Hot Issues in Florida Non-Compete Litigation

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About 90 percent of my practice is representing employees. If you get fired from your job, call me. Many clients come to me asking to review the enforceability of non-compete agreements.

To be enforceable, the agreement must be signed after July 1996, be in writing and be reasonable in time, area and type of business. Most importantly, the party seeking to enforce the agreement must prove the existence of one or more legitimate business interests.

What is a legitimate business interest? It could be a trade secret, which the statute defines as a formula, pattern or other information that provides economic value, and "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

A lot of companies try to say that a customer list is a trade secret. If the company spent a lot of time compiling the list using its own in-house sources, a case could be made for calling it a trade secret. But if the company is pulling the list from a phone book, it is not secret – it's public knowledge.

In weighing whether something is a trade secret, you also have to look at what steps the company has taken to keep the list confidential. If the list is accessible by everyone in the company, it might not be considered a secret. The bottom line is that not everything is a trade secret.

A second type of legitimate business interest concerns protecting valuable confidential business or professional information. These could be company manuals or sales leads, for instance. Again, you have to look closely to see if the information was derived from readily available commercial sources.

A company may strive to protect substantial relationships with prospective or existing customers, patients or clients, or to protect customer, patient or client goodwill. In these types of cases, it's important to understand that there is no prohibition on customers who voluntarily follow the ex-employee to a new place of business where there is no showing that the employee used trade secrets, customer lists or directly solicited the customers.

A final area of protection of a legitimate business interest is in the case of an employee who received extraordinary or specialized training. In one Broward County case, I represented a longtime employee of Autonation who left to go with a competitor. The company filed for an injunction, stating the employee had been given special training in sales and finance and insurance. We argued that the employee's training was the same as all other dealers were offering, and backed that up using third-party sources. The judge denied the injunction.

In order to protect a legitimate business interest, a company must prove that the employee would obtain an unfair advantage. Since any former employee that leaves a company may injure the business of the employer, the employer can't seek to restrain "ordinary competition" and must instead seek to restrain situations where "without the covenant to compete the employee would gain an unfair advantage in future competition with employer." Case Passalacqua vs. Naviant Inc. 844 So.2d792 (Fla. 4th DCA 2003).

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What happens if you can't prove a legitimate business interest? The company loses. The statute says without that legitimate interest, a non-compete agreement is unlawful, void and unenforceable.

Even if a legitimate business interest is proven, the person opposing it can still challenge the noncompete on other grounds, such as having an agreement that was too broadly written or is no longer applicable. For instance, one company that was no longer in business tried to enforce a non-compete agreement. The court said no because the company itself wasn't competing in the marketplace any longer.

A company also needs to prove it is still doing work in that particular geographic area or specific line of business. If a whole sales department was laid off in a certain territory, for instance, it's hard to enforce a non-compete agreement against an ex-employer working in the same region.

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Now, let's look at another hot issue: which state law governs these agreements? It's important because state laws differ and one state's law may be more favorable to the company or to the employee. Although Florida readily enforces non-competes, other states like Colorado, Alabama and California, for instance, are very limited in terms of enforcement.

Some states, such as Florida, also allow the court to "blue pencil" an agreement, essentially modifying the scope or length of an otherwise unenforceable agreement. As the Florida statute says, "If a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests."

However, Texas and other states do not allow for blue-penciling. In that case, the employer is stuck with the language in the agreement. If it is not enforceable as written, the agreement will be tossed out.

Many non-compete agreements specify which state law will govern in the event of a dispute. The presumption of the courts is to enforce the choice of law set forth in the agreement,

However, that "choice of law" provision can be challenged as well. A careful analysis of the case might show that Florida has no substantial relationship with an employee's situation. For instance, if someone who worked in California for a Florida company and takes another job in California, then why should Florida law apply?

The bottom line: an examination of choice of law provisions should take into account where the employee works, where the employer is located, where the employee now lives and whether there is a significant difference between the state laws.

The moral of the story: Carefully consider which states impact each non-compete agreement. Decide which state's law is more favorable to your client position and argue for its application. ■