



ATTORNEYS AT LAW

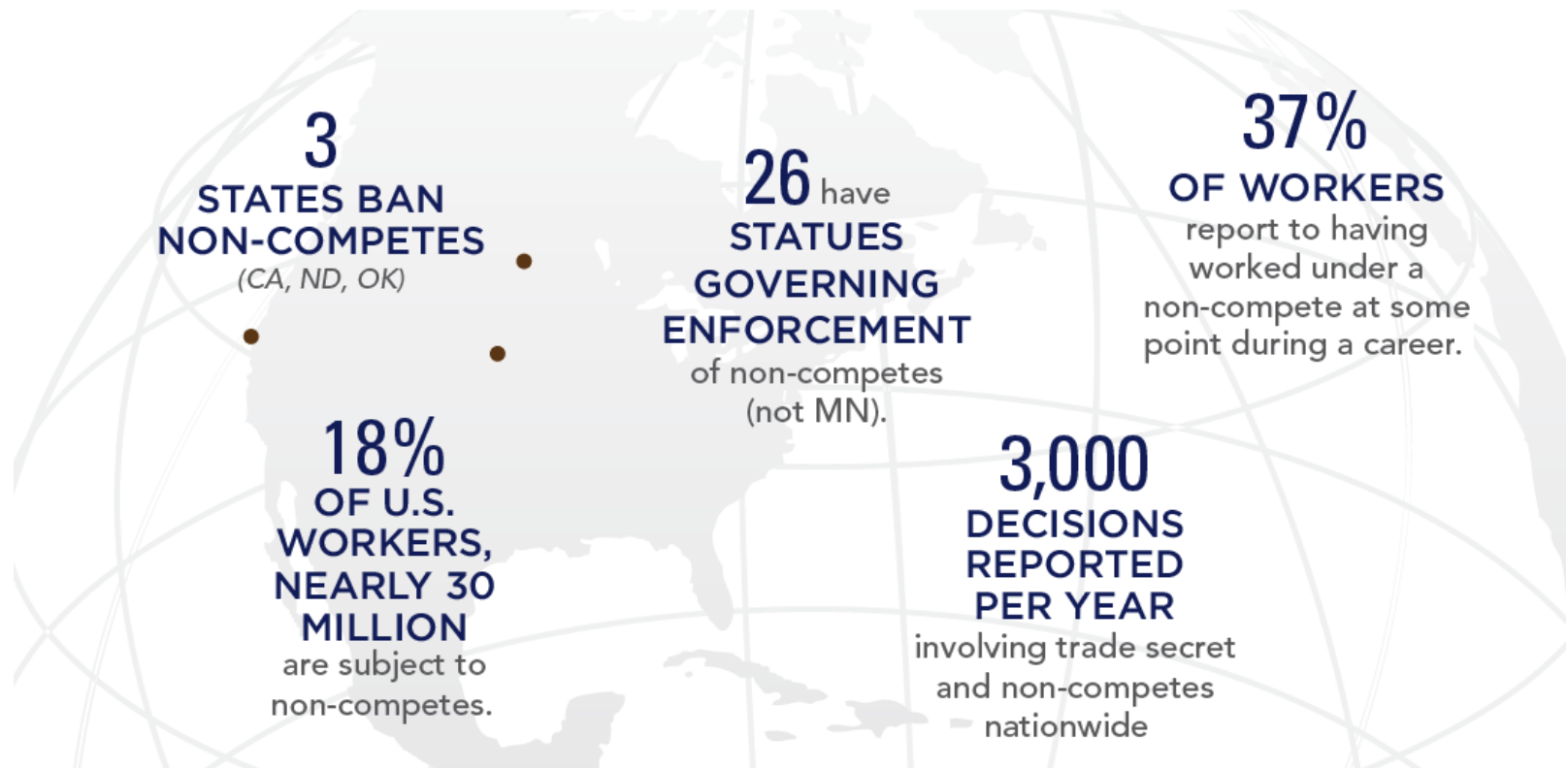
Walk Me Through Non-Competes



ATTORNEYS AT LAW

What's enforceable?

