

# Confidentiality, Non- Competition, and Non-Solicitation Agreements

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NORTH RISK PARTNERS®



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# Confidentiality, Non-Competition, and Non-Solicitation Agreements

Virtually every employer with employees who have access to a customer list or other sensitive information have those employees sign some form of an agreement to protect that information.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

However, there is a difference in the protection that those agreements provide.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

For example, some employers have employees sign the full panoply of non-compete, non-solicit and confidentiality agreements.

Others, who may not have thought out the process entirely, may not have specific agreements in place, and still others may rely on more general statements about confidentiality of information either in an employee handbook or perhaps a separate signed document.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

A confidentiality agreement (or statement regarding confidentiality in a handbook) provides some protection relating to customer lists and other information, but it does not provide certain safeguards relating to whether an employee may go to work for a competitor.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

For example, while a confidentiality agreement may protect against use of an employer's confidential customer information it still will not prevent, generally speaking, an employee from working for a competitor.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

In order to retain the ability to assert that a former employee either cannot work for a competitor or at least solicit former customers, employers should consider non-compete and non-solicit agreements.





# Confidentiality, Non-Competition, and Non-Solicitation Agreements

These should be in addition to confidentiality agreements or general confidentiality statements in handbooks.

These agreements typically restrict the employee from working for a competitor for a certain length of time in a certain geographic area.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

They also typically contain a clause restricting the employee from calling on the employer's customers for a certain period of time.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

Having all three of these areas covered (non-compete, non-solicit and confidentiality) will give you the most flexibility in protecting your confidential information from unfair use by competitors.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

But it is no guarantee.

Unlike typical contracts, if a non-competition agreement is breached by a former employee working for a competitor, that is not the end of the story.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

Employers obtain from an employee an agreement that prohibits an employee from working for a competitor as long as it protects an employer's reasonable competitive business interests and is reasonable in duration and geographical area.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

Given these conditions, it is simply not enough for an employer to show that an employee has signed a non-competition agreement and that it has been breached.

Rather, unlike "normal" contracts, does the agreement protect the employer's reasonable competitive business interest?



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

Understanding the interplay between the different types of agreements you may enter into with an employee to protect confidential information, and how they may be enforced, will allow you to better protect that information.

If done properly, they will help avoid disputes and prepare for an orderly transition if an employee does decide to leave.





# Confidentiality, Non-Competition, and Non-Solicitation Agreements

As a condition of employment, an employer may require that an applicant or employee sign an agreement not to work for a competitor and not to form a competing business during the term of his or her employment or after he or she departs.

The agreement also may provide that the individual may not solicit the employer's customers or employees when he or she starts a competing business or works for another employer.







# Confidentiality, Non-Competition, and Non-Solicitation Agreements

Such agreements are enforceable against former employees if they protect a legitimate interest of the employer, are supported by adequate consideration, and are reasonably limited in scope and in time.

Non-competition and non-solicitation agreements should be separate documents, distinct from other employment paperwork.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

If the employee is employed “at will,” the non-compete agreement should state specifically that it is a separate agreement to protect intellectual property rights, not an employment contract, and that it does not modify what otherwise may be an “at will” employment relationship.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

Adequate consideration for a covenant not to compete varies from case to case.

Courts generally agree that consideration is adequate when, for example, the agreement was executed as a condition of, and in consideration of, hiring, or in exchange for payment.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

If an employer is going to require a new employee to sign a non-competition or non-solicitation agreement, the employer should provide notice to the prospective employee at the time the offer of employment is made so that the new employee knows that he or she will be expected to sign the agreement as a condition of hire.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

Ideally, the prospective employee will receive notice before he or she has quit another job, moved to a new location, or otherwise made changes in his or her life in reliance on his or her expectation of new employment.

Because there is no such thing as a “standard” non-competition agreement, an employer should provide a prospective employee with an opportunity to review and respond to the proposed agreement before he or she accepts the new job.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

If an employee has verbally accepted an offer of employment without being advised that such an agreement will be required, or without an opportunity to review the terms, the agreement may have to be supported by separate consideration, such as a cash payment, in addition to the initial offer of employment.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

Employers should review non-competition, non-solicitation, or confidentiality agreements with existing employees to determine if each agreement was adequately supported by consideration at the time it was signed.

