Great Lakes Graphics Association
Illinois • Indiana • Wisconsin

Do you use non-compete/non-solicitation/confidentiality agreements for your sales staff and, if so, how long is the term—12-18-24 months or more?

Summary: more than half of the member companies that responded do use some form of a non-compete or non-solicitation agreement. A 12-month agreement is the term most in use.

Replies below are sorted by state.

FROM ILLINOIS-BASED MEMBERS:

Yes we use these agreements. We always have our lawyer review as we hire as the law changes.

We do not currently have any non-competes established with our sales staff. While sales relationships are important on a few accounts here and there, our customer service reps have stronger bonds with most of our customers than our sales staff.

Our agreement has a 12 month term

Here are the formal requirements:

> **Legal Requirements for Non-Competition Agreements**
> In order to be considered valid, a non-competition agreement must:
>
> - Be supported by consideration at the time it is signed;
> - Protect a legitimate business interest of the employer; and
> - Be reasonable in scope, geography, and time.
>
> Non-competition agreements must generally be supported by valid consideration -- the employee must receive something of value in exchange for the promise to refrain from competition. If an employee signs a non-competition agreement prior to beginning employment, the employment itself will be sufficient consideration for the promise not to compete. However, if an employee signs a non-competition agreement after beginning employment, the mere promise of continued employment will not be considered valid consideration for the promise. In this case, the employee must receive something else of value in exchange for the promise. Such additional consideration may consist of a promotion or other additional benefit that was not part of the original employment agreement.
>
> - See more at: http://employment.findlaw.com/hiring-process/non-competition-agreements-overview.html#sthash.5db8PwiW.dpuf

I have never seen one go beyond twelve months without financial compensation. Normally it is only applicable to companies that are current customers.

We do not currently have any in place, but will use them for specific situations when we are providing employees access to clients or information that they would not otherwise have access to. Council has made it clear that they can be quite enforceable when used and limited properly. Often these are written as a “catch all” which then have little value as an enforceable tool. These do have some intimidation value by creating a perception, but will quickly be dismissed when overreaching to take away ones livelihood.

I have used non competes for sales staff in the past for 24 months.

We have a non-compete agreement. Ours is for a 12 month period and lists specific clients which the sales person cannot call, plus “any and all customers of (Name of Company) not developed or serviced by the employee”.

So, it does allow the sales person to call on customers he/she developed and serviced. We are under the opinion that this is sufficient to make the contract legal because it allows the terminated sales person to continue working in his/her profession.

Yes, we do use a non-compete/non-solicitation/confidentiality agreement for our sales staff. The term is for 12 months after separation of employment.

Our company does have a non-compete/confidentiality agreement that all employees sign when they are hired. The term is for 24 months after leaving the company.

This is a blog post from our website on recent Illinois law on non-competes:

A very recent Illinois Appellate Court opinion will have a significant impact on an employer's ability to enforce a restrictive covenant against a former employee, regardless of whether that employee resigned or was terminated. Indeed, if the only consideration received by the employee was an offer of employment or continued employment, such consideration will not be sufficient to enforce a restrictive covenant unless the employee worked for the employer for at least two years following the date he/she signed the agreement.

In Fifield v. Premier Dealer Services, Inc., 2013 IL App (1st) 120327, the employee (Fifield) was employed by Great American Insurance Company, which assigned him to work for one of its subsidiaries, Premier Dealership Services ("PDS"). PDS was an insurance administrator that marketed financial and insurance products to the automotive industry. In October 2009, Great American sold PDS to Premier Dealer Services, Inc. ("Premier"). As a result of the sale, Great American informed Fifield that his employment would end on October 31, 2009.

However, prior to October 31, Premier made an offer of employment to Fifield. As a condition of his employment, Premier required Fifield to sign an employment agreement containing non-solicitation and non-competition provisions. Fifield accepted Premier's offer of employment and signed the agreement. However, approximately three months later, Fifield resigned from Premier. Following Fifield's resignation, Premier attempted to enforce the restrictive covenant contained in the employment agreement, and the parties took their dispute to court.

At the heart of the dispute was whether Premier's offer of employment to Fifield served as adequate consideration to enforce the restrictive covenant. Premier argued that the offer of employment itself was sufficient consideration to render the restrictive covenant enforceable. In contrast, Fifield argued that the restrictive covenant was only enforceable if employment continued for a substantial period of time following execution of the agreement.

Typically, Illinois courts analyze the adequacy of consideration in the context of post-employment restrictive covenants because often the simple promise of continued employment is an illusory benefit when an employee can be terminated at-

will. Generally, Illinois courts have held that continued employment for two or more years constitutes adequate consideration to enforce a post-employment restrictive covenant.

