

**Protecting the Company's Information and Relationships:
A Series of Questions to Set Your Company's Noncompete and Trade Secret Strategy**

- 1. Does your company have info of any kind that, if a competitor obtained it, would give the competitor an unfair advantage?**
If YES: Go to question 2.
If NO: Feel free to stop reading here, and check your e-mails for the remainder of this discussion.
- 2. Do you take steps such as (a) requiring confidentiality agreements and (b) restricting access to information on a strict need to know basis in order to protect this information?**
If YES: Good for you. Go to question 3.
If NO: Discuss these steps with your legal counsel. (a) is easy, (b) probably isn't but it is important. Go to question 3.
- 3. Would it be valuable to restrict departed employees from soliciting or otherwise contacting key business associates (customers, prospects, suppliers, continuing employees) for a limited period?**
If YES: Consider a nonsolicitation agreement. Work through the drafting questions in Table A. Then go to question 4.
If NO: You are probably done, but take a look at question 4.
- 4. Would it be valuable to restrict departed employees from being employed by competitors or in certain capacities by competitors?**
If YES: Consider a noncompete agreement. Work through the drafting questions in Table A.
If NO: Do a great job on steps 2 and 3!

William A. Nolan
Barnes & Thornburg LLP
(614) 628-1401
bill.nolan@btlaw.com
Blog: www.btcurrenents.com
[@ohiocurrents](#) and [@BTLawLE](#)

Table A – Restrictive Covenant Drafting Considerations

	If YES	If NO
a. Will you really spend the resources to enforce the agreement, or are you just going for whatever deterrence just having agreements gives you?	Then you probably want the provisions to be as narrowly tailored as possible, because a more narrowly tailored agreement is easier to enforce.	Then you probably can be somewhat less precise in crafting your agreement. No shame in this (though obviously it will be inconvenient to change later if you change your mind).
b. Are you going to do anything about it when your biggest producer / best engineer / etc. refuses to sign ?	Go to next row.	Again, might as well be honest about this now. This is OK, but consider whether you really want the agreement, because inconsistency will make them harder to enforce and create employee relations issues.
c. Will having such contractual restrictions have a negative effect on your ability to recruit qualified employees (e.g. because your competitors do not require such restrictions) that will outweigh the value of the provision?	Then you can probably stop here, and consider lesser restrictions.	Go to next box.
d. Do you plan on observing, to the extent required by applicable law, the contractual restrictions imposed on employees you hire away from competitors ?	Go to next row.	Discuss with counsel whether to have the provision. While “clean hands” are not technically required for enforcement, unclean hands can greatly limit your enforcement ability.

<p>e. Have you identified the states in which you may seek to enforce the provision and at least preliminarily assessed the applicable law in those states and made strategic decisions about what law and forum to specify in light of those findings?</p>	<p>Go to next row.</p>	<p>This is critical (see attached article). Discuss with counsel before proceeding.</p>
<p>f. Have you defined as precisely as possible what restrictions you really need and why?</p>	<p>Great. Having done so will be very helpful if you ever need to enforce the agreement in court. Discuss with your lawyer how to best document this so you can use it in court.</p>	<p>Unless you answered NO to question a, it is important to do so.</p>
<p>g. Will you be rolling out the agreements with current employees as well as new employees?</p>	<p>Depending on the states in which you might want to enforce the agreement, you may need to provide additional consideration. And different rules about consideration for different employees raises employee relations issues as well.</p>	<p>In most states, this makes the legal aspects of the agreement much easier. Still consult with counsel regarding whether you need to provide consideration in addition to employment in order to have enforceable agreements.</p>

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