If there is a question about the fact of or adequacy of consideration, the agreement may not be enforceable unless the employee signs a new agreement promising not to compete and receives new consideration.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

Because the law generally disfavors non-compete agreements, it is important that the language in each contract be appropriately drafted to protect the specific interest of the employer in each circumstance.

Courts determine if restrictions are reasonable in scope and time based on their evaluations of individual contracts.





# Confidentiality, Non-Competition, and Non-Solicitation Agreements

For example, a non-compete agreement executed by the seller as part of the sale of a business is likely to be enforceable for a decade or longer. In the employment context, by contrast, restrictive covenants may endure for two or at most three years.

Because courts view covenants not to compete with skepticism, the contract may be interpreted against the employer.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

For example, a non-compete covenant in an employment contract may not be enforceable after an employee has been fired unless it is absolutely clear that the parties intended the non-compete clause to survive even involuntary termination of employment.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

Where restrictions are determined to be overly broad, a court may modify or “blue pencil” the agreement by substituting reasonable geographical scope and time limitations.

In egregious cases of employer overreaching, courts will refuse to enforce an unreasonable agreement at all.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

Some states, like Wisconsin, do not permit a court to “blue pencil” an agreement.

Instead, Wisconsin courts will simply declare such a contract invalid and unenforceable if even a single provision is deemed to be overbroad.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

Some states also may refuse to enforce an agreement by one of their residents, even if the agreement selects the law of another jurisdiction; no matter what law the parties have agreed will apply, the courts of these states will apply their own state law, which may have the effect of invalidating the agreement.

A Minnesota employer must take care to ensure that non-competition agreements comply with the laws of the states where its employees live.





# Confidentiality, Non-Competition, and Non-Solicitation Agreements

If an employee lives in North Dakota, for example, the non-competition agreement may not be enforceable at all if the court applies the law of the employee's state of residence.

If a court applies South Dakota law, the non-compete may be enforced for a maximum of two years, and possibly not at all.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

Thus, an employer with employees located in several states should carefully tailor the non-compete agreement for each employee to ensure that it is enforceable wherever the employee lives, regardless of what law is applied.



# Confidentiality, Non-Competition, and Non-Solicitation Agreements

Before an offer of employment is made, employers also should determine if a prospective employee is subject to a non-competition, non-solicitation or confidentiality agreement with a prior employer that may restrict or limit that applicant's ability to perform effectively.

An employer who hires a new employee without making such an inquiry may be liable for interference with the previous contract of employment and could be ordered to pay the previous employer damages, including attorney fees.



# Confidentiality, Non-Competition, and Non-Solicitation Agreement

## CONFIDENTIALITY, NON-COMPETITION, AND NON-SOLICITATION AGREEMENT

This Confidentiality, Non-Competition, and Non-Solicitation Agreement (“Agreement”) is made between \_\_\_\_\_ (the “Employee” or “you”) \_\_\_\_\_ and \_\_\_\_\_, a Corporation, (“\_\_\_\_\_”), along with its subsidiaries, parents, joint ventures, affiliated entities, and includes its successors and assigns or any such related entities (the “Company”). In consideration defined in Section 1 below, both parties agree as follows:



# Confidentiality, Non-Competition, and Non-Solicitation Agreement

1. Consideration. In consideration of the Employee's execution of this Agreement, you shall hold the position of "\_\_\_\_\_ " as an at-will employee of \_\_\_\_\_ and shall receive future wages and employment benefits, payment of which during the period of your employment is a condition of this Agreement. You acknowledge the receipt and sufficiency of this consideration.

# Confidentiality, Non-Competition, and Non-Solicitation Agreement

## 2. Restrictive Covenants.

### a. Definitions:

(1) “Business of the Company” means the highly competitive business of developing, manufacturing, marketing, distributing, and/or selling

\_\_\_\_\_.

