

DO I NEED A COVENANT NOT TO COMPETE IN ARIZONA?

An Experienced Attorney Can Provide Invaluable Advice and Assistance in Determining If a Covenant Not to Compete is Necessary and in Drafting a Non-Compete Agreement that Meets the Needs of Your Business Enterprise and is Likely to be Upheld in Court





Customers are the lifeblood of any business and your company needs to maintain its customer base in order to exist as a profitable commercial enterprise. Customers may form relationships not just with a brand or company, but also with individual workers who represent that business and who act on its behalf. This is especially true of service businesses where a client or customer may regularly receive professional, medical, legal or other services for one or more individuals who are part of your organization.

Because of the relationship that exists between clients and individual employees, businesses are at risk when a worker leaves the company and moves to a competitor or makes the decision to start his or her own business. Many companies turn to a non-compete agreement to prevent former-



employees from poaching customers and adversely impacting business operations.

Covenants not to compete are also important in companies where sensitive information is shared with employees. In the technology field, in research and development

and in numerous other industries, workers are often given advanced or insider information about new products, services, techniques or systems that are proprietary and that have significant value. When an employee leaves, the business is vulnerable to having this private information misused, released or provided to competitors. Both nondisclosure agreements and non-compete agreements may be appropriate to protect confidential business information.

While these are the two primary reasons why companies require a covenant not to compete, there may also be other situations where an agreement of this nature is necessary. An experienced business law attorney can provide invaluable advice on whether a covenant not to compete is appropriate. Your attorney can also help you to draft an effective document that protects your business interests and that has the best chance of being upheld if challenged in a court of law.

IS A COVENANT NOT TO COMPETE NECESSARY FOR YOUR BUSINESS?

It is advisable for your business to require employees sign a covenant not to compete if:

- The employee works with confidential or proprietary materials.
- The employee has access to databases that provide information on clients.
- Your business has a direct competitor who would benefit from hiring your workers.
- The employee has access to or is aware of trade secrets.
- The employee is developing material for your business that is eligible to be trademarked, patented or copyrighted.
- Your employees work closely with customers providing professional services such as legal services, medical services, accounting services or financial services.

For most businesses, there is little downside to requiring employees to sign covenants not to compete and there is tremendous upside in that the agreement can provide legal protections if the employee acts in a manner that could harm your professional interests.

DRAFTING AN ENFORCEABLE COVENANT NOT TO COMPETE



The creation of a covenant not to compete is beneficial to your business only if the courts enforce the agreement when your former employee engages in prohibited behavior. Courts are generally reluctant to enforce non-compete agreements as unfair restraints on trade, but covenants not to compete are permitted in Arizona provided that they fall within accepted legal guidelines.

A 1999 case, *Valley Med Specialists v. Faber*, 982 P.2d 1277, made clear that a reasonable covenant not to compete should be enforced in Arizona as long as the agreement is “no broader than necessary to protect the employer’s interests.”

To avoid being considered overly broad, the covenant not to compete must be reasonably limited in both time and space and it must not be unreasonably restrictive on an employee's rights. The agreement must not contravene public policy, and it must be reasonably necessary to provide protection for the employer's company. It also must serve some specific purpose for the business besides solely the employer's desire to protect its company from legitimate competitive enterprises.

Finally, the covenant not to compete must meet all additional requirements for creating a contractual agreement and it must be incident or ancillary to a contract that is otherwise legally enforceable.

Whether a covenant not to compete is reasonable in time and scope is a question that must be determined by considering the specific circumstances. Answering the question is fact-intensive and the needs of the employer are weighed against public interest and the rights of the worker. In the past, Arizona courts have found agreements unenforceable that:

- Imposed a 36-month restriction on the use of customer information.
- Imposed a two-year restriction on providing DJ services to any client within 50 miles of any of the employee's former job locations.

Courts have upheld agreements that:

- Imposed a six-month restriction on soliciting customers within city limits to sell a competing product when such product accounted for at least half of the business' revenue.
- Imposed a ten-year limit on starting a lettering shop or silk screening business within 100 miles of a geographic area after a business was sold.

Courts have generally been more willing to uphold restrictive covenants that are created in connection with the sale of a company because the sale is often contingent upon the business transferring its goodwill and brand recognition as well as its physical assets.

Enforcement of non-compete agreements generally takes the form of an employer seeking an injunction to prevent an employee from violating the terms of the contract. This means that the court may order the employee to discontinue working for a competitor, contacting customers or otherwise engaging in the prohibited behavior. In certain cases, companies may also seek monetary damages for the losses caused by an employee who violates the covenant. Proving damages can present challenges as the losses must be actual damages and not speculative.

An experienced attorney can provide invaluable advice and assistance in determining if a covenant not to compete is necessary and in drafting a non-compete agreement that meets the needs of your business enterprise and is likely to be upheld in court. Your attorney can also help with the enforcement of a covenant not to compete.

About the Author

Lotzar Law Firm, P.C. was founded in 2005, and serves clients throughout the U.S. We pride ourselves on the level of service we provide our clients and are determined to see each project through to positive results.

In addition to bringing a legal expertise to the table, we offer clients sound ideas and invaluable advice that enhances their business. One of our greatest attributes is our ability to approach projects from a business-owner perspective. Rather than narrowing in on the setbacks of a challenge and informing clients of what stands in the way, we prefer to seek innovative ways to transcend issues and create a better path for clients. With an unparalleled savvy in developing modern methods of financing, we can present you with viable and efficient options.

Our diversified portfolio of clients is comprised of entrepreneurs, real estate developers, contractors and property managers. We also do business with numerous nonprofit clients including Chicanos Por La Causa, Inc.; Tiempo, Inc.; and The Industrial Development Authority of the City of Tucson, Arizona.

We work in a team-based environment, supported by a skilled and caring staff, eager to answer your questions and provide you with consistent access to your team. Whether your needs are small or large in scope, we look forward to working with you.

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