



Non-Disclosure and Restrictive Covenant Agreements: Cost-Effective and Preventative Tools that Protect the Value of Your Business and Investment in Your Employees

BY AMY BETH DAMBECK

Have you built your business to the point that it seems to run itself? Or, do you find yourself on the opposite end of the spectrum - are you just starting a business and hiring and training employees to assist in this new venture? If you literally can't do it all yourself anymore, then you are necessarily starting to rely on others. Most likely, your experience falls somewhere in between. Whether you find yourself turning over the reins to your employees completely or simply delegating responsibilities to others in varying degrees, all businesses have one thing in common: without successful relationships with clients, customers, referral sources and/or vendors, they'd be out of business.

How you foster these relationships depends on the nature of your business. Many times the day-to-day relationships that your clients have with your salespeople, customer account managers and assistants make all the difference as to whether or not the client is satisfied with your services and remains a loyal customer. So what happens when a valued employee leaves to join a competitor or to start a business of her own? Can you prevent her from contacting your clients, from providing them with her new contact information, or from soliciting their business? What if your sales assistant joins a competitor and knows all of your clients' contact information, specifications and buying preferences? What if your IT guy leaves with intimate knowledge of your software programs and databases that he helped design? And what if your sales manager leaves to start a new business and wants to hire away all of the employees that used to report to him?

Obviously, your employees are one of your most valuable assets. You want them to be knowledgeable, successful and to excel in their dealings with your clients. Delegation of duties to employees - others who may, in fact, be the key to the success or failure of your business - is often a necessary step in building a business and a sign of growth, sound management and opportunity. However, when employees leave, all of the inside information you've entrusted with them also walks out the door. Now, the valuable employees you trained and invested in may be poised to capitalize on the information and relationships developed through the considerable efforts and expense of your company.

Many business owners go to great lengths and expense to protect their company's assets. They purchase insurance, hire professional advisors, invest in alarm systems, and secure their computer systems with virus and firewall protection.

However, many business owners fail to take very basic and cost-effective steps to protect their two most important assets - their confidential information and client relationships. Often, the reasons for this aren't too complicated. There is a common misconception among some business owners that restrictive covenant agreements, including non-competition, non-solicitation, and non-disclosure agreements, are not enforceable. As a result, many small business owners decide that it is not worth the time or expense to utilize such agreements.

Also, in New Jersey, as in most states, employment is "at will," meaning that employers may hire and fire employees at any time, for any legal reason, and that employment is not guaranteed for any particular term, absent an employment agreement to the contrary. Often busi-

nesses decide not bother to use employment agreements since employment is "at will anyway."

Additionally, some business owners feel that their company is simply too small or unspecialized and lacks the "secret" type of information that really needs protection by such agreements.

Unfortunately, many learn too late that such a decision can prove costly - as employee departures can be a painful and expensive burden to a business. In the absence of a contractual agreement, there is little a business owner can do to prevent a former employee from opening a competing business, soliciting clients, disclosing confidential information, recruiting employees and/or misappropriating key competitive assets.

Once used almost exclusively by large businesses, restrictive covenants that protect the confidentiality of business information and trade secrets, require the assignment of all inventions, patents, copyrights, trademarks, and avoid unfair restrictions on competition are a necessity for most employers in today's increasingly technical and mobile workplace.

Simply put, just because your business may be a small one, doesn't mean that you do not need or are not entitled to protection against disclosure of your confidential, proprietary or trade secret information, or from competition from a former employee.

Further, the use of such agreements can also increase your company's value when it's time to sell, as your company will be worth more to a prospective buyer if the buyer is confident that employees can't steal the business that it intends to purchase.

Reference to the term "restrictive covenants" is generally made with regard

to three types of agreements - or combinations thereof: non-disclosure and confidentiality agreements; non-competition agreements; and non-solicitation agreements.

Non-disclosure and confidentiality agreements are frequently used in conjunction with non-compete and non-solicit agreements, but can also stand alone. They protect your business from a current or former employee disclosing your company, personnel or client information and from using any such information in a harmful manner.

