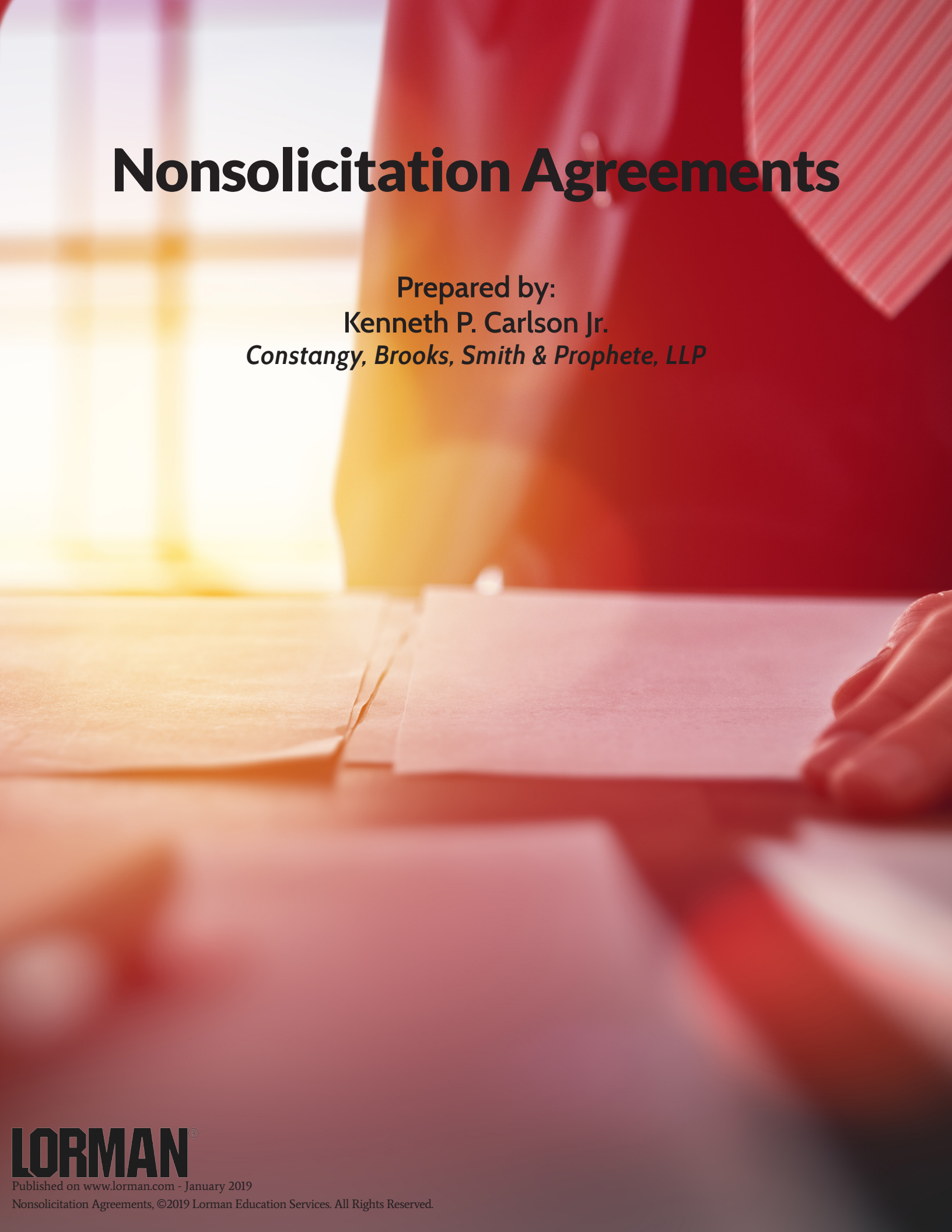

Nonsolicitation Agreements

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Nonsolicitation Agreements.

Nonsolicitation agreements are usually distinct provisions in an overall covenant not to compete, or standalone agreements that appear quite similar to noncompetes and generally have the same legal requirements of being in writing, signed at least by the restricted party, supported by adequate consideration, and reasonable as to time and scope. The primary difference is as follows: A noncompetition agreement prohibits competitive business activity within a certain territory (usually defined geographically). A nonsolicitation agreement only prohibits doing business with the former employer's customers, clients, suppliers or other key business partners – usually regardless of where they are located, provided that the restriction is appropriately limited under applicable law to only protect the employer's legitimate business interests. (*See also* the below discussion regarding nonsolicitation of employees, which is a closely related restriction.) Therefore, in one sense a nonsolicitation agreement is the *least restrictive* form of a covenant not to compete because it allows competition to exist literally across the street – provided that the competition does not involve soliciting to sell or selling to certain customers, clients or other key business partners of the non-restricted party for a certain period of time.

A. Legal Requirements for Nonsolicitation Agreements.

The primary requirement for a nonsolicitation agreement is to identify those businesses or individuals that cannot be solicited. In a typical employer-employee setting involving nonsolicitation of customers, those customers are usually placed in three categories: (1) customers of the company at large; (2) customers of the company at the facility or facilities where the employee was located; and (3) customers of the company to whom the employee, or anyone he or she directly managed or supervised, solicited or sold products or services.[12] To help increase enforceability, the closer the connection between the employee and the identified customer base, the better – and in the absence of direct customer contact, the more you can show that the employee was exposed to confidential information regarding that customer base, the better. In addition it is generally good to identify which "customers" you're addressing in a nonsolicitation agreement – such as only those customers that purchased or contracted to purchase the company's products or services within the 12-month period immediately before the employee's employment terminated (rather than just any individual or entity that did business with the company over the past, say, 20 years – many of whom might no longer be working with the company)..

