THE BACKLASH AGAINST NON-COMPETE AGREEMENTS

A PRACTICAL GUIDE FOR EXECUTIVES AND RECRUITERS IN FLORIDA

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Your Guide to Reviewing Non-Compete Agreements in Florida

Introduction

Non-compete agreements are no longer the preserve of senior executives and media personalities, it seems. These days, even minimum-wage workers such as janitors and personal care aides are asked to sign non-compete agreements.

But the case in 2016 against Jimmy John's (which prohibited its sandwich makers from taking jobs with local competitors) has created a backlash. Federal legislators are now being asked by unions and advocacy groups to impose a nationwide ban on a practice currently regulated at state level.

The concern that non-compete agreements are starting to negatively affect social mobility has led some states to raise legal standards. Some have even gone so far as to make them unenforceable. The backdrop to non-compete agreements is changing—in some cases significantly.

This informative guide clarifies the main issues you need to consider when reviewing a non-compete agreement in Florida.

CHAPTER ONE

Understanding Non-Compete Agreements

What Is a Non-Compete Agreement?

A non-compete agreement is a legal contract between two parties, usually an employer and a prospective or current employee. However, sub-contractors, consultants, and buyers of a business may also be asked to sign a non-compete agreement.

This legally binding document, known also as a “covenant not to compete” or a “non-compete clause” (NCC), prevents an employee from working with a competitor or starting a competing business while employed and for a specified time after employment ends.

When Should a Business Use a Non-Compete Agreement?

Gone are the days when most people stayed with one employer for twenty or thirty years. Job hopping is widespread, which presents a particular problem for companies.

It’s not just a question of losing a talented worker. It’s also the risk that an employee (especially one with access to sensitive business information) ends up working for a competitor.

Of course, companies can’t prevent someone from leaving their employ. But they can—perhaps—prevent certain ex-employees from working for a competitor. At least, for a certain amount of time and under certain conditions.

Non-compete agreements are designed to protect a company’s interests.

Florida's Non-Compete Statute

Non-compete agreements are designed to protect a company's intellectual property and other propriety information that is not readily available to the public.

The definition of these "protective interests" vary from state to state. Florida's current non-compete statute, §542.335, sets out a list of legitimate business interests that include, but are not limited to:

- ❑ trade secrets
- ❑ valuable confidential information;
- ❑ substantial relationships with customers, patients and clients
- ❑ goodwill
- ❑ extraordinary or specialized training.

CHAPTER TWO

The Content and Legality of Non-Compete Agreements

What's Included in a Standard Non-Compete Agreement?

Like any other contract or restrictive covenant, a non-compete agreement must be both fair and equitable to both parties. To be considered legally binding, the agreement must include the:

- ❑ names of the parties involved
- ❑ date the agreement begins
- ❑ reason for entering into the agreement;
- ❑ duration and geographic area covered by the agreement
- ❑ consideration for the non-competing party.

After that, the details vary. Each contract must be tailored to the industry and to the specific nature of the relationship between both parties.

The courts understand that what's fair and equitable in one situation may not be fair and equitable in another. For that reason, be wary of templates that can be downloaded from the internet. There is no such thing as a standard non-compete agreement.

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How Enforceable Is a Non-Compete Agreement?

It’s probably no surprise to you that each state has its own idea of fairness when it comes to enforcing non-compete agreements. Most states permit non-compete agreements, and they generally enforce them, although some professions are exempt from signing non-compete agreements, such as broadcasters in Alabama and physicians in Delaware.

The most notable exceptions to this rule of thumb are California, Massachusetts, North Dakota and Oklahoma; these states do not enforce non-compete agreements. Other states, such as Nebraska and New Hampshire, remain undecided on the issue of enforcing against employees who have been terminated without cause, especially when it comes to trade secrets and confidential information.

The Definition of a Legitimate Business Interest

In Florida, the law is less hostile to the idea of an NCC, although even here non-compete agreements must demonstrate a legitimate business interest. According to the Supreme Court, “a ‘legitimate business interest’ is a business asset that, if misappropriated, would give its new owner an unfair competitive advantage over its former owner.”

In other words, an employer cannot use a non-compete agreement as a stick to beat off ordinary business competition. What’s more, the restrictive clause will only be enforced by the courts if the employee has used knowledge of the former employer to damage the critical interests of the former employer.

A good example of Florida’s pro-business approach to non-compete agreements is the case of White v. Mederi Caretenders Visiting Services of Southeast Florida LLC. The Supreme Court concluded that referral sources are legitimate business interests for health care providers, even though the statute does not precisely list the term “referral source” under legitimate business interests.

CHAPTER THREE

Before Signing The Dotted Line

Warning Signs That a Non-Compete Agreement Could Be Unfair

When a court either fails to enforce a non-compete agreement or reduces the restrictions to something that is far more reasonable, it usually involves any or all of these three issues:

- ❑ the restraint is overbroad
- ❑ the restraint is overlong
- ❑ the restraint is not reasonably necessary to protect an established legitimate business interest.

A business operating only in Florida and Georgia, for example, should not ask an employee to sign a non-compete agreement that prevents working with a similar company operating only in Washington and Oregon (an overbroad restraint).

Likewise, it would be unfair to prevent an employee from working for a competitor for an unreasonable length of time. In Florida, the courts consider between six months and two years to be reasonable in most cases. However, the duration is extended to seven years when selling a business and to ten years when it relates to the protection of trade secrets.

The issue of protecting legitimate business interests is perhaps the most contentious, as they can be hard to define. The role of the employee is often a decisive factor. Low-skilled, low-wage earners who do not have routine access to sensitive or confidential information are unlikely to pose a threat to the established business interests of a company.

Asking a sandwich worker or shelf stacker to sign a non-compete agreement is a probable basis for unfairness.

Questions to Ask Before a Non-Compete Agreement Is Signed

It pays to be cautious before signing any contract. Non-compete agreements are no exception. The most important question anyone should ask before signing: Could this non-compete agreement significantly restrict the employee's ability to earn a living in the future?

If the restrictions seem unreasonable, ask if they can be changed. Perhaps the geographical limits can be reduced to a certain state or city, or maybe the length of time can be shortened. If the final agreement allows both parties to move forward without compromising mutual interests, the company may be willing to negotiate.

Check the employee understands that continued employment provides valid consideration for a non-compete agreement. Unless the employer breaches the employment contract or fails to meet other obligations, the employee is bound by the agreement even if he or she is fired.

Finally, in Florida, it's important to note that the courts won't consider individual economic or hardship as a result of enforcement. Therefore, before signing the dotted line, it's highly advisable to have the terms checked by a local lawyer who specializes in non-compete agreements in your state.

If the restrictions seem unreasonable, ask if they can be changed.

Drafting a non-compete agreement or representing someone who's been asked to sign one?

Make sure you're familiar with this controversial subject in Florida. The Bedell Firm has a wealth of experience in corporate investigations, and we're always happy to advise on the reasonableness of non-compete agreements.

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