IT MAY BE BIGGER THAN YOU THINK

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Summary

Are you a soon-to-graduate student approaching the decision of choosing which job offer to accept for your first “permanent” position in industry? Or might you already be employed and be considering a change of companies? The decision may be bigger — much bigger — than you had thought. This article focuses on a subtle, yet highly serious issue of which any prospective employee should be aware: a company may require its employees to sign an agreement that imposes restrictions on one’s choice for future employment with another company. The article also offers a step that the prospective employee can take to keep from being caught by surprise about this problem.

Preliminary

My colleagues and I on the faculty of the Colorado School of Mines Department of Geophysics now give the advice offered below to all our students, both undergraduate and graduate. We consider the guidance to be important for students planning to enter industry — any industry, anywhere — and to be comparably valuable to any professional who is considering a change of employers. This advice does not cover the full range of considerations that should be taken into account in addressing the question, “of several job offers, which one should I accept?” Rather, it focuses on one serious issue that had not previously occurred to us, but that should not be ignored.

Familiar Issues — Not the Problem

Deliberations on a new job or change of company include many familiar considerations: for example, job satisfaction (of prime importance), type of work, size of company, and location. Also, it is worthwhile to learn about various company benefits such as health and other insurance, vacation and leave policies, and retirement plans.

But these quite familiar matters are not the point of the guidance here. Perhaps the short form of this message is “read the fine print.” But this is much too terse; it needs elaboration.

As any new employee certainly expects, the first day on the job will include necessary paperwork. There will be forms to complete with the human resources department — forms for the various insurances, to get onto the payroll, and to enroll for other benefits. Some, not all, companies will also have you (the new employee)
sign an agreement covering issues of patent ownership and confidentiality. Such an
agreement may cover any of a number of issues of importance to the company. An
example may be an agreement that makes clear that the company is the owner of
any idea in your technical field that you develop while an employee. Another may re-
quire that you not divulge or disclose to others outside the company any information
that is proprietary to the company, either while you are employed there or afterward,
if you have changed jobs and work for a new employer. Further, you may not use
such confidential information outside the company as long as it is confidential. Such
agreements, which must be signed upon starting a new job, are commonplace in in-
dustry. Their purpose is to cover the legitimate right of the company to protect its
proprietary ideas and technology.

Beware

But there are other, considerably more demanding, requirements that some com-
panies may attempt to impose. These are ones that my colleagues and I urge our
students to be especially aware of and to take into serious consideration in their de-
cision process. One such part of the agreement might stipulate that you (again, the
new employee) agree that, for some stipulated time period after taking employment
with a different company, you will not work in areas of research or technology in
which you had been directly involved while working for your present company. A
more extreme requirement that a company may attempt to impose is one that states
that you are not allowed to work for or consult for a competitor for a stated period of
time after leaving the company. In some confidentiality agreements, the time periods
for such requirements can be significant — as long as one and even two years. You
should think very carefully before signing such a binding agreement — and it can be
binding.¹

Now, typically, when you accept a position with a new company you have no
thought of working elsewhere. Perhaps you have hopes that the job really will be
permanent. But, who can count on anything lasting forever? Some examples: (1) your
level of job satisfaction could change over time if your assignments do not match your
expectations; (2) you may develop a desire to work internationally, but find no such
opportunity in your company; (3) you may wish to move to a specific city in which
your company has no operations; (4) you may find your work environment degraded
through ineffectiveness of management or managers; (5) you may find yourself laid
off, as happens often in industry these days; and (6) you may find a wonderful new
opportunity with another company, such as a desirable promotion. Such reasons for
change may arise relatively early in your career or after many years.

When embarking on a possible change of employers, you may have forgotten that
you had signed the binding agreement; but management in your present company will
remind you. Is the prospective company a competitor? Will that agreement preclude

¹Such “non-compete” agreements can be successfully challenged in court, but at the cost of time,
anxiety, and money.
you from moving to a desired position with some particular company of choice? If you are presently employed by an oil company, does that mean that you cannot work for another oil company for one or possibly two years? If you work for a seismic service contractor does that prelude your taking a position with another one? As a result, you may either have to leave the industry, be out of work for 1-2 years, or (if you haven’t been laid off) remain in a position that you find less than acceptable.

The agreement you are asked to sign could include a clause stating that the company may choose to waive the requirement that restricts your subsequent right to work for a competitor. Keep in mind that this conciliatory-sounding clause reserves this right solely for the company; it offers no valid reassurance to you. Another seeming reassurance in the company’s agreement may be a promise by the company to pay your base salary for the period that you are prevented from working for a competitor. This may not sound so bad, particularly if you are young, just starting your career, and about to earn considerably more than your student salary. An extended (somewhat) paid vacation at home in mid-career, however, offers no advantage for your long-term professional career. Perhaps you could use that no-work time to further your education at a university. If you wished to do so, it would behoove you to know in advance that the company won’t exercise the above-mentioned waiver in mid-stream so as to avoid paying for your extended education.

You may not be troubled by having to sign a binding agreement that does not allow you to work for a “competitor” for $n$ years. That, of course, is your choice. The essential point here is that you be well aware of the binding nature and implications of agreements that have the potential to exercise control over your career options beyond the term of employment with your new employer. Then, the choice can indeed be yours.

**When Do You Need to Know?**

The non-compete agreement that you sign when starting with a new employer (or, as may happen, after you’ve been with the company for some time) is written primarily to protect the company’s interests — not yours. So you need time to review the agreement. Aside from this time requirement, timing can be even more important. Suppose you’ve just graduated from a university in one city and have made your choice to work for a company in another city. The company agrees to pay your moving costs. You move, and show up for your first day’s work. At the human resources department, you are asked to sign the necessary paperwork to get started. Among the papers is an agreement with a paragraph that precludes your working for a competitor for $n$ years after leaving this company, if you should leave. Is this the moment when you would wish to first learn of such a binding agreement? Even if you should ask to take the agreement home for review, what will you do in case you cannot accept some of its terms? You’ve already turned down other offers, moved to a new city, and have the moving van with your household goods on its way.

So, here is the core advice in this article. *Before* you make your decision among
different job offers, and before you’ve left your university town or home town — indeed, as an essential component of your decision process — ask the companies that have made job offers to send you copies of any and all agreements that they will have you sign when you join the organization. You would then have the opportunity to seek legal advice in case you find a possibly troubling non-compete clause in the agreement of a company for which you otherwise are attracted to work.

**Conclusion**

The cautions raised here — about (1) items that may appear in a prospective employer’s confidentiality agreement, and (2) the stage in your decision process when you would want to know the contents of such an agreement — offer no opinion on the legalities of such restrictive agreements. At the time you sign any agreement, however, you must assume that it will be binding.

Are such agreements ethically right and justifiable? The requirements written into confidentiality agreements range widely — from being quite mild and reasonably undemanding to being beyond the bounds of what I personally think proper. Whatever the specifics, these agreements are written in the interest of giving the company the protection that it feels it needs.

Some companies require you to sign a confidentiality agreement and others not, and some of the agreements have potentially severe implications for your future career, while others do not. The essential point here is that it is much in your interest to be aware of the likelihood that some of your prospective employers will require your signature on a binding non-competitive agreement that can severely limit your choices for future employment if you should leave the company. That knowledge gives you the opportunity to request and study the content of the agreement in sufficient time to allow you, early on, to factor it into your employment decision.