As a general rule, and *unlike* noncompetition agreements, courts do not require that a specific geographical territory be included in the agreement – although states will differ on this point. And as alluded to above, when determining whether a nonsolicitation agreement is reasonable courts will often consider the extent to which the employee had actual contact with the customers. This distinction between a company's customer base at large (broad) versus only those customers with whom the employee had contact (narrow) can be critical to whether the agreement is considered enforceable in a given situation. *See, e.g.*, Wade S. Dunbar Ins. Agency, Inc. v. Barber, 147 N.C. App. 463, 469, 556 S.E.2d 331, 335-36 (2001) (summarizing and following North Carolina law that allows client-based restrictions without any geographical limitation);

[12] This language that accounts for direct contact with customers by the restricted employee, *or those employees he or she managed or supervised,* can be quite important. For example, it enables restricting sales managers who primarily interact with customers through sales representatives they manage rather than on an in-person basis.

Arpac Corp. v. Murray, 226 Ill. App.3d 65, 79-80 (1992) (although noncompetition provision keeping employee from working in any capacity in shrink wrap industry is overly broad and therefore unenforceable, nonsolicitation provision that protects only former employer's customers and employees found reasonable and enforceable); Dynamic Air, Inc. v. Bloch, 502 N.W.2d 796 (Minn. App. 1993) (lack of territorial restriction in nonsolicitation of customers and confidentiality agreement irrelevant, as limiting restriction to employer's customers is narrow enough to protect legitimate interests). *But see*, Equity Enterprises, Inc. v. Milosch, 247 Wis.2d 172, 185-86, 633 N.W.2d 662, 669-70 (2001) (nonsolicitation of customers restriction unenforceable for not including a geographical restriction as required by state statute governing covenants not to compete).

By focusing on customers rather than territory, nonsolicitation agreements arguably are better suited than traditional noncompete agreements for protecting against unfair competition in certain industries, especially those that are sales-oriented, highly mobile, and relatively borderless through the use of outside sales representatives, direct mail and Internet-based activities.

Example of noncompetition provision v. nonsolicitation provision:

> *Noncompetition* – Employee agrees that for one year immediately following the voluntary or involuntary resignation or termination of his or her employment with the XYZ Company, he or she shall not within the Restricted Territory defined below, through his or her own actions or through an agent or representative, compete with the XYZ Company as follows: (1) Develop, manufacture, market, sell, or otherwise provide or perform _____ products or services; or (2) Be employed by, perform work for hire, or own any company or other business entity that develops, manufactures, markets, sells, or otherwise provides or performs _____ products or services in competition with the XYZ Company.
>
> *Nonsolicitation* – Employee agrees that for one year immediately following the voluntary or involuntary resignation or termination of his or her employment with the XYZ Company, he or she shall not market, solicit to sell or sell _____ products or services to or for any customer of the XYZ Company that purchased or contracted to purchase such products or services during the 12 months immediately before such employment ended. [*Note*: Consider making the nonsolicitation restriction apply to only those customers to whom the Employee, or any person managed or supervised by the Employee, marketed, solicited to sell or sold _____ products or services – which should increase the chance of enforcement even more.].

B. Nonsolicitation of Employees.

Although the primary focus of this section is on nonsolicitation of customers, similar nonsolicitation agreements are often used as an "anti-piracy" or "non-poaching" measure to prohibit former employees for a specific period of time from soliciting to hire, hiring, or otherwise encouraging any current employees of a company to leave their employment. This form of

nonsolicitation agreement is generally enforceable under the restrictive covenant laws of most states, given the legitimate business interest in protecting a company's workforce "investment" – especially in attracting, hiring and training its employees. *See, e.g.*, Arpac Corp .v. Murray, 226 Ill. App. 3d 65, 76-77 (1st Dist. 1992) (covenant restricting solicitation of employees upheld as being reasonably calculated to protect employer's interest in maintaining stable work force); Phoenix Capital, 176 P.3d at 844 (stating general principle that "where a nonsolicitation provision is limited to prohibiting only initiating contacts or `active' solicitation of the employer's employees, it is enforceable, despite the invalidity of an accompanying noncompetition provision" [but holding that a nonsolicitation of *customers* provisions *would* be unenforceable in those circumstances, due to its being more of a covenant not to compete); Marsh USA, Inc. v. Cook, 354 S.W.3d 764, 55 Tex. Sup. Ct. J. 184 (2011) (subjecting nonsolicitation of employees provision to same legal requirements of enforceable covenant not to compete and nonsolicitation of customers provision); Roto-Die Co., Inc. v. Lesser, 899 F.Supp. 1515 (W.D.Va. 1995) (nonsolicitation of employees restriction enforceable). *But see*, Cain v. Cain, 967 So.2d 654, 661-63 (Miss. App. 2007) (restrictive covenant preventing one business from hiring the other business' employees for period of time was unenforceable as unreasonable restraint of trade due to not defining specific employees being affected).

Note: Antitrust concerns enforced by the U.S. Department of Justice are usually *not* an issue in covenant not to compete litigation or settlements involving former employees who go to work for competitors. Rather, as a general rule, only those agreements between companies that generally restrict one company's ability to hire the other company's employees (so-called "horizontal agreements") are potentially liable for Sherman Act violations absent some type of larger, legitimate business interest being served. *See, e.g.*, settlement and consent decree in *United States of America v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation*, Case No. 1:18-CV-00747 (D.D.C. April 3, 2018).