



Non-Disclosures & Non-Competes: To Sign Or Not To Sign?

Marc Mencher

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You're being asked to sign a non-disclosure or a non-compete agreement. Should you sign -- or not? That's a very good question.

These agreements are fairly common in the video game industry, especially if you're a job seeker since they are more likely to be asked to sign one than those who are currently employed. Your decision should really be based on how badly you want -- or need -- the job. For once it's signed, you're bound by its terms if you leave the company for any reason.

The story often begins on the date of hire when an employer requires an employee to sign on the dotted line as a condition of employment. Employers and employees have a natural conflict of interest on the subject of agreements. The employer thinks it's unfair competition when a former employee -- using the skills, training, and information they acquired from the employer -- takes a job with a competitor. The employee, on the other hand, usually wants to negotiate more favorable terms but seldom has the clout to do so. Remember that the best time to negotiate these issues is when you're first being hired, not after you've accepted the job.

If you don't have the clout -- and most people don't -- don't just close your eyes and sign. Read the agreement carefully to determine how reasonable it is; remember that it will be legally binding. Depending on the situation and the financial consequences, you might want to consult an attorney first.

You might also think about how long you intend to stay with your new employer; if you plan to leave in a year or two, having signed a non-disclosure or non-compete agreement can have certain consequences on your next move. An employee who thinks that a court may keep him from successfully landing with a new employer may not want to sign. Also, the presence of such an agreement may dissuade competitors or their headhunters from offering you better employment. These days, one of the first questions a savvy recruiter will ask is whether a prospect has signed a non-compete agreement. Few businesses want to become embroiled in expensive and time-consuming litigation as part of the hiring process, particularly if the agreement looks like it will stand up in court.

You might also try to determine what your new employer's response was when other employees left the company as this could give you a good idea of what you might face. Some employers wish departing employees well and welcome the competition; others take it personally and track them down with barking lawyers.

If you do decide to sign the agreement, be sure to keep a copy. It would be awkward to ask for one when you're planning your exit strategy. And once you've signed, don't forget about it. Your employer won't. He'll keep it in a secure place until it's needed, and you should, too.

What's The Difference Between A Non-Disclosure & A Non-Compete?

Non-disclosure agreements -- sometimes called "confidentiality agreements" -- are designed to protect sensitive technical or commercial information (intellectual property or "IP") or trade secrets from being shared with others. Simply stated, when you sign a non-disclosure agreement, you swear that you won't reveal anything that the company considers to be proprietary or confidential, such as details of new products, technology, business plans, financial information, models,



sketches, and so on. It doesn't mean you can't work for a competitor; it simply means you can't use what you learned or obtained from your former employer with your new employer.

Meanwhile, non-compete agreements are designed, too, to protect employers but they are a different breed. If a former employee moves to a competitor, there is often a transfer of knowledge. To prevent this, many companies routinely ask new employees to sign statements restricting them from working for a direct competitor for a reasonable length of time and within reasonable geographic limits after leaving. In other words, you'd violate a non-compete agreement if you took a job at the only game developer in your state, learned all you could while you were there, and then quit and tried to start your own development studio right across the street.

Are The Agreements Enforceable?

Some people sign these agreements under the assumption that they aren't enforceable. But they'd be wrong. Generally speaking, courts will enforce non-disclosure and non-compete agreements and so it's worth taking the time to read and understand what you're being asked to sign.

Ask yourself these questions:

- What legitimate interest is my new employer seeking to protect?
- What is the scope of the agreement? Is it unduly restrictive?
- What impact will this have on me and any third parties (like my future employers)?

The critical question is, does the agreement look like it will pass judicial scrutiny? If an employee is contemplating a move, the employer's first call will usually be to an attorney for an opinion as to the probability of the agreement being enforced by a judge. Likewise, a competing employer, if serious about a potential employee, will consult with an attorney.

When evaluating a non-competition agreement, an attorney will be looking for reasonableness and fairness (since that is what a judge will require). The interests of the employee, as well as the employer, must be protected and a restriction will be declared invalid if an employee is unreasonably prevented from pursuing his occupation and supporting his family.

Over the years, the courts have developed a five-pronged test for assessing whether an agreement not to compete is reasonably limited and fair to both the employee and the employer. In determining the validity of an agreement, a court will consider:

- Whether the length of time that the restriction will remain in effect is reasonable.
- Whether the geographic area covered by the restriction is reasonable.
- The overall fairness of the protection accorded to the employer.
- The extent of the employee's opportunity to pursue his or her occupation if the restriction is enforced.
- And the extent of interference with the public interest.

Note that there are different circumstances depending on where you work. For example, non-compete agreements aren't enforceable against employees in California. However, California employers can use non-disclosure agreements to protect their trade secrets and client lists when an employee leaves.



Keep in mind that the intent of non-compete and non-disclosure agreements is considered to be fair; it restricts the employee's freedom to compete just enough to enable the employer to protect its business interests. In other words, since it would not be fair for you to take advantage of an employer's training or investment, a court will allow the employer to protect that training or investment.

What Are The Penalties?

If you try and compete after signing a valid agreement, your employer can file suit against you for an injunction and money damages. If the employer can point to a valid agreement with reasonable restrictions, most courts will grant an injunction while the lawsuit is pending. You will have to hire an attorney to defend the suit and, when it's over, you not only may owe the money damages sought by the employer, but may be prevented from competing for a period of time following the lawsuit.

In many cases, you may have little choice but to sign an agreement. Because agreements protect employers (not employees), you may be forced to choose between signing the agreement and not accepting the position. However, you should know your rights and understand the ramifications of what you are signing.

If you're leaving for a better job opportunity with a competitor, it's not likely that an employer will release you from a non-disclosure or non-compete agreement. However, if you're being downsized or laid off, talk this over with your boss. Since you're not choosing to leave on your own, an employer might be more willing to give you the freedom to leave without restricting your ability to find another job. But the employer could still hold to the agreement's terms.

The bottom line? Be cautious when asked to sign an agreement. Assuming it was written by a competent attorney and is reasonable, you'll be bound by its provisions. Start by taking the long-term view when you're offered a job. No matter how great the job is and how well it suits you, the days when employees stayed at one company for life are long gone. Sooner or later, you're going to want to move on. If you sign a broad non-disclosure or non-compete, it will be hard to convince the employer to change the terms when you want to leave. The best time to get changes made is now, when you have the most leverage -- between the time they make you the offer and when you accept it. So read through the document carefully and, by all means, consult a lawyer.