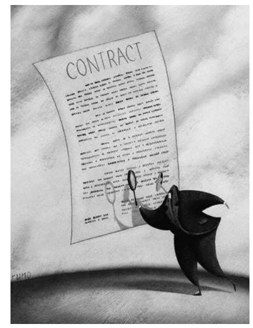
THE Business Owner® Advisor

Expertise for the business owner

RBC Bank™

INFORMATION FOR RBC BANK CLIENTS

Employee Non-Compete, Non-Solicitation and Anti-Piracy Agreements



Business owners who have non-compete and/or non-solicitation agreements in place with their employees should resist the temptation to place unmerited reliance on their usefulness and enforceability. That is, as a means for protecting against loss that could result from the departure of, and eventual direct competition from, a key employee.

Business owners should familiarize themselves with the similarities, differences, and general enforceability of non-compete, anti-piracy, non-solicitation and related agreements — and the limitations of each.

Non-Compete. Agreement between employee and employer that prohibits the employee from competing against the employer. Typically, it's for a limited period of time after the employee leaves the employ of the employer. It's also common to restrict the non-compete to a certain industry and/or geographic region. Many states consider non-compete agreements to be illegal or, at least, unenforceable. For this reason, most employment law experts steer their clients away from non-compete agreements and toward other means of protection.

Anti-Piracy. Similar to the non-compete, but much narrower. Attempts to restrict the departed employee from soliciting customers of employer **and** from disclosing or making use of confidential information of employer. Because it is less restrictive on the employee (and thereby less of a restraint on free trade), courts have been more willing to uphold anti-piracy agreements (compared to non-compete agreements). Most employment law attorneys now suggest employers use anti-piracy-type agreements.

Non-Solicitation. Even narrower than the anti-piracy agreement. Restricts the departed employee from soliciting business from established customers of the former employer, but does not address the employee's potential use of the former employer's confidential information. Agreements such as these have been upheld in state courts when they are properly drafted and contain appropriate limitations.

Confidentiality. An employee's promise not to use or disclose (to third parties) sensitive and confidential information of the employer. Often, the prohibition extends for a period of years after the employee departs the employ of employer. State courts have widely upheld agreements of this type as enforceable.

Again, business owners should take care to know how these agreements can and should be used, and their limitations, which are considerable.

The enforceability of employment-related agreements is established by state law. Making the employer's task more challenging is that state laws vary from state to state. The only remedy is to definitively

continued on page 3

Information for RBC Bank Clients

301 Fayetteville Street Raleigh, NC 27601
Toll-Free: 800-236-8872 • www.rbcbankusa.com

Can Your Contracts Also Help "Sell"?

What rules govern what can and cannot be put into an agreement or contract? To be binding, a contract simply must have an offer, acceptance and consideration. There are no rules on what it **cannot** contain. So why not add language that reaffirms why clients are hiring you and how they will benefit?

If you are one of these people who treat written agreements as some sort of sacred script that, once written, can be touched only by high priests (i.e., lawyers), stop taking them so darn seriously. Sure, agreements are important and, once signed, they document binding commitments. But feel free to work with them and rewrite them so they serve you better.

It is always good to keep agreements short and easy to read and understand, but allow some room to include summary language as to what clients want to accomplish, how you will help and why they are selecting you. Also add how clients will benefit if the goals are accomplished. Be careful, though, that your additions do not create additional promises, obligations or guarantees on your part.

If you are unsure about changes, talk to your lawyer. If he/she doesn't support your effort to improve the salesmanship of your agreements, consider finding a new lawyer. Shorter, friendlier and more simply written contracts that also reinforce client benefits will result in more signatures, clients and sales. ❑

THE BUSINESS OWNER ADVISOR

David L. Perkins, Jr., Publisher and Editor

DPerkins@DLPerkins.com

This publication is owned and published by DL Perkins, LLC, 5727 South Lewis Avenue, Suite 400, Tulsa, Oklahoma 74105; 918.493.4900; Fax 918.493.4924. Info@TheBusinessOwner.com.

 Issn. No. 1556-2026. Vol. 4, No. 6

Cover illustration credit: © Dynamic Graphics

Have a "Most Trusted"? Watch Out!

Scams hide behind smiling faces.

"People who think they can spot investment scams can't because they're suckers for smiling faces," says the Council of Better Business Bureaus website. "They look professional and appear successful."

To be sure, fraud is prevalent. According to the Association of Certified Fraud Examiners (ACFE), U.S. organizations lose 5% of their annual revenues to fraud. Applied to the United States Gross Domestic Product, this 5% figure would translate to approximately $700 billion in fraud losses.

Small businesses suffer disproportionate fraud losses. The median loss suffered by organizations with fewer than 100 employees was almost $200,000 per scheme, and most involve the accounting department or upper management.

Research also shows that when fraud is perpetrated by employee on employer, it's typically carried out by the employee who is most trusted. The golden boy. Your closest confidante.

When it occurs in a single event, it's made possible, in part, with pressure, stress or emotion. A skilled fraudster finds a way to bring these elements to bear on the victim, usually the person who must provide approval, access or authorization. Or the fraudster waits patiently and strikes when outside forces rise up and conveniently apply pressure, stress or emotion.

