. We are getting different opinions on the ability to enforce or defend a non-compete in the court of law. If you have one in place, have you ever had to test it in the courts? And would anyone be willing to share theirs with the group?

FROM ILLINOIS-BASED MEMBERS:

As to con competes the simple answer is it is like preventive medicine, better to be inoculated from the harmful effects than to suffer the cure.

As to a non-compete these are imminently defendable because their intent is to prevent someone from their career and that in itself has inherent risks...not many courts are going to give such blanket authority that forces an individual from earning income.

The better route is a non-solicit agreement which only restricts the ex-employee from selling those customers he/she gained knowledge of by working for your company.....You definitely wish to limit the time it is enforceable because again if the terms are unreasonable you can lose a legal battle.

As with any legal document, before its' implementation make sure and have your corporate attorney review it to ensure your best protection, make sure you state clearly what is 'OFF LIMITS', and remember, whenever there is a contract there is a potential for litigation therefor make your document as clearly defined as possible to lessen the risk of a legal challenge.

Non-competes are difficult to enforce. Judges are reticent to tell someone they can't work. Non-solicitations, however, are much more enforceable. It means your salesperson can't go after your current customers. Judges are more likely to view the customer list as an asset of the company for which it's not unrealistic to ask for protection.

Regarding implementing new agreements –

They simply can't have an existing employee sign the document. In a contract, you must have "consideration" meaning both sides have to get something. In most states, continued employment is not valid consideration. So if you're going to implement a new agreement, the employee has to get something – maybe a life insurance policy where the spouse is the beneficiary, or maybe it's a new bonus plan...

Re: have we ever had to test it – I have enforced non-solicitations numerous times. Most of the time, I don't enforce non-competes because morally, I don't want the person to be without a job (just not with my company!). It's hard for me to try and force a guy who has been in the printing industry 20 years to sit on the sidelines or find a whole new career.

Important to have it for a specific period of time i, 2,3, years. You cannot prohibit them forever. Unless you are buying a company and then usually only the current accounts are limited

We currently do not have a non-compete in place however, we are reviewing our options now, as well. It is more important for us to protect our accounts if a sales person leaves or is terminated, than it is to restrict other employees from working in the industry at a "like company" in a capacity other than sales. This is one reason why we may incorporate a non-solicitation agreement and forgo the non-compete agreement.

We do not have a non-compete agreement because they are really difficult to enforce. You cannot take away a person's ability to obtain a job and make a living. A grey area that is just too tough to deal with.

FROM WISCONSIN-BASED MEMBERS:

We have Agreements in place and have found that it keeps the honorable people honorable and the rest will do whatever they want.....

We do not have the sales reps sign anything. Most non-competes are not enforceable in the state of Wisconsin. Past experience shows that a rep that leaves only takes about 50% of his/her business along anyway.

We do have all of our sales reps on a formal Agreement which, among many other things, includes a non-compete clause. We have done this for more than thirty years and have had to enforce it on a couple of occasions. While never actually ending up in court, a strongly worded letter from our lawyer has been required at times to remind them of what they signed. As long as the language is worded properly and is not too restrictive, it should be enforceable. You should also include language regarding company assets such as customer lists and job information. Any company that doesn't do this is foolish and risking loss of valuable information.

We have discussed it and have researched the idea in the past but have not administered one. Our attorney told us that they are considered a gray area in Wisconsin e.g. a person has to be able to make a living, so the part about not working in the same field within a certain radius of your company doesn't have much integrity.

However, if a former employee purposely targets your company's customers, (and you had a non-compete in place), you'd have a legitimate reason to take action because they are potentially causing harm to your business. Actually in this case, I believe you can take some legal action even without a non-compete, unless those customers have approached the sales rep themselves.

We decided that we are not worried about sales reps leaving for another company – they are all long-term employees. If we had those concerns though, I'd reconsider having the staff sign a non-compete in some form. You should get the advice of an attorney beforehand.

We do not use Non-Competes. But have had to deal with a few legal issues when hiring Sales Representatives who had signed a Non-Compete with a previous employer. We have found court decisions regarding Non-Competes are usually handled based on prior case law. How the Non-Compete is written, conditions under which it was signed, and application to the new job all will be considered on a case by case basis in court. Can be costly to defend and each state has different interpretations on Non-Competes validity.

Non-compete agreements are similar to slander suits. Years ago both were used in courts. Today slander is almost nonexistent as non-compete is fast being struck down. To ask a salesman to sign away a future ability –ie rights- to make a living - is as touchy as the prohibition of indentured servitude vs slavery as was originally covered our Constitution. I believe courts are not supporting these kinds of property rights going forward today in favor of Corporate ownership. The real question is who owns and who is aware of the customer's file of business, and who is trusted to perform these duties. I think the first opportunity comes with advertising and the last comes at billing and collecting the job. These are the times the company must claim its due as to finding the client, pricing and job correctness. Also to learn of needs, expectations & complaints and other valuable information about the customers' business plans. A HDWD survey-how did we do--with a prize /incentive for completion as a report to Corporate management could be awarded drawn each time period. This is the one opportunity for top mgt – those supervising sales forces- to get feedback from their top mgt customers—the people who write the payment checks. Also the company should visit once in a while the account without the salesman possibly using an independent survey for future directions.

