

LEGAL MATTERS



By: Scott M. Behren

Is your Non-compete Enforceable by your Employer?

Although they have been around for many years, one of the increasingly more popular documents that employees are being asked to sign are non-compete agreements. As a result, employees are more frequently calling my office asking me to review and provide legal advise on these agreements. As with many legal issues, there are no simple answers, but in this article I hope to identify some key issues you should consider when reviewing your non-compete agreement:

APPLICABLE LAW

Most non-compete agreements will provide a "choice of law provision". This provision sets forth the state's law that will be used in enforcing the agreement. For instance, if you have a company based in California, the agreement may provide that California law applies rather than Florida law. In many instances, other states have non-compete laws that are different than the State of Florida and in many cases are more favorable to employees. For instance, California only enforces non-compete agreements in limited instances. So you want to carefully evaluate which state's law applies to your non-compete to determine the extent it is enforceable.

SCOPE AND DURATION

The next provision of the non-compete you want to consider is the length of the non-compete and the geographic scope of the non-compete. The duration is the length of time that the agreement would be enforceable against you. Generally, in Florida, other than in certain limited circumstances, a two-year duration is legal. The geographic scope is the area in which your former employer can prevent you from working. For instance, your non-compete may restrict you from working in competition with your former employer in Broward County. If the geographic scope is too broad, under Florida law, the Court will modify enforcement of the agreement to a reasonable geographic scope. For instance, if you cut hair in Broward county, a nationwide or even statewide geographic scope would probably not be enforceable. Finally, one other aspect of the "scope" of a non-compete is the type of business that you are

restricted from working in. In many instances, the employer will draft the language of the agreement to prevent you from working in a very broad class of jobs where only prohibition from working in a more narrow class of jobs would be enforceable. For instance, a copier salesperson could probably not be prohibited from working in the "office supplies" industry.

LEGAL BUSINESS INTEREST

In order to enforce the non-compete, the employer must be seeking to protect a legitimate business interest. The Florida non-compete statute defines a legitimate business interest as: trade secrets, valuable confidential information, customer and client goodwill and/or specialized training. Increasingly, courts in Florida have been finding non-compete to be unenforceable where the employer has not proven a legitimate business interest. Just because the employee signed the agreement does not mean that the employer can legally enforce the agreement even if reasonable in scope and duration. For instance, a restaurant could probably not enforce a non-compete against a waiter or even a manager unless that employee had some specialized training or knowledge of trade secrets.

Although this article raises some possible defenses to enforcement of a non-compete agreement, it does not address all of the possible defenses which could be raised based upon an employee's factual circumstances and the particular language of the non-compete. Therefore, if you have a question regarding enforcement of a non-compete, you should have your agreement reviewed by an experienced employment lawyer.

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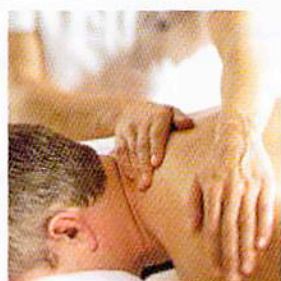
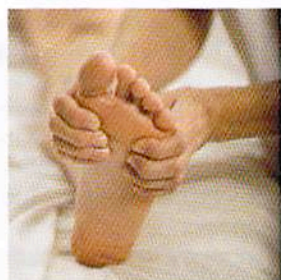


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