In the case of investment scams, a la Bernie Madoff (United States) or Pacific Continental Securities (United Kingdom), it might be a hot stock tip that must be seized on right away. In the case of fraud in the workplace, it might be that you are under considerable time pressure and stress from unrelated matters, and the perpetrator presents you with the resolution to the problems that you have been having in your relationship with him/her. "I really want to get this resolved now. Do me a favor and just sign this. It's not perfect and I know it's deficient in these areas, but trust me. We'll work the rest out later."

In short, watch out for:

- "I'm insulted."
- High emotion.
- Territorialism.
- "Do we really need these formalities?"
- "Don't you trust me?"
- "Just let me handle it!"
- Unreasonable or irrational claims of "it can't be done that way."

Watch out when you feel yourself really needing, or wanting, to accommodate someone. Watch out when you feel yourself really wanting to make another person feel that you trust him/her or feel that you approve of his/her efforts. Finally, watch out when you find yourself listening to the assurances of others rather than the voice inside your own head that's saying "this smells funny!"

Trust your gut instinct. If you feel pressure or uncertainty, back away! ❑

Peer Benchmarking: #1 Tool for Improving Your Business

What is possible?

The reality is, humans have a hard time figuring out what is possible. The interesting thing is, the art of the possible is about envisioning the future, but humans really only move into the future by peeking into the past. It's just the way we work. To envision what is possible, we rely almost exclusively on two things:

- Our own past performance
- Others' past performance

Virtually every development on earth is incremental. Evolution is incremental. In sports, records are broken every day — in tiny increments. To break a record, the athlete's challenge does not require him/her to create a new reality. The athlete is not required to deliver a never-before-in-history performance. The bar is set much lower — simply edge current reality by a hair. Consider as well that each of us is heavily influenced by psychological barriers that, by their very nature, are not real. They exist only in the mind.

Take the 4-minute mile as a case in point. Though generations of runners clipped second after second off the 4-minute-mile record without interruption — and steadily approached the 4-minute-mile mark — there was a widely accepted belief that it was not humanly possible to run a mile in fewer than 4 minutes. And so, as world-class milers approached the 4-minute-mile mark, the pace slowed. The only explanation for this is the psychological barrier. Self-doubt, if you will. Runners came closer and closer to the mark, and then it happened. In 1954, Roger Bannister finally posted a time that began with a 3 (3 minutes and 59.4 seconds) and, in the ensuing months, the rest of the field burst through with their own times under 4 minutes.

So Goes the Business World. Business people are obsessed with learning others' accomplishments. Why? Because we are unsure whether we can do something until we see that someone else has. If you can, then maybe I can. And when we meet someone who accomplished X, Y or Z, we're further emboldened. Why? He/she doesn't look any more special than me!

Peer benchmarking is about looking at what other companies similar to yours are doing. If you, as a business owner, can match the best of your peers in key categories such as inventory turns, collection rates, gross profit margins, labor productivity, etc., then you will secure your place among the 20% who enjoy the spoils of victory.

Where to Find Peer Data. The first place to look is your industry or trade association. Call the executive director and inquire. If they don't currently gather and publish peer data, launch an initiative to get this important member benefit in place. The second place to look is the Risk Management Association (RMA). Ask your banker if he/she can get you in touch. RMA is a not-for-profit that gathers financial statements and relevant data of small and midsize private companies, aggregates them and publishes the results.

Comparing Peer Data to Your Company Data. Once you've obtained peer data, the first task is to understand them. Spend some time immersing yourself in the way the data are compiled and presented. It can get a little complex, but the investment of time and effort is well worth it.

Second, organize your own financial statements in a way that mirrors the peer data you obtained. Calculate the various ratios the same way as the peer data.

Third, identify areas where your business appears to underperform. We use the word "appear" because there can be many explanations for a large deviation. Give much thought to the possible explanations. Obtain assistance from your accountant because accounting policy and/or methodology can be a key factor.

Fourth, identify which area, if improved, would have the greatest positive impact on your business.

Fifth, develop a strategy for improving your business' performance in the area you target. This may include spending time investigating how some of your peers achieve better results than you do. A great way for doing this is to attend your trade show or industry conference with peer data in hand. Ask around. Corner a few business owners and/or managers whom you respect or have in the past shown a willingness to be open and helpful. Make it your priority to leave the event with answers.

If you, as a business owner, can match the best of your peers in key categories such as inventory turns, collection rates, gross profit margins, labor productivity, etc., then you will secure your place among the 20% who enjoy the spoils of victory.

Sixth, track your company's progress. Garner your employees' support and assistance. Involve them in the pursuit of improvement, if not peer-leading performance. Set goals and consider offering incentives.

I'm convinced that peer benchmarking is vastly underused in the business world. But that's good for you and me. If all of our competitors were on the ball, we'd have a much more challenging row to hoe. ❑

RISK MANAGEMENT

***Employee Non-Compete, Non-Solicitation and Anti-Piracy Agreements*, continued from cover**

determine the set of laws (i.e., which state laws) under which a particular agreement will be interpreted, and then craft the agreement in a way that maximizes protection and minimizes any risk that the agreement could be rendered void.

To be sure, court dockets throughout the United States are filled with rulings whereby non-compete and non-solicitation agreements have been rendered null and void, leaving employers with virtually no recourse or protection against employees who have departed and competed — in many cases, causing considerable harm to their former employers. ❑