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NON-COMPETE AGREEMENTS – TOP 5 MISTAKES EMPLOYERS MAKE

You want your employees to abide by their non-compete agreements when they leave. But many employees will sign non-competes assuming they will not be enforceable. Many employees think that, just because an employer forced them to sign the agreement or be fired, that they are not bound by a non-compete agreement. That's just not true. Continued employment is valid consideration for a non-compete agreement in Florida. Florida statutes presume that non-compete agreements are valid. Truth be told, most employees don't have the will or the resources to fight them. What employers need to be concerned about is the employee who is willing to fight.

What usually happens is the employer sends a letter to the employee and the new employer, threatens to sue both, and the employee gets fired from their new job, even where they told the new employer about the non-compete. The employee who is willing to fight will sue the former employer for tortious interference with that employment relationship, and if the non-compete is held to be unenforceable, they will win, costing the former employer not only attorneys fees and costs, but possibly thousands in damages in the form of lost wages and non-pecuniary damages.

Here are just some of the ways that an employee can defeat a non-compete agreement:

1. Employer breaches the contract: Many non-compete provisions are part of an employment contract spelling out compensation, insurance and other conditions of employment. If the employer breaches the agreement by failing to pay all compensation due, failing to fulfill the insurance requirements, or failing to meet some other obligation, the employee is relieved of all obligations under the contract. It is important for the employer, particularly upon termination, to make sure all obligations under the contract on the employer's part have been met. And many employers put changeable provisions like insurance in a contract that says it may only be amended by writing signed by both parties. If something in a contract is a provision the employer wants to be able to change, then either leave it out of the contract, or put the fact that the employer may unilaterally change insurance policies without the need to amend the contract.

2. No legitimate interest to enforce: Many employers attempt to overreach their legitimate business interests, and this is one of the most common mistakes. For instance, an employer has no legitimate interest in enforcing a non-compete against low-level employees such as receptionists and clerical employees. An employer who manufactures computer software for accountants has no legitimate interest in preventing an employee from working on software for doctors. An employer who is phasing out of an area has no legitimate interest in preventing an employee from working in that area. An employer who abandons a particular customer, area of business, or product has no legitimate interest in the area it abandoned. The statute allowing non-compete agreements assumes that the following are legitimate business interests:

- a. Trade secrets;
- b. Valuable confidential business or professional information;
- c. Substantial relationships with specific prospective or existing customers, patients, or clients;
- d. Goodwill associated with an ongoing business or professional practice, by way of a trademark, geographic location or marketing/trade area;
- e. Extraordinary or specialized training

3. Agreement is for too long a time period: For employees, a period of less than 6 months is presumed valid, and over 2 years is presumed invalid. In between, the employer will have to prove that the time period is reasonable. However, most courts will assume that agreements up to 2 years are reasonable. Some judges will find agreements under 3 years reasonable because there is a related statute finding 3 years reasonable when there is a former business owner selling a business. But anything over 2 years is going to be a hurdle for the employer to overcome. If the non-compete is connected with the sale of a business, the allowable time periods are longer.

4. The so-called confidential information is something readily available to the public: Many companies get their sales leads from public sources. Phone books, professional directories, the internet, notification services, are all sources that are available to anyone in the industry. So an employer who claims they are protecting their valuable secret client sources is going to have to show that the information was not available to everyone else in the industry. Existing customer

lists or unique sources are protected, but chamber of commerce directories are not.

5. Public health or safety would not be served: This primarily applies to doctors, nurses, and people in specialized scientific and health areas. If there is a shortage of people in a particular specialty, or in a particular geographic area, then the employer cannot enforce a non-compete even if all the other requirements are met. If your employee is one of 10 brain surgeons in the country who can perform a particular procedure, you probably can't prevent him or her from saving people's lives.

An employee with the time, will, and resources to fight can frequently limit or eliminate their non-compete provisions. An employer who tries to enforce a non-compete and fails will end up paying the attorney's fees and costs of the prevailing employee, and will sometimes be paying money damages to the employee for tortious interference with an employment relationship if they cost the employee a job.

If a key employee is leaving with a book of business, then contact an employment attorney immediately to find out about your available remedies. If you want employees to be bound by non-compete agreements, the best course of action is to have an attorney prepare them, and to have them reviewed at least once a year for any changes necessary. An unenforceable non-compete is worse than useless – it is dangerous to the employer who tries to enforce it.