If a salesman leaves the door is open for maintaining feedback and continuity of future business if the salesman's name and the VP of sales is listed on the invoice. This promotes continuity of responsibility for the customer's account.

Attached please find two GENERIC agreements (*editor's note: these are on pages 7 and 9*).

Why two?

In order to have a non-compete you need to have an underlying agreement specifying the context of what are the company and salespersons responsibilities duties specifically are when employed - "working in the best interest of the employer" clause.

So when an employee leaves employment, he continues to "work in the best interest of the employer" for a specified defined period of time - this is the non-compete agreement which is an extension of the sales employment agreement.

Enforcement of a non-compete agreement?

The court looks at a number of factors:

1. Is the geographic area the same as when employed and specific enough to not cause undue hardship on the ex- employee?
2. Did those sales accounts that the ex-employee brought to the company defined in the sales agreement addendum?
3. Is the time frame of non-competing overly broad such that it would cause undue hardship on the ex-employee?
4. Are non-competing agreements enforced consistently?
5. Loss of reputation is far harder to prove than loss of business - because it requires a reluctant client's testimony. Loss of business, on the other hand, can be measured, quantifiable, and impartial.

It all comes down to this - What price (attorney fees) are you willing to pay to enforce the non-compete? This is the critical question that must be answered prior to going to court. Please note

that enforcement of a non-compete generally requires the company to hire an attorney, while the salesperson does not.

We do require all of our sales people and our management people to sign non compete clauses. They are rather simple, but they are specific as to what is being protected. Wisconsin is a right to work state, so they are difficult to enforce. However they do protect the company in other ways, not only against stealing of accounts, but also against manufacturing secrets. We have only had to force this issue one time, and it proved effective in keeping a former salesperson /employee from calling on one of our bigger accounts.

XXXX INC.

SALES PERSONNEL NONCOMPETITION AGREEMENT

The undersigned ("Employee") acknowledges and agrees that: XXXS Inc. (the "Company") is engaged in a personal service business; the Company's customer contacts and relations are established and maintained at a great expense; Employee, by virtue of Employee's employment, will have unique and extensive exposure to and personal contact with the Company's customers; and Employee will be able to establish a unique relationship with those individuals which will enable Employee, both during and after Employee's employment, to unfairly compete with the Company. In consideration of Employee's employment by the Company, and in consideration of the compensation and other benefits to be provided to Employee by the Company, Employee hereby agrees that Employee shall not, at any time during the term of Employee's employment, nor for a period of one (1) year after Employee ceases to be employed by the Company for any reason (whether voluntarily or involuntarily), directly or indirectly, either for Employee's own benefit or as a shareholder, partner, officer, employee, representative or agent of any entity providing or offering commercial printing or other services that are competitive with those offered by the Company:

- a) Contact or solicit any "Protected Customer" (as defined below) for the purpose of selling commercial printing or other services that are similar to or competitive with those offered by the Company (For purposes of this Agreement, "Protected Customer" means: any person or entity that has transacted business with the Company at any time within the two (2) year period prior to Employee's termination of employment and with respect to whom Employee, at any time during the twelve (12) month period prior to the termination of Employee's employment with the Company: (i) solicited any order on behalf of the Company; (ii) sold any product or service on behalf of the Company; or (iii) otherwise dealt or had contact on behalf of the Company. However, "Protected Customer" excludes any person or entity identified on Schedule 1 attached.); or
- b) Induce, attempt to induce, or assist others to induce any customer, supplier, distributor, manufacturer or any other entity having a business relationship with the Company or its affiliates, to terminate such relationship, or do anything to interfere with the relationship of the Company or its affiliates with any such person or entity.

Employee and the Company each recognize that: irreparable injury may result to the Company and its business in the event of a breach of Employee's obligations under this Agreement; the damages which the Company may sustain are difficult to ascertain and money damages alone may not be an adequate

remedy to the Company; and Employee's acceptance of these restrictions is a material factor in the Company's decision to offer Employee employment.

Employee further agrees that if Employee violates any of the covenants, restrictions or provisions of this Agreement, the Company will be entitled to: an accounting and repayment of all profits, compensation, commissions, remuneration or benefits which Employee directly or indirectly realizes or may realize as a result of any such violation; and/or any injunctive relief necessary to prevent or restrain any violation of the provisions of this Agreement. Such relief shall be cumulative and non-exclusive and shall be in addition to any other remedy to which the Company may be entitled. Employee also agrees to reimburse the company for any and all costs (including reasonable attorneys' fees), incurred by the Company related to or arising out of any such breach of this Agreement by Employee.

