

**PRODUCER CONTRACTS
AND
COVENANTS
NOT TO COMPETE**



PRODUCER AGREEMENT

THIS MATERIAL IS INTENDED FOR INFORMATIONAL PURPOSES ONLY AND IS NOT INTENDED TO BE LEGAL ADVICE OR TO BE TAKEN VERBATIM.

You should consult your attorney for an actual contract which will suit your individual needs.

THIS AGREEMENT made on the _____ day of _____, 20 _____ by and between _____, as agency principal, on behalf of (hereinafter referred to as Agency) an insurance agency organized under the laws of _____ [state] and located at _____ and _____ (hereinafter referred to as Producer) residing at _____ who is an independent producer licensed to do business within the State of _____.

WHEREAS Agency desires to employ Producer and Producer desires to be employed by Agency, the parties do hereby agree and covenant for mutual consideration exchanged as follows:

1. Term of Agreement:

A. The Agency shall employ the Producer as a full-time employee based upon the terms and conditions to be hereinafter specified; this agreement to commence on the _____ day of 20_____.

B. The Agency and Producer hereby agree that this contract shall continue and be in effect until _____ day of _____, 20_____, unless revoked earlier as herein provided. Unless revoked, this contract may be renewed annually only upon the signed mutual acceptance by both parties.

C. Notwithstanding any other agreement or any other provision of this agreement, this agreement (a) may be terminated by either party at any time by providing the other party with _____ days advance written notice; (b) will terminate automatically without notice upon the violation by Producer of any law, rule, regulation or order, pertaining to insurance or criminal matters, of this State or any of its political subdivisions or the State Department of Insurance; (c) will terminate upon the death of Producer; (d) will terminate upon the occurrence of Producer no longer maintaining a license as an insurance producer.

2. Duties of Producer:

A. Agency and Producer hereby agree that Producer will at all times maintain a valid _____ [state] license as an insurance producer and will conform his/her conduct to the laws, rules, regulations and orders of this State applicable to insurance producers.

B. Producer hereby agrees that he/she will, during the course of this agreement, at all times work exclusively for Agency and will solicit, procure, effectuate and negotiate insurance business only on behalf of Agency.

C. Agency and Producer agree that Producer's primary duties will consist of the solicitation, negotiation, placement and procurement of insurance business for which he/she is licensed and authorized in this State to solicit, negotiate or place on behalf of Agency and will give whatever assistance is legally permissible on behalf of the customers of the Agency in such matters. Further, it is agreed that Producer has authority only to solicit, procure and negotiate policies of insurance on behalf of Agency and that Producer has no authority to bind Agency to any contract unless such authority has been given to Producer in writing by Agency; that Producer will be liable and hold Agency harmless from any claim or damages which result from the Producer's signing of any unauthorized contract.

D. Producer hereby agrees that at times Producer will handle certain monies belonging to the Agency and/or the clients of the Agency; that at all times Producer will be held accountable for such monies and will only use such monies as directed by the principal and in accordance with the laws of this State; that in the event that Producer misappropriates, misuses or otherwise does not follow the direction of the principal in the use of such monies that Producer will indemnify and hold harmless the Agency for an accounting of such monies to any person, firm, entity or corporation.

3. Ownership of Business:

A. It is expressly agreed between Producer and Agency that all business negotiated, procured, solicited or renewed by Producer during the term of this contract is the sole property of the Agency and that Producer will have no interest in such materials, including but not limited to, the names of customers, renewal or expiration dates of policies, amounts of coverage for particular customers, and phone numbers of customers.

B. It is hereby expressly agreed between Agency and Producer that the production of Agency's insurance business depends in large part upon the solicitation of business and renewal of existing business; that as between Agency and Producer, information concerning a particular client or prospective client which has been contacted by Agency or Producer, including but not limited to, the names of customers, the policy renewal and expiration dates, amounts of coverage for particular customers of Agency are considered to be trade secrets and it is expressly recognized by both parties that the cultivation of such information represents a significant investment of time, energy and money by Agency;

THEREFORE, it is expressly agreed that Producer will not, during the term of this contract and any subsequent renewal, or for a period of one (1) year after termination of this contract for any reason, directly or indirectly, by himself or in connection with another, solicit any Agency insurance business or customers for or on behalf of any person, firm, corporation or partnership other than Agency and;

