

FACTUAL CONSIDERATIONS IN NON-COMPETITION CASES

Courts have considered the following factors when determining the enforceability of a non-competition agreement:

- The absence or presence of limitations as to time and space;
- Whether the employee represents the sole contact with the customer;
- Whether the employee has confidential information or trade secrets;
- Whether the agreement seeks to eliminate competition that would be unfair to the employer, or merely seeks to eliminate "ordinary" competition;
- Whether the agreement seeks to stifle the inherent skill and experience of the employee;
- Whether the benefit to the employer is disproportional to the detriment to the employee;
- Whether the agreement would bar the employee's sole means of financial support;
- Whether the employee's talent that the employer seeks to suppress was actually developed during the period of employment; and
- Whether the forbidden employment is merely incidental to the main employment.

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The following additional facts may also be significant when courts decide whether noncompetes are enforceable:

- Where does the employee live and work?
- Where does the new employer have operations?
- Is the new employer a direct competitor?
- Does the new employer have any history of hiring the company's employees?
- What specific information did the employee have about the company's business?
- How will the employee's actions damage the company (e.g., lost sales, lost opportunities, lost customer relationships, damaged goodwill, etc.)?
- When did the employee begin his employment with the company?

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- When was the non-competition agreement signed?
- Was the employee at-will?
- Was the non-competition agreement a mandatory condition of employment?
- Did the employee have a non-compete agreement with any previous employers?
- Did the employee bring any customers or clients to the company?
- Did the employee have any prior experience in the field?
- Did the company provide the employee with any training?
- Has the employee returned all documents, binders, etc. that might contain company information?
- Did the company ever tell the employee that the non-competition agreement would not be enforced?
- Has the company pursued any other employees with non-competes who have left in recent years?
- Has the employer satisfied all of its obligations (if any) under the agreement?
- Does the employee have any potential counterclaims against the company (e.g., unpaid wages or overtime, harassment or discrimination, etc.)?

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