

## Law

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by **Robert Goff**

### **Guard proprietary info with a non-compete agreement**

Most businesses use patents, trademarks and copyrights to protect their intellectual property.

Some, however, do not take even simple steps to guard other crucial information of commercial value, such as costs, profits, markets, sales, volumes, contracts, project cost estimates, unit prices, payroll information, employee rates and salaries.

To protect such information, businesses should require individuals who are exposed to such valuable proprietary information to enter into confidentiality and non-compete agreements. Such individuals could be employees, former owners, consultants or contractors.

Current employees are theoretically prohibited from disclosing proprietary information or using it for their personal benefit.

However, as most employees are not trained in the law, requiring them to sign a confidentiality agreement will make them aware that the business values its proprietary information and that they are prohibited from disclosing it except pursuant to their jobs.

A confidentiality agreement also provides written evidence that an employee's former employer did not provide any consent or permission for the former employee to use proprietary information after the employment relationship ended.

Since it is practically difficult, if not impossible, to police the use of proprietary information by former employees, or other key personnel, businesses use non-compete agreements.

Non-compete agreements prohibit an employee or key person from engaging in a business competitive with the protected business for a period of time after the employee or key person has terminated his relationship with the protected business.

They are generally valid and enforced by the courts as long as they are supported by consideration and reasonable both in length of time and in geographic scope.

A typical non-compete and confidentiality agreement could contain the following:

- A prohibition against competition with the protected business for an identified term of years within a radius of an identified number of miles.
- A non-exclusive list of competitive businesses which includes all current businesses engaged

in by the protected business as well as contemplated future businesses.

- An identification of the position that the employee or key person must have in a competitive business before being affected.
- A non-solicitation clause that the employee or key person will not solicit employees or customers of the protected business.
- A confidentiality clause defining confidential information, prohibiting its disclosure and requiring delivery of all documents containing it back to the protected business upon termination of the relationship between the employee/ or key person and the protected business.
- A clause authorizing the protected business to seek an injunction against competition by the employee or key person in the event of breach and stating that monetary remedies will be inadequate in such event.
- An acknowledgment by the employee or key person that there is sufficient consideration for the non-compete, that the time and geographic scopes are reasonable and that the employee or key person will be able to make a living without competing with the protected business.
- A statement that if any term of the agreement is determined by a court to be unenforceable, such court can modify the terms to make it enforceable.
- A statement that any modification to the terms of the agreement or waiver of it must be in writing.
- A clause identifying the state whose laws will govern the agreement, as well as the location where any dispute over the agreement must take place.

In addressing the terms of any non-compete agreement remember that it should be custom tailored to most effectively address the particular information that the employee or key person will obtain and yet not violate the reasonable time and geographic scope limitations imposed by the courts.

**Robert Goff** is an associate with Paducah's **Denton & Keuler** law firm. His areas of practice include estate planning wills, trusts, estates and probate, contracts, business corporations and partnerships, and elder law. He is admitted to practice in Kentucky and Tennessee and Illinois. He can be contacted at 270-443-8253.

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