THEREFORE, it is expressly agreed that Producer will not, directly or indirectly, by himself or in connection with another, compete with the business of Agency either during the term of this contract or any subsequent renewal for a period of two (2) years after termination of this contract for whatever reason within a five (5) mile radius of the Agency's place of business. It is agreed between Agency and Producer that violation of this clause would lead to significant detriment on the part of Agency, which detriment is not easily calculated in terms of damages;

THEREFORE, Agency and Producer agree that in the event of violation of this clause by Producer, Producer will pay to Agency the liquidated damage sum of \$ _____ which amount represents the undeterminable but likely damages which will result from any violation of this covenant.

4. Compensation to Producer from Agency:

As full compensation for the services of Producer on behalf of Agency in any matter relating to the production, procurement, solicitation, negotiation or any other action concerning the business of the Agency, Agency agrees to compensate Producer as follows:

[See Addendum]

5. Law to be Applied:

It is hereby agreed between Agency and Producer that to the extent permitted by law, the law to be applied to this contract is the law of the State of _____ [state].

6. Severability:

It is agreed between Producer and Agency that if any part of this agreement should be found by a court or other tribunal to be ineffective, void or a nullity that such court or tribunal will, to the extent permitted by law, give the remainder of this agreement full force and effect, taking into consideration the intent such part which was found to be ineffective, void or null.

IN WITNESS WHEREOF, the parties have hereunto set their hands on the date and year above written for the purposes set forth in this contract:

Witness

For The Agency

Witness

Producer

ADDITIONAL CLAUSES

These are clauses which may be added to the main contract. Included are samples of different ways to structure compensation. You may find that alternative structures are more appropriate for your Agency.

Office Supplies and Materials

Agency and producer hereby agree that Agency will provide at no cost to the Producer all supplies, office space, telephone and any other customary materials necessary for the carrying on of the Agency business.

Advancements

Agency agrees to advance to producer the set sum of \$ _____ each _____ without interest for the purpose of the Producer carrying on the business of the Agency. Producer agrees that Producer is responsible for repayment to Agency of any such sums so advanced. It is further agreed that Agency may, at any time, set-off any such amounts owed to Agency by Producer from any commissions due to Producer by Agency. Such set-off may be made by Agency either during or after the termination of this agreement regardless of the reason of termination of this agreement.

Compensation Concepts:

1. Producer is to be paid a set salary, payable every _____ by Agency in the amount of \$ _____.

2. Producer is to be paid a set salary, payable every _____ by Agency in the amount of \$ _____ and in addition a set commission of _____% on all "New Business" brought into the Agency by the efforts of the Producer and a set commission of _____% for any "Renewal" of existing business which was originally brought into the Agency as New Business by the Producer. Commission percentage is to be based upon the "Net Annual Commissions" actually received by the Agency on any business produced by the Producer whether new or renewal business. "New Business" is hereby defined to be insurance sold to a person, organization or other legal entity which is not at that time a customer of the Agency or, insurance sold to a person organization or other legal entity of another type of insurance than the customer already has in existence with the Agency. Where the insurance placed by Producer replaces an existing policy and involves a cancellation of such existing policy of the customer of the Agency, the commission to be paid to the Producer shall be based upon the excess of the premium of the replacing policy for the full term over the premium for the same term for the replaced policy. Consolidations of existing coverages, lines or policies into new combinations or packages shall not be considered to be New Business. "Net Annual Commissions" is defined to be the gross annual commissions, less any return commissions---the premium for which has been paid in full, without regard to any contingent, bonus or profit-sharing commissions.

