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NON-COMPETE AGREEMENTS – TOP 5 WAYS TO GET OUT OF YOURS

Your employer will tell you that you are bound by your non-compete agreement when you leave. The reality is that most employees don't have the will or the resources to fight them. 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. That doesn't mean you can't get out of yours if you're 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. That's because, unless you have a contract with the new employer spelling out that you can only be fired for cause, and that the non-compete is known to the employer and is not cause, Florida is an at-will state. That means any employer can fire any employee for any reason or no reason at all.

Smart employees consult an attorney before signing a non-compete to be advised of their rights. Even if you signed without getting advice, you still may have some legal arguments to defeat your non-compete.

1. Employer breaches the contract: If your employer put the non-compete provision in an employment contract spelling out compensation, insurance and other conditions of employment, it is important to have an attorney go through the contract line-by-line. If the employer breached 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.

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.

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 you are one of 10 brain surgeons in the country who can perform a particular procedure, your employer probably can't prevent you from saving people's lives.

In general, I tell people to assume their non-compete agreements are enforceable, and not to sign them unless they can live with the restrictions. But an employee with the time, will, and resources to fight can frequently limit or eliminate their non-compete provisions.

And 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 you're leaving a job and you have a non-compete, the best thing to do is get advice from an employment attorney before you leave. A written agreement with the new employer to defend you and to pay you even if you can't perform particular services if a court issues an injunction will protect you. If you get sued to enforce a non-compete, you **MUST** contact an employment attorney immediately to defend yourself or you will lose your new job, you will have a money judgment against you, and you will have no ability to raise any defenses to the non-compete agreement.