(2) “Competitive Business(es)” include any firm, partnership, joint venture, corporation and/or any other entity and/or person, \_\_\_\_\_ and/or any licensee of such entity, that develops, manufactures, markets, distributes, and/or sells any of the products described in Section 2.a.(1).





# Confidentiality, Non-Competition, and Non-Solicitation Agreement

(3) Your “Job Duties” are those duties described in Exhibit A, attached hereto, as well as those duties as may from time-to-time reasonably be prescribed by the Company during the period of your employment with the Company.

(4) “Customers” means any firm, partnership, corporation and/or any other entity and/or person that purchased or purchases from the Company any of the products described in Section 2.a.(1).

(5) “Customer Prospects” means any firm, partnership, corporation and/or any other entity and/or person reasonably expected by the Company to purchase from the Company any of the products described in Section 2.a.(1).



# Confidentiality, Non-Competition, and Non-Solicitation Agreement

(6) “Vendors” means any individual and/or entity that provides goods and services to the Company.

(7) “Material Contact” means personal contact or the supervision of the efforts of those who have direct personal contact with Customers, Customer Prospects, or Vendors in an effort to initiate or further a business relationship between the Company and such Customers, Customer Prospects, or Vendors.

(8) “Confidential Information” means information about the Company and its Customers, Customer Prospects, and/or Vendors that is not generally known outside of the Company, which you will learn of in connection with your employment with the Company. *(continued)*

# Confidentiality, Non-Competition, and Non-Solicitation Agreement

## (8) “Confidential Information” (*continued*)

Confidential Information may include, without limitation: (1) the terms of this Agreement, except as necessary to inform a subsequent employer of the restrictive covenants contained herein and/or your attorney, spouse, or professional tax advisor only on the condition that any subsequent disclosure by any such person shall be considered a disclosure by you and a violation of this Agreement; (2) the Company’s business policies, finances, and business plans; (3) the Company’s financial projections, including but not limited to, annual sales forecasts and targets and any computation(s) of the market share of Customers and/or Customer Prospects; (4) sales information relating to the Company’s product roll-outs; (*continued*)



# Confidentiality, Non-Competition, and Non-Solicitation Agreement

## (8) “Confidential Information” (*continued*)

(5) customized software, marketing tools, and/or supplies that you will be provided access to by the Company and/or will create; (6) the identity of the Company’s Customers, Customer Prospects, and/or Vendors (including names, addresses, and telephone numbers of Customers, Customer Prospects, and/or Vendors); (7) any list(s) of the Company’s Customers, Customer Prospects, and/or Vendors; (8) the account terms and pricing upon which the Company obtains products and services from its Vendors; (9) the account terms and pricing of sales contracts between the Company and its Customers; (10) the proposed account terms and pricing of sales contracts between the Company and its Customer Prospects; (*continued*)



# Confidentiality, Non-Competition, and Non-Solicitation Agreement

(8) “Confidential Information” (*continued*)

(11) the names and addresses of the Company’s employees and other business contacts of the Company; and (12) the techniques, methods, and strategies by which the Company develops, manufactures, markets, distributes, and/or sells any of the products described in Section 2.a.(1).

(9) “Territory” means the area defined in Exhibit A.

(10) “Trade Secrets” means Confidential Information.



# Confidentiality, Non-Competition, and Non-Solicitation Agreement

(11) “Proprietary Rights” means any and all inventions, discoveries, developments, methods, processes, compositions, works, supplier and customer lists (including information relating to the generation and updating thereof), concepts, and ideas (whether or not patentable or copyrightable) conceived, made, developed, created, or reduced to practice by you (whether at the request or suggestion of the Company or otherwise, whether alone or in conjunction with others, and whether during regular hours of work or otherwise) during your employment, which may be directly or indirectly useful in, or related to, the Business of the Company or any business or products contemplated by the Company while you are an employee, officer, or director of the Company.