Non-Competes in the United States



Common Provisions in Non-Compete Agreements

- Non-Compete Covenant
- Non-Solicitation Covenant
- Trade Secret/Confidentiality Provision
- Anti-Raiding Provision
- Shop Rights Provision



Requirements for an Enforceable Non-Compete

- Independent Consideration
- Protect Legitimate Business Interest
- Reasonable in Scope, Duration, and Geographic Territory





Independent Consideration

- Must confer a “real advantage” to an employee
- Common Examples of Independent Consideration:
 - New Employment
 - Increased Compensation
 - One Time Bonus
 - Stock Offer
 - Promotion
- Continued Employment is NOT Alone Sufficient



Legitimate Business Interest

- Goodwill and Customer Relationships
- Confidential Information and Trade Secrets
- Specialized Training



Reasonable in Scope

- Customer-Based or Product-Based Restrictions
- Common Issues:
 - Preexisting customers brought by employee
 - Prospective customers
 - Cold call customers
 - Limited or no direct customer contact



Reasonable in Duration

- Two Standards:
 - Length of time necessary so that employer's customers no longer identify former employee as working for employer;
or
 - Length of time necessary for employer to hire and train replacement employee
- Two Years – Typically Reasonable in Minnesota



Reasonable in Geographic Territory

- Fact Specific Depending on Business and Customers
- Best Practice: Limit geographic scope to area where employee will actually work.
- Using Non-Solicitation Provisions Instead of Geographic Restrictions

Other Key Non-Compete Provisions

- Attorneys' Fees and Expenses
- TRO/Injunction & Irreparable Harm
- Choice of Law and Venue
- Tolling of Non-Compete Period





Other Key Non-Compete Provisions

- Confidentiality Provision
- Inventions
- Return of Property
- Defend Trade Secrets Act Disclosure
- Notice to Prospective Employers/Notice to Company
- Assignability





ATTORNEYS AT LAW

How do you enforce a non-compete?



- **Handling suspicions about employees**
- **Cease and Desist Communications**
- **Preserving Evidence / Forensic Examinations**
- **Temporary Restraining Orders**
- **Litigation**
- **Damages**



ATTORNEYS AT LAW

Hiring Someone with a Non-Compete



Hiring Someone with a Non-Compete

- ✓ Is the applicant subject to a restrictive covenant?
- ✓ Is the restrictive covenant valid?
- ✓ What can the candidate still do for me?
- ✓ How can I carefully draft the job offer?
- ✓ Do I need to respond to this “cease and desist” letter?
- ✓ I have been sued! Can I defend this?

Is the Applicant Subject to Restrictive Covenant?

- ☐ Make this inquiry early in the process
- ☐ Often found in an employment agreement, but not always:
 - Stock option agreement
 - Deferred compensation agreement
 - Confidentiality agreement
 - Inventions agreement
- ☐ If no, recite this in the offer letter and make offer contingent on absence of restrictive covenant
- ☐ If yes, obtain a copy of the restrictive covenant



"I believe the courts have recently ruled that asking questions of an applicant, during an interview, is illegal."



Is the Restrictive Covenant Enforceable?

- ❑ Consult with outside legal counsel
 - Reasonable reliance on outside counsel is a defense to tortious interference claim
- ❑ Choice of Law Provision
- ❑ Consideration
 - Executed at the outset of prior employment
 - Non-illusory benefit conferred in connection with mid-employment restrictive covenant
- ❑ Vague or Unreasonable in Scope
 - Temporal restriction
 - Geographic restriction
 - Customer solicitation restriction (words matter)



Can the Applicant Function within Restrictions?

- ☐ Assign employee to a different account/customer during restricted period
- ☐ Assign employee to a different territory during restricted period
- ☐ Assign employee to a different division during restricted period
- ☐ Avoid “inevitable” disclosure of trade secrets
- ☐ Avoid disclosure of confidential information



Carefully Draft Employment Offer/Job Description

- ☐ Disclose and enclose new restrictive covenant
- ☐ Recite existence/non-existence of restrictive covenant
- ☐ Precisely explain what conduct is prohibited
- ☐ In all cases, explain that the employee cannot use/disclose former employer's confidential and/or trade secret information



Offer Letter: Example

As indicated in the attached Agreement, your offer of employment is contingent upon execution of the enclosed Employment Agreement, which contains restrictive covenants.

employment – Marcus Twa

employment is contingent upon execution of the enclosed contains restrictive covenants.

