



NON-COMPETE QUIZ

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The following quiz will test your knowledge of the general enforceability of non-competition agreements in Kentucky. This should not be considered to be legal advice, nor a definitive legal opinion, however, since the following questions and answers provide only generalized statements of how likely the courts are to enforce this type of agreement in Kentucky. Different jurisdictions treat these issues in different ways. In some states, this type of agreement is considered to be against public policy, and can actually land the employer in hot water. Currently, in Kentucky and many other states, these agreements are generally enforceable, if properly drafted, presented to the employee under appropriate circumstances, and properly executed.

There are major differences in the outcome of various disputes, based upon factors, including, but certainly not limited to:

- whether the matter is litigated in federal or state court;
- the type of business;
- whether the agreement is part of the sale of a business;
- whether the business is one engaged in high tech enterprise, where expertise is rapidly changing;
- the sensitivity of the employee's position in the company, with regard to non-public information regarding customers, prices, trade secrets, etc.

Is your Non-Competition Agreement enforceable?

1. Is the Non-Competition Agreement in writing?

-If Yes, the Agreement is more likely to be enforced.

-If No, the Agreement is not as likely to be enforced.

2. Does the Non-Competition Agreement have a reasonable geographic limitation?

-If Yes, the Agreement is more likely to be held enforceable *if* the geographic territory, within which competition is limited or prohibited, is reasonable to protect the employer (ex. 25/50/100/150 mile radius from the employer's current principal office address). Reasonable restrictions, however, have included nationwide bans on competition, if the scope of the employee's work spanned the country, and a restriction was necessary to protect the employer's business.

-If No, the Agreement is not as likely to be enforced.

3. Does the Non-Competition Agreement have a reasonable time limitation?

-If Yes, the Agreement is more likely to be enforced.

-If No, the Agreement is likely to be held enforceable only if reasonable geographic limitations exist. Some courts will simply rule the Agreement unenforceable, while others may allow enforcement for what the court determines to be a reasonable period of time under the circumstances of the case. Generally, six months to a year is considered a reasonable time period, although enforcement of agreements in the five year range sometimes occurs. If the Agreement is part of the sale of a business, however, and was an inducement to the buyer to purchase the business, the Agreement is more likely to be enforced, and the term of prohibited competition can be substantially longer.

4. Upon leaving the job, can the employee find gainful employment reasonably related to employee's qualifications?

-If Yes, the Agreement is more likely to be enforced. For example, if the employee is a salesman, and the restriction simply prohibits him or her from selling: 1) in a certain industry; and 2) to the employer's customers, the Agreement is more likely to be seen as reasonable by the courts, because the employee can still use his or her sales qualifications in a different industry with different customers.

-If No, the Agreement is probably not enforceable. The general rule is that the non-competition restriction must be only as broad as is reasonably necessary to protect the employer's business. It should not be so unreasonable, with regard to time and territory, as to effectively make the employee unemployable in his or her chosen field.

5. Did the employee sign the Non-Competition Agreement at the time of employment?

-If Yes, the Agreement is more likely to be enforced.

-If No, enforceability depends on what consideration (value) flowed to the employee at the time of signing the Agreement, or thereafter. For example, take a situation where an employee signed the Agreement, not at the time of employment, but shortly thereafter, was employed for several years, given raises, promotions, and acquired specialized knowledge which he or she might not have otherwise had. A challenge to enforcement of the Agreement, based on a lack of consideration on the date the Agreement was signed, would probably be defeated, based on the items of value that flowed to the employee later during his or her employment. Additionally, courts have found that simple continuation of employment can be enough consideration to make a Non-Competition Agreement enforceable.

6. Is the employee in a low-level, minimum-wage position?

-If Yes, the Agreement is probably not as likely to be enforced. Courts have allowed Non-Competition Agreements, primarily in order to protect employers from higher-level employees unfairly competing against them by taking customers and non-public business information (trade secrets). Restrictions are less likely to be enforced against lower level employees who have limited skills, less access to or influence with customers, and less access to confidential information. If the Agreement has the other necessary ingredients (reasonable time and geographic limitations, etc.), however, there is no guarantee that a court will not restrict a lower level employee who executed a reasonable Non-Competition Agreement.

-If No, the Agreement is more likely to be enforced.

7. Did the employee learn the important job skill through employer training?

-If Yes, the Agreement is more likely to be enforced. Modern Kentucky cases have placed more emphasis on the employer's investment in the employee. If an employee trained in the processes of a company, and became acquainted with its unique methods, the courts have found that the employee (who signed a Non-Competition Agreement) should not be allowed to use those processes and methods in a competing business, and consequently injure something which the employer has built upon under its name throughout the years.

-If No, the Agreement is less likely to be enforced (if other factors are lacking).

8. Does the employee have client contact?

-If Yes, the Agreement is more likely to be enforced. When an employee, through his or her employment, is given the opportunity to develop a special business relationship with an employer's client, the employer is vulnerable to the employee simply "cutting out the middleman." The courts have consistently held that Non-Competition Agreements were designed to grant employers protection in this situation because such relationship would not have been possible without the assistance of the employer.

-If No, the Agreement is less likely to be enforced (if other factors are lacking).

9. Has the employer broken any terms of the employee's employment agreement?

-If Yes, the Agreement is less likely to be enforced. The breach by an employer of a material provision of a contract of employment, such as failure to give notice of termination, injures its right to complain about that employee's breach of a Non-Competition Agreement.

-If No, the Agreement is more likely to be enforced.

10. Is the nature of the competitive activity well defined?

-If Yes, the Agreement is more likely to be enforced.

-If No, the Agreement is less likely to be enforced. Many agreements make the basic mistake of not accurately defining what the employer does, and therefore what the employee is prohibited from doing.

This area of employment law is fairly widely misunderstood. Many employers and employees have heard this type of agreement is "not worth the paper it's written on." In Kentucky and many other states, however, it is generally enforceable. In fact, in situations related to the valuation or sale of a business, the existence of well drafted, properly executed non-compete agreements, particularly with key employees, can add an element of substantial value to the business.

Conversely, it can also be a wise decision for an employer to require prospective employees to sign documentation, as part of the application process, stating that their potential employment with the employer would not violate the terms of any non-compete agreement with a former employer. Litigation in this area often involves claims against both the allegedly wrongful actions of a former employee, as well as for injunctive relief and damages, against the new employer.