Employee has carefully read and considered the covenants, restriction and provisions of this Agreement and acknowledges and agrees that the covenants, restrictions and provisions of this Agreement are reasonable and necessary for the protection of the Company and to prevent damage or loss to the Company as a result of Employee's actions. Employee acknowledges that the consideration provided by the Company is sufficient to fully and adequately compensate Employee for agreeing to the covenants, restrictions and provisions set forth in this Agreement. Employee has represented to the Company that Employee's experience and capability are such that Employee can obtain employment, notwithstanding the restrictions imposed in this Agreement, and that the enforcement of this Agreement will not prevent Employee from earning a livelihood.

Employee Name (Type or Print)

Employee Signature

Date: _____

XXXXX INC.
SALES EMPLOYMENT AGREEMENT

1. You will commence employment on (date) and your employment will continue until it is terminated pursuant to Paragraph 4.
2. You agree to devote your entire business time, energy and skills to selling the Company's printing and other services and performing such other duties as may be assigned to you by the Vice President of Sales of the Company from time to time.
3. You will report directly to the Vice President of Sales. All quotes for sales of the Company's products and services must be approved by one of the Company's officers. To avoid an embarrassing situation for you and the Company, you will discuss any new prospects for approval with the Vice President of Sales to avoid calling on customers who are already assigned to other Company sales representatives.
4. You acknowledge that employment under this Agreement is "at will", and either you or the Company may terminate this Agreement at any time, with or without cause; provided, however, if either you or the Company desires to terminate your employment with the Company for any reason, the terminating party must give written notice of termination to the other party not less than 14 days prior to the effective date of termination. Notwithstanding the preceding sentences, the Company shall have the right to terminate your employment immediately without written notice upon the happening of any of the following events:
 - a) You become disabled, which shall mean that you are unable to substantially perform the essential functions of your job as a result of a physical or mental injury or illness, with or without reasonable accommodation, for a period of three (3) consecutive months or for a total of 90 days in any six (6) month period. If there is any dispute as to whether the termination of your employment was due to your physical or mental illness or incapacity, such question shall be submitted to a licensed physician acceptable to the Company for the purpose of making such determination;
 - b) You materially breach any provisions of this Agreement or any of the XXXXX Inc Company Policies as published;
 - c) You commit any act of dishonesty or fraud with respect to the Company or its business;
 - d) You fail to properly resume substantial acceptable performance of your duties for the Company (other than by reason of death or disability), including failure to achieve sales goals established by the Company from time to time, after a review of your performance is made with you

that identifies the manner in which the Company believes that you have failed to perform your duties;

- e) You are convicted of a felony or misdemeanor which, in the reasonable judgment of the Company's Board of Directors, is likely to have a material adverse effect upon your or the Company's business or reputation or which substantially impairs your ability to perform your duties for the Company;
- f) You engage in conduct which is demonstrably and materially injurious to the Company, monetarily or otherwise; or
- g) Subject to applicable law, you use alcohol and/or drugs in such a manner as to interfere with the performance of your duties for the Company.

Termination of your employment for any reason described in (b) through (g) above, or for any mistake or misrepresentation made by you to the Company, shall constitute termination of your employment "for cause".

Also, this Agreement will terminate immediately upon your death and, in that event, except as may otherwise be provided in the Company's employee manual, the Company will have no further obligation to pay any compensation hereunder, except for commission on value added sales delivered on or prior to the date of your death and any positive balance remaining in your account after reconciling your draw and commissions. If, as of the date of your death, the Company has advanced to you a sum in excess of the commissions which you have actually earned, your personal representative will not be required to refund the excess.

Within 30 days after the termination of your employment, the Company will pay you whatever sums of money may be due to you in accordance with this Agreement. If, upon termination of your employment, the Company has advanced to you a sum in excess of the commissions which you actually earned, you shall be required to refund the excess within ten (10) days of your termination date.

The covenants, restrictions and provisions of this Agreement and your obligation to repay any excess draws shall survive the termination of your employment.

- 5. In the event the Company terminates your employment for any reason other than for cause or due to your disability (each defined above), the Company agrees that it shall not, for a period of one (1) year after you cease to be employed by the Company, contact or solicit any party identified on Schedule 1 of this agreement, for the purpose of offering or selling commercial printing services.
- 6. This Agreement shall be governed by the laws of the State of Wisconsin, and any suits arising under this Agreement must be commenced in the state or federal courts located in Milwaukee County, Wisconsin.

7. This Agreement and its Exhibits supersedes all prior oral or written agreements, understandings and negotiations between you and the Company regarding your employment with the Company, and may be modified or amended only by a written instrument executed by you and the Company.

If you wish to accept employment with the Company under the terms outlined above, please sign the enclosed copy of this document and return it to me.

XXXX INC.
YYYYY
Vice President, Sales

I accept this offer of employment and agree to be bound by all of the terms and conditions set forth above.

Dated this _____ day of _____, (year).

Signature

Employee Name (Type or Print)