

## The Real Story Behind Non-compete Deals

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Can you please talk about non-compete agreements? In the past year, I separated from a company, to build my own business with new clients. While it was never my intention to take clients from my former employer, I do get 2-3 calls a week from old customers, asking me to work with them. Callers are telling me they won't work with the business owner I separated from, under any circumstances. These people are frustrated, unhappy, and I can't help them, because I am bound by a non-compete agreement I signed when I first took the job.

This question comes from a new business owner in Fairfield County, who, for obvious reasons, wishes to remain anonymous. Let's take a look at a few items. What is the real problem here? What are good non-competes all about? What should employees and employers consider when entering into non-compete agreements, and when separating from each other?

What is the real problem with this situation? In my opinion, it is that the original employer's customers are saying they don't want to work with that company. The non-compete agreement is masking a problem and diverting the owner's attention away from dealing with the underlying issues of customer loyalty and satisfaction.

As owners, when our customers say they don't want to work with

us, we have bigger problems than enforcing a non-compete. If this owner is on the ball, he or she will set in motion a program to personally contact every customer, find out what they like and don't like about the company, and what the company could be doing better. He will then put into action a detailed program to address those concerns. He'll follow up to insure that customers are more satisfied.

A non-compete probably won't hold unsatisfied customers in the fold for long. Smart customers can always find other options, and this employer's loss of a key employee will probably force their hand. If he doesn't know what to do, he would be well advised to find someone to help him figure it out, and quick. He needs to focus on satisfying customers, more than on enforcing non-competes.

Competition is a reality for most businesses, and it is logical to assume that the people who know us best, our employees, may turn out to be our greatest source of competition in the future. It is also logical to assume that companies will do whatever is reasonable, and sometimes seek to do what is unreasonable, to protect their interests, including limiting competition as far as possible.

Eliminating competition is not considered a legitimate use of a non-compete, but protecting a business for a limited set of

conditions – geography, time, and scope – is appropriate. In this case, the employer may get away with enforcing the non-compete, because the agreement specifies a timeframe of 2 years or less, and bars competition only in settings where the employee previously worked. There are other suppliers of similar services in the area, so customers do have options. And, the agreement does not prevent the employee from seeking out new customers, from sources that the employee and employer did not have in common.

What are non-compete and non-solicitation agreements? In the simplest form, they are written documents in which an employee agrees not to compete with a former employer, or not to solicit business via contacts made while working for that employer. When considering a non-compete agreement, be sure that it is:

- limited in scope to efforts the individual would have knowledge of or be involved with during employment
- limited to geography in which the company is already doing business
- limited in length of time – competitive prohibition of no more than 1-2 years is generally accepted
- fair to both employer and employee – employee was given adequate time to review the document prior to signing, and freely entered into the agreement in trade for some

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betterment, typically salary offered at time of hiring or time of promotion

- does not unnecessarily interfere with public interest – if this employee is no longer available to the market, the market must still be able to get what it needs; removal of the employee from the market cannot unnecessarily inhibit competition in the market
- drafted, reviewed and approved by a qualified attorneys for both parties, so that it stands up in court and accurately represents the intentions of both employer and employee

Let's talk about the reality of employment. People come and go. Few spend a lifetime in a single job. Good people learn on the job, and seek to better their lives by applying what they know as they go forward. Most people think well of their former employers or employees. They acknowledge the contributions made, what they learned by working together. They move on to new employment, or employees, with no real competitive issues. Even in this case, the issue is more customer care than it is competitive threat.

Whenever unemployment drops, we are likely to see more non-compete issues. Job-hopping increases. Competitors pay a premium to secure knowledgeable employees.

Employees have more offers to move between competitors.

It is best for both employer and employee to have a heart-to-heart conversation pre-hire, about expectations. How long do you both expect to be together? What do you both expect to be doing for work, when you go your separate ways? What kind of collaboration can you expect after you separate?

Think of a good non-compete agreement as a roadmap, defining how each party – employer and employee, will deal with each other, once they have just spent years working together for a common goal. Both need to recognize they have choices. They don't have to take the work, or extend the offer, if the non-compete does not work for both of them, they can look elsewhere.

Looking for more information? You can find it on the internet, and at Amazon.com. Just type in non-compete, and you'll get plenty of options. Whatever reading you choose to do, be sure you get qualified legal advice to help you.

*Business owners regularly turn to Ask Andi and Strategy Leaders for advice on how to grow profitable, successful companies. They find what they need time after time. Specific advice is available at [www.AskAndiBlog.com](http://www.AskAndiBlog.com). Ask Andi is also published weekly in the Westchester and Fairfield County Business Journals and Hudson Valley Business. Written by Strategy Leaders President, Andi Gray, the Ask Andi column is a rich source of advice for owners of established, privately held businesses.*

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