# Confidentiality, Non-Competition, and Non-Solicitation Agreement

b. You agree that your work for the Company will bring you into close contact with many of the Company's Customers, Customer Prospects, Vendors, Trade Secrets, and Confidential information. You further agree that the covenants in this Section 2 are reasonable and necessary to protect the Company's legitimate business interests and its Customer, Customer Prospect, and/or Vendor relationships, Trade Secrets, and Confidential Information.

# Confidentiality, Non-Competition, and Non-Solicitation Agreement

c. You agree to faithfully perform the duties assigned to you and will not engage in any other employment or business activity while employed by the Company that might interfere with your full-time performance of your duties for the Company or cause a conflict of interest. You agree to abide by all of the Company's policies and procedures, which may be amended from time-to-time.

d. You further agree that, due to your position, your engaging in any activity that may breach this Agreement will cause the Company great, immediate, and irreparable harm.

# Confidentiality, Non-Competition, and Non-Solicitation Agreement

e. Duty of Confidentiality. You agree that during your employment with the Company and for a period of five (5) years following the termination of such employment for any reason, you shall not directly or indirectly divulge or make use of any Confidential Information outside of your employment with the Company (so long as the information remains confidential) without the prior written consent of the Company. You shall not directly or indirectly misappropriate, divulge, or make use of Trade Secrets for an indefinite period of time, so long as the information remains a Trade Secret as defined by the GTSA and/or any other applicable law. You further agree that if you are questioned about information subject to this agreement by anyone not authorized to receive such information, you will notify the Company within 24 hours. You acknowledge that applicable law may impose longer duties of non-disclosure, especially for Trade Secrets, and that such longer periods are not shortened by this Agreement.



# Confidentiality, Non-Competition, and Non-Solicitation Agreement

f. Return of Confidential Information and Company Property. You agree to return all Confidential Information and/or Trade Secrets within three (3) calendar days following the termination of your employment for any reason. To the extent you maintain Confidential Information and/or Trade Secrets in electronic form on any computers or other electronic devices owned by you, you agree to irretrievably delete all such information and to confirm the fact of deletion in writing within three (3) calendar days following termination of employment with the Company for any reason. You also agree to return all property in your possession at the time of the termination of the employment with the Company, including but not limited to all documents, records, tapes, and other media of every kind and description relating to the Business of the Company and its Customers, Customer Prospects, and/or Vendors, and any copies, in whole or in part, whether or not prepared by you, all of which shall remain the sole and exclusive property of the Company.

# Confidentiality, Non-Competition, and Non-Solicitation Agreement

g. Proprietary Rights. Proprietary Rights shall be promptly and fully disclosed by you to the Company's General Counsel and shall be the exclusive property of the Company as against you and your successors, heirs, devisees, legatees and assigns. You hereby assign to the Company your entire right, title, and interest therein and shall promptly deliver to the Company all papers, drawings, models, data, and other material relating to any of the foregoing Proprietary Rights conceived, made, developed, created or reduced to practice by you as aforesaid. All copyrightable Proprietary Rights shall be considered "works made for hire."

*(continued)*

# Confidentiality, Non-Competition, and Non-Solicitation Agreement

g. Proprietary Rights. *(continued)*

You shall, upon the Company's request and at its expense, execute any documents necessary or advisable in the opinion of the Company's counsel to assign, and confirm the Company's title in the foregoing Proprietary Rights and to direct issuance of patents or copyrights to the Company with respect to such Proprietary Rights as are the Company's exclusive property as against you and your successors, heirs, devisees, legatees and assigns under this Section 2.g. or to vest in the Company title to such Proprietary Rights as against you and your successors, heirs, devisees, legatees and assigns, the expense of securing any such patent or copyright, however, to be borne by the Company.



# Confidentiality, Non-Competition, and Non-Solicitation Agreement

h. Non-Competition. You covenant and agree that, during the term of your employment with the Company and for twelve (12) months after the termination thereof, regardless of the reason for the employment termination, you will not, directly or indirectly, anywhere in the Territory, on behalf of any Competitive Business perform the same or substantially the same Job Duties.



