

NON-COMPETES DEMYSTIFIED:

The copier professional's guide to understanding and negotiating non-compete agreements

Congratulations, you just landed that new job!

The money is right, the benefits are fantastic, the commute is short, and the company has a reputation for treating its employees like family. There's only one problem: your new "family" wants you to promise that if you stop working for them, you won't start working for one of their competitors for a period of, say, one year. They're asking you to sign a non-compete agreement.

Should you do it? On the one hand, this sounds like a great opportunity, and you don't want to jeopardize it by refusing to sign the non-compete. On the other hand, is any job worth signing away your ability to work in the industry?

It's a difficult position to be in, but at least you're not alone. According to a recent poll by Copier Careers,

more than three quarters of all copier industry employees say they've signed a non-compete agreement at work, with another 13 percent unsure whether they've signed one. The confusion doesn't end there. In addition to being uncertain about whether they've signed a non-compete, many professionals question whether the agreements are enforceable at all. We'll answer that question and many others, but first let's answer the most essential question of all: what is a non-compete agreement, anyway?

Non-Compete Basics

A non-compete agreement is a legal contract between an employer and an employee. It prevents employees from competing with their employers after their employment has ended, either by going to work for a competitor or by starting their own businesses. These contracts

usually cover a specific period of time (ranging from a few months to a few years), a specific industry, and a specific geographic area. Sometimes they come in the form of a standalone document, other times they're one of many clauses in an employment agreement. Although non-competes are most commonly signed at the time of hire, some companies may ask existing employees to sign them as well.

What Are Non-Competes For?

Non-competes exist to help businesses protect their confidential information, like trade secrets and client information. They are intended to keep employees from using the proprietary knowledge they gained working at Company A for the benefit of Company B. They are not meant to prevent employees from

making a living—any agreement that did that would probably be considered too broad, and would likely be deemed unenforceable in court. Still, many companies do aim to make their agreements as broad as possible, perhaps not always for the right reasons. As one Copier Careers poll respondent said, “In our industry, non-compete agreements are used more as a tool to keep good people away from competitors than as a way to protect trade secrets or client relationships.” The truth of that statement is impossible to gauge, but it undoubtedly encompasses the feelings of many employees.

Do I Have to Sign a Non-Compete?

Employees frequently ask whether they have to sign non-compete agreements. The philosophical answer is no, you don't have to do anything you don't want to do. The dose-of-reality answer, which assumes you want the job, is usually yes.

Legally, employees are required to receive some benefit in exchange for signing a non-compete agreement. When the non-compete is signed at the time of hire, the benefit is simply that the employee receives the job. In other words, employers are within their rights to include a non-compete agreement as a condition of new employment.

Sometimes, however, an employee who has already been on the job will be asked to sign a non-compete. In that situation, employees are free to reject the non-compete, because although new employment is considered a sufficient benefit, the continuation of employment usually is not. Instead, existing employees

According to a recent poll by Copier Careers, the majority of document imaging professionals believe the people who sell and service copiers should be required to sign non-compete agreements:

Should sales reps and technicians be required to sign non-compete agreements?

- Yes, but only sales reps, not techs: **73%**
- Yes, but only techs, not sales reps: **10%**
- Yes, both sales reps and techs should be required to sign non-competes: **9%**
- No, neither sales reps nor techs should be required to sign non-competes: **8%**

Poll conducted in March 2011.

must receive something extra for signing the contract, such as a bonus, promotion, or salary increase. Whether they choose to sign the non-compete in exchange for more money or responsibility is up to them.

That said, it never hurts to ask potential employers whether the contract is obligatory—they may be more willing to omit the non-compete than you think. Consider the following story from a Copier Careers newsletter reader:

“I was asked to sign a non-compete when I was 53. It said I couldn't work in the field for one year after leaving the company, so I didn't accept the job. I have worked in the industry since I was 17—what am I supposed to do for a year, eat beans? I ran into the potential employer a year later and he asked why I had refused the position, because he thought he had offered me a nice package. When I told him it was because of the non-compete clause, he said he would have taken it out if I'd asked him to.”

Are Non-Competes Really Enforceable?

Perhaps because non-compete agreements have become so ubiquitous, many people wrongly believe they aren't enforceable. The truth is that although the courts in many states don't look favorably on non-compete agreements, they will enforce them if they find that the employer has a legitimate business interest to protect. Violate your non-compete and you risk being taken to court.

Former employees aren't the only people at risk of being sued, either. If you leave your job and sign on with a competitor, your new employer may also be sued for something known as “tortious interference with contract.” For this reason, it's important to be upfront with prospective employers about any existing non-competes. If they think you're worth the risk, they may hire you anyway. Regardless, it's never safe to assume your non-compete agreement can

be broken without incurring personal or professional consequences. One Copier Careers poll respondent put it well:

"Non-competes have been a misunderstood concept for years. The fact is, if you sign one and you ignore it when you leave the company, you can be taken to court. If you don't lose the court case, at the very least you will have to hire an attorney to represent you. Companies count on having greater financial resources than you do. If you break your non-compete, will you be able to afford the cost of defending yourself?"

The Bottom Line

In the end, the most important thing to keep in mind is that non-compete agreements are no joke. Don't enter them carelessly, don't break them lightly, and if you have any questions about them, consult an attorney. In this diverse and complicated area of the law, every situation is unique—and we want to make sure your unique situation turns out for the best. **-CC**

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Tips for Negotiating Your Non-Compete Agreement

While most employers won't totally eliminate non-competes from their employment contracts, many of them are willing to negotiate the terms. A few tips to help you out at the negotiating table:

- **Talk to a lawyer.** Gene Hoff, a Minneapolis-based attorney, says it's important for workers to recognize that in any employer/employee negotiation, there is unequal bargaining power. Hoff and his partner, Mike Minenko, practice in the areas of business litigation, sales representative law, and employment law. "Usually," Hoff says, "the employers are holding the upper hand. So if you're presented with a non-compete agreement, it's a good idea to review it with an attorney who practices in that area." Though it may cost you a few hundred dollars to get your non-compete reviewed, doing so could end up saving you thousands in lost wages. Before you sign that contract, it's a good idea to know exactly what rights you're signing away.
- **Find out if your employment category really needs to be covered by a non-compete.** Any type of employee—managers, sales reps, techs, or front and back office staff—may be subject to non-compete contracts in this industry. However, as Minenko says, it's beneficial for employers to be selective about who they ask to sign non-competes. "Employers put themselves in a better position with the judge if they can demonstrate that they don't ask every employee to sign a non-compete, but rather only those employees who truly have an impact on their legitimate business interests."
- **Try to reduce the scope.** If the geographic area or amount of time covered by the non-compete seems too broad, find out if you can scale it down to what's strictly necessary to protect the employer's business interests.
- **Ask for a non-disclosure agreement instead.** A non-disclosure agreement prevents employees and former employees from sharing protected information, but does not place restriction on their future employment.
- **Request a severance package** in the event of an involuntary termination so you have something to live on while you're waiting out the non-compete.

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