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Don't Get Burned by Noncompetes

By Toddi Gutner | [Business on Main](#)

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Whether you've been laid off or are just sick of working for someone else, starting a business that directly competes with your former employer is probably an option you've considered. But before you launch wholeheartedly into your new venture, it's essential to explore a potential risk that could cause legal hassles down the road: noncompetition (or noncompete) agreements.

"The key thing is to understand all the [risk] factors and make an assessment," says Stephen Furnari, corporate attorney with Furnari Scher. Depending on the nature of your new business, there may be no risk of a lawsuit in some cases, while in others you'll need to be particularly vigilant.

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Dig deep into your employment contract

If you signed a noncompete agreement with your previous employer and are thinking of starting a new business, then you need to understand the parameters of the agreement. These restrictive contracts, which forbid employees from competing with

their employer for a certain time period, are often part of larger employment contracts. It's imperative that you get a copy of your employment document when you submit your resignation.

"Any employer will gladly share that document with you because they want it to be honored," says David Gevertz, an employment lawyer at Baker Donelson.

And even if you didn't sign an employment contract, your employer could look to another area of the law for protection. "The employer might still threaten the employee into compliance, and this could cost you money and embarrassment," says Furnari. But understanding your contract or what legal action may be taken against you could require the help of an employment attorney.

A court's perspective on noncompetes

There are some conditions that a noncompete must adhere to for a court to uphold it: The agreement can only apply for a certain length of time, it has to be limited geographically, and there generally needs to be some sort of "consideration." Consideration, says Furnari, is a legal term for giving payment or anything of value in exchange for the employee signing the contract.

But the truth is that "courts do not like to restrain trade, so noncompete agreements are not looked upon favorably by judges," says Steven J. Thayer of Handler Thayer LLP. "Courts generally must find a legitimate business interest to protect before they will enforce a noncompete agreement. [It must] do more than simply restrain trade for the purpose of inhibiting competition."

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In general, circumstances where a legitimate business interest needs protection are hard to find. An exception is if an employer has spent substantial time and money developing a customer relationship and a former employee sets up a competing business that jeopardizes that relationship.

Another issue arises around the information and ideas that you have learned on the job before starting your own business. "Former employers can generally only protect information that is not already in the public domain," says Thayer.

Working around noncompetes

Even though courts don't typically uphold noncompete agreements, it probably isn't wise to take these contracts lightly. One strategy may be to stay in touch with previous clients while refraining from doing business with them during the terms of your noncompete.

This was David Chapman's strategy. The CEO of 919 Marketing Company had a one-year noncompete with his former employer, and couldn't go to his former clients for business right away.

"I could talk to them, but I couldn't solicit business," says Chapman. "I wanted to plant a seed in their heads and to network with them, because I valued their opinion." The effort paid off. After the year was up, he got a large account because he stayed in touch.

"I was very careful not to say I was looking to take their business," he says. Chapman now has a noncompete with his own employees that states: "You can't pitch any of our business, take accounts, or use our methodologies."

Another potential strategy when an employee leaves a firm and takes clients is creating a revenue-sharing arrangement. "This does make the old firm feel a bit better, [possibly] avoids litigation, and keeps the client relationship," says Furnari.

Clearly, noncompetes are fraught with uncertainty and often lack clear guidelines. Be sure to do your research in advance so you aren't caught by surprise with a lawsuit as you're launching your new venture.

Toddi is an award-winning journalist, writer and editor and currently is a contributing writer covering career management issues for The Wall Street Journal.

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