In the Fifield decision, the First District Appellate Court took this legal concept to the next level, and held that at least two years of continued employment are also necessary to constitute adequate consideration where the only benefit to the employee was the initial offer of at-will employment.

Going forward, employers should re-visit their existing employment agreements and consider altering the terms of those agreements for prospective employees so that the consideration ultimately provided is sufficient to enforce any restrictive covenants, even if the employer and employee part ways before two years have elapsed.

(Editor's note: the link to the original post may be found on the Shaw Fishman Glantz & Towbin website at http://www.shawfishman.com/employers-beware-offer-of-employment-alone-may-not-be-sufficient-to-enforce-restrictive-covenants/)

FROM INDIANA-BASED MEMBERS:

We do not require that.

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12 months

Our opinion: Why force them on employees? They don't enhance corporate culture. No big secrets in Printing. If an employee wants to fly away, open the door and give him a pat on the back (push). Empower your sales team,

don't enslave them to legal document.

FROM WISCONSIN-BASED MEMBERS:

We do not have any of those things in place.

We use a non-compete and confidentiality agreement for our sales staff. It is for 12 months.

We do not

We use them and they remain in effect for one year after termination of employment.

We have NO non-competes

No, we do not.

Yes, we have non-competes in place for all of our sales people. Our non-compete language is enforceable for 12 months. Not too long ago, we re-crafted the verbiage of our non-compete agreement. Our attorney advised that we limit enforcement to 12 months because longer-term agreements hold up to litigation less often. The more open-ended and longer term the non-compete is the less enforceable it is. Please note however, I am not an attorney.

Yes, but under the current Wisconsin law even one year is iffy. My understanding is that the legislature is moving something through that would make them more enforceable.

We have not as we don't think they are easily enforced in Wisconsin.

Standard non-compete for our Sales group is 6 months. We have been advised that it is unlikely that a 12mo term would hold up, if contested, as it keeps them from "making a living". I would think the only way a term even longer than 12mo would hold is if it is a very proprietary product and then it would probably only apply to the confidentiality portion of an agreement; I doubt the non-solicitation period would extend.

Our product is fairly generic and has a competitive environment. If we can't re-establish the customer relationship with our newly assigned rep in a 6mo period, shame on us.

We use Non-solicitation agreements for sales and customer service staff. And the term length is 12 months.

We do not, but did consider implementing one after we lost a seasoned sales rep who was looking to make a change. Little did we know the change would be selling for a competitor! Needless to say the rep went out and contacted every major account he handled while he was with us. We only lost one account but it was a very frustrating process.

I have heard mixed reviews on non-competes so I look forward to hearing responses.

Yes, for 12 months

Yes. One year. Anything over than that, the courts will strike the whole agreement.

We do mandate that our sales staff sign a 12 month non compete clause before beginning employment.

We've considered them in the past but have not implemented them. We're not concerned with employees leaving for another printer, other than the part of non-solicitation and/or confidentiality purposes, but we cover those topics in our employee handbook for all of our employees.

Best plans I have seen use a balanced score card, which makes sure reps don't just sell one service and be MORE value added.

Although all fulltime employees undergo various screening tests and sign offer sheets that are relevant to the employment being offered, our Sales Executives have additional agreements that protect and define the employee/employer relationship for all parties. They are:

1. OFFER OF EMPLOYMENT

This is the underlying "at will" employment agreement that is the linchpin of other agreements that our signed by our Sales Executive team. Our offer of employment (or promotion letter) defines a series of items – The Position title (job description handed out later), Date of Hire, Reporting responsibility, Rate of Commission and Draw against future Value Added Sales, Auto Allowance (if any), Expense Reimbursement, Vacation, Benefit Eligibility, and a request for a Drug test. This mutually signed offer is contingent upon the execution of a mutually agreeable Non-Compete agreement AND a Sales employment agreement.

2. SALES EMPLOYMENT AGREEMENT

Although not specifically asked for, the Sales Employment Agreement's purpose is to prevent poaching of existing clients from other Sales executives and their clients. The agreement points out the VP of Sales has sole discretion to approve new sales prospects or the reassignment of any existing client. It also highlights the obligation of the Sales executive to "devote your entire business time, energy and skills to selling the company's" products and services. It lists a series of termination reasons as well as a promise by the company to not solicit clients for a period of one year identified PRIOR TO EMPLOYMENT (mutually agreed to between the parties). Obviously, any reassignment of accounts after hiring (and not on this list) are Company "PROTECTED" accounts.

3. NON-COMPETE AGREEMENT

A Sales executive terminated, for any reason, may NOT contact, solicit, induce, assist to induce, or assist others to induce any Company account (except those explicitly agreed to in the Sales Employment Agreement for one year after termination. The Company will be reimbursed for any profit, commission, or other compensation as well as reasonable attorney fees.

