



Beau Ruff

J.D.*, LL.M in Taxation
Director of Planning

Matt Riesenweber

CFP®, CMFC

President &

Wealth Advisor

Matt Wiser

MBA, CMFC

Vice President &

Wealth Advisor

Non-Compete Agreement

Business owners often know they have a product, process, or relationship that does or will provide profitability. They work hard to refine and leverage those key components of the business. But, they often fail to protect the very thing that makes them successful through the use of a non-compete agreement.

A non-compete agreement is an agreement offered by the employer to an employee in which the employee agrees that, in exchange for some form of consideration, the employee will not take what he or she has learned and use it to compete with the employer. It's important for business owners to know that a cookie cutter non-compete agreement doesn't cut it (pun intended) in Washington. A non-compete is worthless if it is not enforceable by the Courts. To be enforceable, the agreement must be: (1) reasonable; and (2) and the employer must have offered some form of consideration. What does this mean?

First, we will explore a court's determination of the reasonableness of a non-compete. Reasonableness of a non-compete is determined in accordance with a three-part test under Washington law. The factors are: (1) whether restraint of the employee is necessary for the protection of the business or good will of the employer; (2) whether the non-compete imposes upon the employee any greater restraint than is reasonably necessary to secure the business of the employer or its goodwill; and (3) whether the public is sufficiently injured by the loss of the service and skill of the employee such that nonenforcement of the covenant is warranted. In the event the three factors are not satisfied the employer runs the risk of having the employment agreement restructured by the courts or thrown out in its entirety.

One of the leading cases on the issue of reasonableness, believe it or not, is the horseshoer apprentice case of *Wood v. May* from 1968. In that case Mr. Wood employed Mr. May as an apprentice horseshoer. The parties signed a non-compete agreement wherein Mr. Wood agreed to teach Mr. May the art of horseshoeing. Mr. May agreed that he would not compete for a period of five years within 100 miles of the business. After working for three years, Mr. May left and started his own horseshoeing business just five miles away from Mr. Wood. Ostensibly, this was in violation of the non-compete agreement. The parties litigated the issue in the courts. The court ultimately found that the non-compete agreement was unenforceable because the stated distance restriction (100 miles) and the stated term (5 years) was not reasonable and therefore refused to enforce the agreement.

The key is that if the business owner wants the non-compete to be enforceable, the business owner must look at the three-factor test outlined above and apply the test to his or her business to come up with reasonable restrictions. Simply applying an arbitrary time and geographic distance is not sufficient. And, determining what the courts will find "reasonable" is not easy to define without the help of a lawyer in drafting the non-compete agreement.

Next, we will explore the consideration element of the enforceability calculus that joins with the reasonableness element to make a non-compete enforceable. If an employer wants a promise from the employee not to compete, then the employer must also promise to do something in return. This is sometimes referred to as “independent consideration.” “Consideration” in this context is the thing that the employer is giving to the employee in exchange for the employee’s promise not to compete. Examples of independent consideration for a non-compete agreement include a raise, a promotion, or a bonus. If the business owner wants to enter into a non-compete agreement with an existing employee, merely allowing continued employment in exchange for the employee’s promise not to compete is generally not sufficient consideration. Instead, the employer must offer independent consideration to the existing employee. However, if a prospective employee agrees to a non-compete restriction as part of the hiring process, employment by itself may be sufficient consideration.

So, be bold and innovative with your business. Be creative and daring. But, when it comes to non-compete agreements, be reasonable and fair. Evaluate your business’s specific needs for success and incorporate them into your non-compete. Give your employee something in return for his or her promise. Don’t be afraid to invest in your employees, as they are great assets to your business. Help them grow and develop and they will help you grow and develop. But carefully consider whether a non-compete agreement would be in your best interest to protect that investment and protect the future of your business. Another wise investment in your business could be investing in some time with a good attorney who can assist you with drafting an enforceable non-compete agreement.

Cornerstone Wealth Strategies

8905 W Gage Blvd, Suite 110

Kennewick, WA 99336

509-396-0588

www.cornerstonewealthstrategies.com



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