Non-competition agreements typically restrict a former employee from working for a competitor for a specific period of

time. These agreements can also contain geographic restrictions. For example, an employee may be restricted from working for any competitor within 5 miles of any Company office, for a period of 1 year following the employee's resignation or termination of employment.

Non-solicitation agreements, unlike non-compete agreements, do not restrict a former employee from working for a competitor. A person bound by such an agreement can work for herself or for one of your competitors as long as she doesn't solicit or service any of your former customers or protected relationships. These agreements can also be drafted to keep former employees from inducing other

employees to leave and work for their new business or a competitor.

Generally speaking, non-disclosure and confidentiality agreements are appropriate for use in any business, no matter the size or nature of the company. Similarly, non-solicitation agreements are generally appropriate all types and sizes of businesses and for all company personnel, but should be considered essential for any employees that have relationships with clients or have intimate knowledge of proprietary information that, if disclosed or misappropriated, could substantially benefit a competitor. Finally, depending on your business, you may also require the additional protections afforded by non-competition agreements which protect reasonably defined geographic areas against competition for a specified period of time.

Of course, in order to be an effective tool, it must be enforceable. These types of agreements, which restrict post-employment activities of employees, are generally subject to enforcement under New Jersey law provided that certain established criteria are satisfied. It is essential that any restraints be narrowly tailored to protect your legitimate business interests and needs. Overly restrictive, purely anti-competitive covenants will not be deemed enforceable. Whether or not an agreement will be enforceable in a court of law is determined on a case-by-case basis and depends upon the specific nature of the employer's business, the employee's job, and the interests the employer is trying to protect. It is, therefore, essential that the attorney drafting an agreement specifically for your use is aware of the nature of your business, and the level and type of protection you require.

The use of non-disclosure and/or restrictive covenant agreements is as important a safeguard for the protection of your company and its confidential information as are the locks on the building doors. It can also be a cost-effective way to help ensure protection of your business upon the departure of employees and to add value in the eyes of a prospective purchaser. Thus, if you do not have such agreements or policies in place - or if your current agreements have not been reviewed in some time - you may wish to contact an attorney to discuss implementing an agreement appropriate for the size of your company, industry in which you operate, and community in which you do business.

Amy Beth Dambeck is with Stark & Stark's Employment Group. For further information, she may be reached by calling 609.219.7452, or via email at adambeck@stark-stark.com

Save \$100 on your next printing job!*

Business Cards
Letterheads
Envelopes
Media Kits
Direct Mail
Flyers
Brochures
Posters
Newsletters
Catalogs
Postcards
Memo pads
Labels
CD/DVD Covers
Ad Books
Carbonless Forms
Business Invitation
Presentation Folders

Printing from your digital files!
1-6 Color Offset Printing • Large Format Posters Indoor/Outdoor
On site Mounting and Lamination • Digital Color/BW Copies & Print
Variable Data Printing • Direct Mail & Fulfillment Services
Bindery & Finishing • Creative Services & Graphics Design
Full Support for Mac and PC • Free Technical Support
Fast Turnaround • Free Estimates • Free Pickup and Delivery

Contact us today!
609-799-4770 www.eprintek.com
51 Everett Drive, Suite B-98, Princeton Jct, NJ 08550



PrinTek
PRINTING & IMAGING

*Good for \$100 off printing services. Discount must not exceed 50% of total purchase value. New customers only. Not valid with any other offer or discount. One offer per customer. No cash or credit back. Void where prohibited. Advertise must be presented at the time of purchase. Offer does not include taxes.

Put Our Team on Your Team

Air Conditioning
Heating
Ventilation
Indoor Air Testing
Maintenance Agreements
24 Hour Emergency Service
Water Treatment
Ductwork

A winning team is built with the best players. That's why the region's construction managers, builders, owners and building managers consistently choose Princeton Air Conditioning Inc. For your building, you want a company on your team that can offer expert planning advice, problem-solving strategies and fast, dependable service. Building a winning team? Make your first pick Princeton Air Conditioning Inc.



A LINC Service[®] Contractor

Princeton Air

Princeton, NJ 609-799-3434