3. Producer is to be paid commissions only, as follows:

A set commission of _____ % on all "New Business" brought into the Agency by the efforts of the Producer and a set commission of _____ % for any "Renewal" of existing business which was originally brought into the Agency as New Business by the Producer. Commission

percentage is to be based upon the "Net Annual Commissions" actually received by the Agency on any business produced by the Producer whether new or renewal business. "New Business" is hereby defined to be insurance sold to a person, organization or other legal entity which is not at that time a customer of the Agency or, insurance sold to a person, organization or other legal entity of another type of insurance than the customer already has in existence with the Agency. Where the insurance placed by Producer replaces an existing policy and involves a cancellation of such existing policy of the customer of the Agency, the commission to be paid to the Producer shall be based upon the excess of the premium of the replacing policy for the full term over the premium for the same term for the replaced policy. Consolidations of existing coverages, lines or policies into new combinations or packages shall not be considered to be New Business. "Net Annual Commissions" is defined to be the gross annual commissions, less any return commissions---the premium for which has been paid in full, without regard to any contingent, bonus or profit-sharing commissions.

4. Producer is to be paid commissions only, as follows:

A. A set commission of ____ % on all "New Property and Casualty Business" brought into the Agency by the efforts of the Producer and a set commission of ____% for any "Renewal" of existing Property and Casualty business which was originally brought into the Agency as New Business by the Producer. Commission percentage is to be based upon the "Net Annual Commissions" actually received by the Agency on any such business produced by the Producer whether new or renewal business. "New Property and Casualty Business" is hereby defined to be insurance of the property and casualty type sold to a person, organization or other legal entity which is not at that time a customer of the Agency or, insurance sold to a person, organization or other legal entity of another type of insurance than the customer already has in existence with the Agency. Where the insurance placed by Producer replaces an existing policy and involves a cancellation of such existing policy of the customer of the Agency, the commission to be paid to the Producer shall be based upon the excess of the premium of the replacing policy for the full term over the premium for the same term for the replaced policy. Consolidations of existing coverages, lines or policies into new combinations or packages shall not be considered to be New Business. "Net Annual Commissions" is defined to be the gross annual commissions, less any return commissions-the premium for which has been paid in full, without regard to any contingent, bonus or profit-sharing commissions.

B. For all life insurance produced by the producer, the Producer will be paid a commission of ____% of the net commissions actually received by the Agency on any such life insurance produced by the efforts of the Producer.

C. A set commission of ____% on all "New Business" not otherwise describe in paragraphs A or B above, brought into the Agency by the efforts of the Producer and a set commission of ____% for any "Renewal" of existing business which was originally brought into the Agency as New Business by the Producer not describe in paragraphs A or B above. Commission percentage is to be based upon the "Net Annual Commissions" actually received by the Agency on any business produced by the Producer whether new or renewal business. "New Business" is hereby defined to be insurance sold to a person, organization or other legal entity which is not at that time a customer of the Agency or, insurance sold to a person organization or other legal entity of another type of insurance than the customer already has in existence with the Agency.

Where the insurance placed by Producer replaces an existing policy and involves a cancellation of such existing policy of the customer of the Agency, the commission to be paid to the Producer shall be based upon the excess of the premium of the replacing policy for the full term over the premium for the same term for the replaced policy. Consolidations of existing coverages, lines or policies into new combinations or packages shall not be considered to be New Business. "Net Annual Commissions" is defined to be the gross annual commissions, less any return commissions---the premium for which has been paid in full, without regard to any contingent, bonus or profit-sharing commissions.

COVENANT NOT TO COMPETE

This report is provided to give you an overview of what a restrictive covenant is, how it can be used to your benefit, and how the courts have and may in the future interpret such covenants. It is important to note, as the format of this report emphasizes, that restrictive covenants are subject to judicial interpretation, hence you should consult an attorney in both the drafting of a new agreement or evaluating the validity of an existing one. Improper drafting or changes that have occurred since the drafting may result in the covenant not being enforced. This report is designed for your use in conjunction with your attorney in preparing contractual language and evaluating your options with respect to incidents that may arise with respect to new or existing contracts. It is designed to save time and provide a quick over- view of the subject. It is not designed as a substitute for legal counsel.

Overview

The law in this area is constantly changing. For that reason this section of the report is designed so that the main body of the report represents the traditional rule, with additional information included on special and/or current cases on the subject. Therefore, it is critical that the reader consult the case decision section for the latest interpretations which may affect the traditional rule.