Pending law change in Wisconsin:

http://www.jsonline.com/business/wisconsin-legislators-propose-strengthening-noncompete-agreements-b99513784z1-306371401.html

Wisconsin legislators propose strengthening 'noncompete' agreements

By Kathleen Gallagher of the Journal Sentinel **June 7, 2015**

A bill proposing to strengthen "noncompete" agreements — which limit a departing employee's ability to work for his company's competitors — may force state legislators to choose between two powerful forces: big business and free markets.

Under noncompete agreements, employees typically are restricted from performing similar work for a specific period of time within a certain geographical area.

Wisconsin is one of the friendlier states toward employees in terms of noncompetes, said Geoff Trotier, an employment lawyer at von Briesen & Roper in Milwaukee.

The proposed bill would radically change that, Trotier said.

Supporters say the changes would help persuade national companies to relocate in Wisconsin and reduce litigation that stems from uncertainties in the existing law.

Opponents call the proposed changes an attack on free markets that would limit the movement of individuals and ideas, and therefore the speed of innovation.

One of the bill's main provisions would be to change the current practice of "red penciling," which negates an entire noncompete agreement if a judge finds one clause onerous. A "blue penciling" provision in the bill would allow judges to revise overly broad clauses but keep the rest of the agreement in place.

"Blue penciling would either put us on par with or ahead of Illinois in terms of how our judges can look at these restrictive covenants," said Daniel Finerty, an employment lawyer at Lindner & Marsack in Milwaukee. Finerty played a part in drafting the bill, according to Legislative Research Bureau files.

Stronger noncompete agreements would help lure more companies from Illinois to Wisconsin, Finerty said.

"If Wisconsin's economic development strategy is premised on luring companies from Illinois, that's horrible," said Dane Stangler, vice president for research and policy at the Ewing Marion Kauffman Foundation, a Kansas City nonprofit focused on entrepreneurship and education.

Most of the research about offering incentives to attract companies from out of state shows there are far better uses of public money, and the promised jobs payoff rarely happens, Stangler said. Also, the companies that come tend to be manufacturing companies, which are increasingly capital intensive, not labor intensive, he added.

To Stangler, the debate about strong vs. weak noncompete agreements comes down to a simple point:

"If your public policy goal is big-company corporate, then maybe strict enforcement of noncompetes is better for you," Stangler said. "But when you're interested in entrepreneurship and economic dynamism, we advocate for nonenforcement or lax enforcement."

Many cite California as an example of a state with booming entrepreneurship that does not enforce noncompetes. But Stangler said a better example of their impact is Michigan, where an inadvertent change to the law in 1985 strengthened enforcement of noncompetes. Controlling for the effects of the auto industry decline, researchers found an almost immediate exodus of scientists and engineers from Michigan after the change, Stangler said.

Over time, even Michigan companies became disillusioned with noncompete agreements, according to a paper published by researchers at Harvard Business School and the University of North Carolina.

"Ultimately...policy planners must decide when the interests of incumbent firms outweigh those of individual careers and possibly regional development," the authors said.

Not only do noncompete agreements limit competition, they can inflict what might be thought of as a tax on employees' earning power by drastically limiting their ability to seek higher-paying jobs, said Joe Kirgues, co-founder of gener8tor, a start-up training program, in a recent posting on JSOnline.com's OnRamp blog.

"It's not good for all of us if our workers are declared ineligible to compete," Kirgues said.

For the companies, however, it is difficult to teach an employee the business, make introductions and share strategies and pricing information, then watch an employee take all of that to a competitor, Trotier said.

A former human resources professional, Rep. Mike Rohrkaste (R-Neenah), said he believes companies should be able to ensure there is a reasonable amount of time between an employee's departure and that person's efforts to hurt them competitively. The proposal could help employees, too, because a judge would be able to strike out or temper a clause in a way benefiting the employee, while leaving the rest of the agreement intact, he said.

"My bigger objective was to allow a judge to be a judge and make a reasonable decision," said Rohrkaste, one of the bill's co-authors.

The bill would also make court attitudes toward noncompete agreements more predictable, Trotier said. "My sense is most companies would be happy to have a little more guidance, which this law provides," he said.

The noncompete bill faces an uncertain fate until lawmakers deal with the state budget. Rohrkaste said he is not aware of any efforts to slip the bill's provisions into the budget in the next few weeks.

Lobbying for stronger noncompetes are 3M, Independent Insurance Agents of Wisconsin, Professional Insurance Agents of Wisconsin, Wisconsin Broadcasters Association and Wisconsin Manufacturers & Commerce. Lobbying against it are the Wisconsin Realtors Association and Wisconsin State AFL-CIO.