We at Acme understand that, pursuant to an agreement with Globex Corporation, you are prohibited from, either directly or indirectly, providing products or services to any Globex Corporation customer or prospective customer with whom you worked during your last year of employment with Globex Corporation. You should understand that Acme Sales requires that you comply with these obligations. To the extent any such customer or prospective customer contacts you, you are required to inform the customer/prospective customer that you cannot work with them, either directly or indirectly.

you are prohibited from, either directly or indirectly, providing products or services to any Globex Corporation customer or prospective customer with whom you worked during your last year of employment with Globex Corporation. You should understand that Acme Sales requires that you comply with these obligations. To the extent any such customer or prospective customer contacts you, you are required to inform the customer/prospective customer that you cannot work with them, either directly or indirectly.

Further, you may not utilize any confidential or trade secret information belonging to your previous employer.

her directly or indirectly. Further, you may not utilize any confidential or trade secret information belonging to your previous employer. Any use of your previous employer's information or use of your previous employer's name will result in discipline up to and including termination.

If you have any questions regarding these requirements of your employment with Acme Sales, please contact me.

Sincerely,

William Coyote, CEO



Re: Vehement

Dear Ms. Stowe:

Please call me regarding your offer of employment from Vehement Capital Partners, which contains requirements that

you are prohibited from, either directly or indirectly, providing products or services to the following customers: [Restricted Customers]. You should understand that Vehement Capital Partners requires that you comply with these obligations. To the extent any such customers contact you, you are required to inform the customer that you cannot work with them, either directly or indirectly

We at Vehement Capital Partners understand that, pursuant to an agreement with your previous employer, you are prohibited from, either directly or indirectly, providing products or services to the following customers: [Restricted Customers]. You should understand that Vehement Capital Partners requires that you comply with these obligations. To the extent any such customers contact you, you are required to inform the customer that you cannot work with them, either directly or indirectly. Further, you may not utilize any confidential or trade secret information belonging to your previous employer. Any violation of your agreement with your previous employer or use of your previous employer's confidential or trade secret information will result in discipline up to and including termination.

If you have any questions regarding these requirements of your employment with Vehement Capital Partners, please contact me.

Sincerely,

Nancy Botwin, CEO



Offer Letter Example 3

Re:

Dear M

employ
employ
contain

employ
to any

you are prohibited from, either directly or indirectly, providing products or services to any Hooli Corporation customer or prospective customer within a [##] mile radius of your prior employer's branch located at [Former Employer Address]. You should understand that Hooli Corporation requires that you comply with these obligations. To the extent any customer or prospective customer from within the restricted territory contacts you, you are required to inform the customer/prospective customer that you cannot work with them, either directly or indirectly

prior employer's branch located at [Former Employer Address]. You should understand that Hooli Corporation requires that you comply with these obligations. To the extent any customer or prospective customer from within the restricted territory contacts you, you are required to inform the customer/prospective customer that you cannot work with them, either directly or indirectly. Further, you may not utilize any confidential or trade secret information belonging to your previous employer. Any violation of your agreement with your previous employer or use of your previous employer's confidential or trade secret information will result in discipline up to and including termination.

If you have any questions regarding these requirements of your employment with Hooli Corporation, please contact me.

Sincerely,

Richard Hendricks, CEO



Responding to a “cease and desist” letter

- ☐ Evaluate the restrictive covenant
- ☐ Evaluate employee’s conduct
- ☐ Evaluate the employer’s potential motivation:
 - Bluster
 - Paranoia
 - Education
 - Preparing for litigation
- ☐ Formulate response

Defending Litigation Commenced by Former Employer

- ☐ Even if new employer does everything right, it still may get sued
- ☐ Tortious interference with contract
- ☐ Tender to insurer
- ☐ Preserve Emails/Documents

Stu's Views

© 2003 Stu All Rights Reserved www.STUS.com





Question & Answer