Some General Points About Covenants Not To Compete

A covenant is a promise. A restrictive covenant is a promise which restricts or limits a person's actions. A covenant not to compete, or a covenant not to solicit, are examples. Such covenants are important to you because in contracts with your employees, you may desire to have a promise in the contract that restricts their actions while employed and/or upon termination of employment. Primarily, this section will deal with covenants that attempt to confine, limit or restrict an ex-employees' ability to compete with you, the ex-employer. Obviously, if allowed, such a covenant is very beneficial to the employer.

Court Interpretation: Restrictive Covenants In General.

"Generally, negative covenants restricting competition are enforceable only to the extent that they satisfy the overriding requirement of reasonableness, which will vary. However, where an anti-competition covenant given by an employee to his employer is involved, a stricter standard of reasonableness will be applied."

The first thing to note is that the restrictive covenant will be viewed differently depending upon the circumstances. If the covenant is part of a purchase of a business, and the good will attached to that business, there is more flexibility and a greater likelihood of enforcement. The only restriction on such a covenant (besides the Sherman Act), is that the covenant be no more restrictive than is necessary to protect the transferee's newly acquired good will.

On the other hand, if the covenant is between an employer and an employee, there is less flexibility, and less likelihood of enforcement because generally such covenants are against public policy.

The covenant must be reasonable; that is, reasonable in terms of duration, geographic scope, and extent. But, "reasonable" means more when the covenant is between an employee and his employer. In re Reed, supra, the Court of Appeals stated that restrictive covenants between an employee and employer will be enforceable only to the extent necessary to prevent the disclosure or use of trade secrets or confidential customer information. Recent cases have interpreted the Reed case, however, as not requiring a trade secret or confidential customer list.

In one case the court stated: "The action is premised upon covenants contained in a written agreement. . . for the sale of the insurance brokerage business and good will. . . (SGI) If a contract for the sale of a business contains an express covenant not to compete, it will be enforceable if it is reasonable in time, scope and extent. .. In an employment contract, a covenant not to compete must meet not only the foregoing criteria, but will be specifically enforceable only to the extent that it is necessary to protect the employer's legitimate interests, is not harmful to the general public, and is not unreasonably burdensome to the employee. "

Some courts have interpreted this to mean that such restrictive covenants will not be enforced unless they involve trade secrets, confidential customer lists, or other special circumstances, such as that the employee's services are unique, special or extraordinary. The trade secret need not be substantial, it need only be any meaningful trade secret, through the use of which the second party might gain an unfair advantage which he might not have gained had he not been in possession of the trade secret, and the covenant must also otherwise be reasonable.

However, note that one court has stated: "The rule is that in the absence of a written agreement a court will enjoin a former employee from competing with his former employer only upon a showing that the employee has engaged in fraud or other wrongful conduct, that the nature of his work was unique or extraordinary or that the competition is based upon a customer list which is properly considered a trade secret. .. The insurance business is not unique, and the names of insurance customers are not a trade secret.

And, in one case, in which there was a covenant between an employee and employer (created after employment, upon promotion), the court stated: "While plaintiff [employee] had under his custody and control records and data of Liberty while in their employ, neither the originals nor copies thereof were used by plaintiff after termination of his employment with Liberty. Although a list of policyholders was made up for use in connection with plaintiffs activities as a representative of Liberty, while in the employ of Liberty, neither such list of policyholders nor any copy has been used by the plaintiff in connection with his business activities since leaving Liberty. . . . Plaintiff has not solicited any policyholders of Liberty. . . . The names of prospective policyholders in the Jamestown area are not trade secrets. They are well-known to all. . . . There has been no solicitation of old customers of Liberty by the Plaintiff and there has been no proof of any unfair competition by the plaintiff in any other respect. Accordingly, to enforce the restrictive covenant to prevent the plaintiff from engaging in the insurance business would run counter to the public policy of this state."

Thus covenants not to compete between an employer and employee are generally not enforceable. They will be enforced only when they involve a trade secret, confidential customer list (i.e., one not available by other means), non-public information, or when the employees'

services are special, unique or extraordinary. Furthermore, such covenants must also be reasonable in terms of duration, geographic area and extent.

