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Non-Compete Agreement In Software Industry: Is It Binding after a lay-off?

[Kristie Prinz](#)

**Q.** I was recently laid off by a software company, which required me to sign a non-compete document when I was hired. I sell software to a niche market and only a handful of companies sell this type of software. Can I be held to this agreement as I was fired? This is hurting my chances of being hired in this niche industry.

-- *bobb*

**A.**

This scenario arises quite often across all of the IP-related industries, and the answer is "it depends."

The good news for you is that non-competes are not universally enforceable, and many states will not enforce them for the very reasons you mention--they often make it impossible for people to earn a living. On the other hand, some states do enforce non-competes but instead minimize the scope of their application.

The reality is that many lawyers and companies include non-competes in agreements as simply a deterrent, knowing full well that they will not stand up in court if challenged. As you can imagine, this tactic has the potential to be quite effective, even if the law is clear that noncompetes will not be enforced. The average employee will most likely adhere to the noncompete without questioning its enforceability, particularly if the employee is reminded of the previously signed noncompete in the context of severance agreement discussions.

While it's always best as an employee not to sign an agreement which includes non-compete language, if you have signed such an agreement, you should consult an attorney in your jurisdiction with expertise in the area of employment and/or contract law. Such attorney should be able to advise you on the treatment of noncompete agreements in your particular jurisdiction, while also looking at the specific facts of your particular situation.

Another option for dealing with a previously signed noncompete agreement is to reopen noncompete

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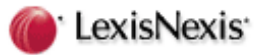
discussions when you are negotiating the terms of a severance agreement. Employees who are being laid off sometimes hesitate to negotiate their severance agreements for fear of losing their severance, but in fact, that is generally a good time to reopen such issues. The employer needs to obtain a waiver of rights to sue from the laid off employee and the only way the employer can obtain a binding waiver is through the payment of consideration. Obviously if the noncompete is revoked or superceded through the terms of the severance agreement, then the employer will no longer have the ability to enforce the previously signed noncompete.

In addition, the employer may be willing to accept an agreement not to solicit employer customers as an alternative to a non-compete, since such language will likely be more enforceable in court and may address the employer's concerns just as effectively as the original noncompete language. This may be an effective manner by which to negotiate a non-compete out of the picture, so that you will have more employment options available.

-- *Kristie Prinz*

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