Jason Stein of the Journal Sentinel staff contributed to this report.

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http://www.jsonline.com/blogs/business/wisconsins-noncompete-tax-382278458972-304266611.html

Wisconsin's Noncompete Tax

By Joe Kirgues, gener8tor

Amazingly, the Wisconsin legislature is considering a bill that will expand the scope of noncompete agreements in Wisconsin.

I'll put it another way.

Amazingly, the Wisconsin legislature is considering an attack on free markets that will restrict competition, increase litigation and take potentially thousands of dollars out of the pockets of Wisconsin employees.

To define noncompete agreements, they are contractual provisions that give an employer the right to prevent (and even sue) an employee if the employee attempts to take their skills to a competing company.

To see how silly and anticompetitive these provisions are, look no further than the name: **NONCOMPETE**.

To see this silliness from another angle, imagine an employee demanding that as a condition of an at-will employment contract, the employer agree to not compete with the employee at the conclusion of the agreement. Can't imagine it happening? That's because it's a bad idea. Just as bad of an idea as allowing these provisions to attack an individual's right to use their skills in a free market.

If you are the type of worker who might get a call from a headhunter and you currently operate under a noncompete, please consider that this bill might drastically limit your options and prevent you from seeking other employment. Thus, **this bill might be a four or five figure annual tax on your earnings.**

If you know anyone who likes to complain about property taxes, sales taxes, or any other taxes, tell them that the one tax they should be really paying attention to is the noncompete tax that might pass in Wisconsin.

Put another way, it is like the legislature authorizing your employer to reach into your pocket and take out thousands (if not tens of thousands) of your own cash and put it into their own pocket.

And all this while employers are free to force all sorts of other restrictive provisions (eg. non-solicit, non-disclosure, assignment of intellectual property) that protect them from the awful risk of employees competing with them in a marketplace.

This is not a hypothetical.

Via statute and common law, California has virtually banned noncompete agreements. But that didn't stop a few companies (Google and Apple among them) from trying to enforce noncompete agreements in a cartel-like fashion. In a recent class-action lawsuit (which Apple offered to settle for hundreds of millions of dollars), hundreds of thousands of workers were shown to have been harmed by an express agreement among employers not to "poach" employees from each other.

Courts found that such collusion had real, detrimental effects on employees' wages and salaries. The effects of the California cartel were all sorts of compensatory and punitive damages against those employers. And a return to the norm where employees are free to compete. California employers sought to restrict the free market options of their employees via an unofficial cartel. In that case, the government stepped in to correct a wrong. In Wisconsin however, it appears the legislature is willing to authorize a government-approved cartel.

In Wisconsin, some lawmakers have hailed this bill as a means to attract high-tech employers to the region. The irony in that statement is that the majority of high-tech employers currently CHOOSE to operate in the state (California) with the least restrictive and the most free market labor laws when it comes to noncompete agreements and their enforcement.

Nor is this just a problem for the owners of labor.

If you own a new business, this a very big problem for you. One of the most critical components in growing a startup is finding the right people. By definition, a new and growing company will be doing lots of hiring and to the extent the best people for its jobs are restricted from joining because of noncompete agreements than **this bill is a tax on startups**.

The most tragic cases are when these noncompetes prevent would-be entrepreneurs (locked in noncompetes with their current employers) from ever making the decision to create more wealth and jobs in Wisconsin. In this sense, **this bill is a tax on entrepreneurs**.

Nor does the noncompete need to be legal for this harm to occur. The threat of an employer lawsuit is often enough to deter an employee from looking for another job, and if they somehow do seek other employment it is often enough to stop a would-be employer from hiring them. What's incredible is the fact that the legislature is considering an expansion of employer power through noncompete agreements thereby aggravating this problem.

I hear from a lot of politicians (among many others) who tell me that they are free market capitalists who want government out of everyday people's lives.

My response to these politicians is to put their money where their mouth is on this bill. Free markets and big business have a fork in the road on this noncompete bill and each legislator who votes on this has to decide whether they are in favor of free markets or corporate self-interest.

If you are someone who voted for a politician who made this claim but is voting for this bill, it is time to reconsider all sorts of assumptions. If you are an employer obtaining these provisions, please stop. If you are a worker under one of these provisions, you might want to check your wallet---something could be missing.

P.S. And to the extent individual legislators are still open to voting against this tax, please do.

FROM MEMBERS BASED IN OTHER STATES:

Although our confidentiality agreement is not specifically used for a printer but for our independent contractors ours reads similar to the following.

For a period of 24 months from the date of termination you shall not contact any client of (Name of Company) contained in its database.