As a final note, the foregoing was premised on the idea that the employment contract is being negotiated before hiring. If the covenant is to be included into an already existing contract, then additional "consideration" (compensation) must be provided for that promise. Also, if the covenant was made as part of a contract which is more than five (5) years old, you should review that covenant in light of the foregoing principles. Also, note that one court has stated: "Since one paragraph of the agreement provided that the defendant [employee] should be free to leave the employ of the plaintiff and to engage actively in the fire and casualty insurance business whenever he chose in the event plaintiff should fail to observe the covenants set forth in another paragraph . . . we view plaintiff's conduct [unilateral attempt to change the retirement conditions] . . . as justification for defendant's active solicitation of insurance business."

Need For An Attorney

This PIA report has several sample "covenant not to compete" clauses of actual contracts. These are samples only, and are not intended to be used literally. The construction of a "covenant not to compete" clause is a difficult task, and if done properly, it may provide you with important protections. The risk of not having the covenant enforced is important enough that you should always consult an attorney when drafting such a covenant.

Covenant not to compete samples:

1. "The employee shall not, during the term of this Agreement and for a period of two (2) years following the termination of his employment, directly or indirectly (i) engage, own, participate in, or become employed by any person or business, or for himself, which solicits, procures or brokers health, life, accident, property and/or casualty insurance within a twenty (20) mile radius from employer's principal place of business (ii) solicit or broker any present or future client of the employer."
2. "Employee agrees that he will not, within a period of two (2) years following the date of the voluntary or involuntary termination of his employment with Employer, either directly or indirectly, by and for himself, or as the agent of another, or through others as his agent engage in, or in any way be connected with the fire, casualty, accident, health and/or life insurance business and/or insurance agency or brokerage business within the County of, which is within twenty (20) miles of employer's principal place of business."

Other Clauses

Choice of law:

This clause is used primarily when the parties live in different states. In essence, it allows the parties to choose which state law will apply to their contract. Such clause is usually honored by the courts, provided it does not violate the laws of the forum state.

Arbitration:

This clause may provide that, in the event of a dispute or breach, the matter will be resolved by a neutral arbitrator. Such clauses are usually honored by the courts.

Non-Disclosure:

This clause is usually contained in the same contract as the covenant not to compete. It is distinguishable from the covenant not to compete in that the covenant not to compete emphasizes the employees' ability to compete with the employer upon termination, whereas the covenant of non-disclosure emphasizes the employee's ability (restrictions thereon) to disclose information pertaining to the employer's company to third persons. Hence, the two clauses complement one another.

The following is a sample of a covenant not to disclose information:

"Employee further specifically agrees that he will not at any time, in any fashion, form or manner, either directly or indirectly, divulge, disclose or communicate to any person, firm or corporation in any manner whatsoever any information of any kind, nature or description concerning any matters affecting or relating to the business of the employer, including without limiting the generality of the foregoing, the names of any of its customers, or any other information of, about or concerning the business of the--employer, its manner of operation, its plans, or other data of any kind, nature or description without regard to whether any or all of the foregoing matters would be deemed to be confidential, material or important, the parties hereto stipulate that as between them, the same are important, material and confidential and gravely affect the effective and successful conduct of the business of the employer, and its good will, and that any breach of the terms of this paragraph is a material breach hereof."

Severance

This clause is very important in that it provides that, in the event that any portion of the contract is deemed to be invalid, only that portion will be enforced, hence, the remainder of the clause, paragraph, or contract will be enforceable.

The following is an example. "The covenants contained in this paragraph shall survive termination of employment. In the event it is determined that the covenants contained herein are illegal and/or unenforceable, it is the intent of the parties that the scope of the covenant be reduced to conform to the requirements of law."

Non-Solicitation:

This clause is a companion clause of the covenant not to compete, and the covenant not to disclose. This clause provides that the employee will not solicit or procure any of the employer's clients.

The following is a sample of this type of clause:

"Employee agrees that he will not, within a period of two (2) years following the date of the voluntary or involuntary termination of his employment with Employer, either directly or indirectly, by and for himself, or as agent of another, or through others as his agent: (a) In any way seek to induce, bring about, promote, facilitate or encourage the discontinuance of, or in any way solicit for and on behalf of himself or others, or in any way quote rates, accept, receive, write, bind, broker or transfer any renewal or replacement of any of the insurance business, policies, risks or accounts, written, issued, covered, obtained (whether through the efforts of Employee or not) or carried by the Employer."