# Confidentiality, Non-Competition, and Non-Solicitation Agreement

i. Non-Solicitation of Customers, Customer Prospects, and Vendors. You also covenant and agree that during the term of your employment with the Company and for twelve (12) months after the termination thereof, regardless of the reason for the employment termination, you will not, directly or indirectly, solicit or attempt to solicit any business from any of the Company's Customers, Customer Prospects, or Vendors with whom you had Material Contact during the last two (2) years of your employment with the Company.

# Confidentiality, Non-Competition, and Non-Solicitation Agreement

j. Non-Solicitation of Employees. You also covenant and agree that during the term of your employment with the Company and for twelve (12) months after the termination thereof, regardless of the reason for the employment termination, you will not, directly or indirectly, on your own behalf or on behalf of or in conjunction with any person or legal entity, recruit, solicit, or induce, or attempt to recruit, solicit, or induce, any non-clerical employee of the Company with whom you had personal contact or supervised while performing your Job Duties, to terminate their employment relationship with the Company.



# Confidentiality, Non-Competition, and Non-Solicitation Agreement

3. At-Will Status. You acknowledge and agree that nothing in this Agreement is a guarantee or assurance of employment for any specific period of time. Rather, you understand that you are an at-will employee and that the Company may terminate your employment at any time for any reason. You are similarly free to resign at any time for any reason.

# Confidentiality, Non-Competition, and Non-Solicitation Agreement

4. Governing Law and Remedies. In addition to any other remedies at law or in equity it may have, each party shall be entitled to seek equitable relief, including injunctive relief and specific performance, in connection with a breach of the provisions of this Agreement. The parties acknowledge and agree that they are bound by their arbitration obligations under Exhibit B attached hereto, which the parties also hereby agree to execute contemporaneously and is an integral part of this Agreement. The parties agree and acknowledge that all provisions of this Agreement shall be governed by and construed in accordance with the laws of the State of Minnesota exclusively and without reference to principles of conflict of laws.

\_\_\_\_\_ Your initials to acknowledge agreement to Governing Law and Remedies provision in Section 4.

# Confidentiality, Non-Competition, and Non-Solicitation Agreement

5. Construction of Agreement. The covenants contained herein shall be presumed to be enforceable, and any reading causing unenforceability shall yield to a construction permitting enforcement. If any single covenant or clause shall be found unenforceable, it shall be severed and the remaining covenants and clauses enforced in accordance with the tenor of the Agreement. In the event the Arbitrator(s) should determine not to enforce a covenant as written due to overbreadth, the parties specifically agree that said covenant shall be modified and enforced to the extent reasonable, whether said modifications are in time, territory, or scope of prohibited activities.

# Confidentiality, Non-Competition, and Non-Solicitation Agreement

6. Entire Agreement. This Agreement, which includes Exhibits A and B, represents the entire understanding between the Company, \_\_\_\_\_, and you on the matters addressed herein and may not be modified, changed or altered by any promise or statement by the Company \_\_\_\_\_ other than in writing signed by you and an authorized representative of Company \_\_\_\_\_. The waiver by the Company \_\_\_\_\_ of a breach of any provision of this Agreement by any employee shall not be construed as a waiver of rights with respect to any subsequent breach by you.

# Confidentiality, Non-Competition, and Non-Solicitation Agreement

**You acknowledge that you have carefully read and understand the provisions of this Agreement, and understand that you have the right to seek independent advice at your expense or to propose modifications prior to signing the Agreement and have negotiated proposed modifications to the extent you deemed necessary. Nothing contained in this Agreement creates a contractual right to a continued employment for a definite term. You represent and warrant that you have entered into this Agreement voluntarily and after consulting with whomsoever you wished.**



# Confidentiality, Non-Competition, and Non-Solicitation Agreement

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

EMPLOYEE

\_\_\_\_\_

(Print Name) \_\_\_\_\_

Social Security #: \_\_\_\_\_

COMPANY

By: \_\_\_\_\_

Title: \_\_\_\_\_



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# Synergy Contact Information



**Mike Bourgon**  
**Employment and Labor**  
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**HR Consultant**



**NORTH RISK PARTNERS®**

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