

Drafting and Enforcing Covenants Not To Compete

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An employer can implement protective measures for his or her business to protect against liability losses, poor employment practices and even an unexpected personnel loss through a variety of insurance policies and other measures. It is equally important to protect a business and the service or product it provides from unfair competition by a former employee. Some employees may believe they can provide the product or service a company offers better as an entrepreneur than an employee and yearn for the day they can be their own boss. For the former employer, particularly a smaller or newer company, such efforts can cause significant problems and may be a violation of law if the ex-employee uses trade secrets, protected information or specialized training to start a competing business. A well-crafted, properly enforced agreement not to compete for key employees can offer protection in such scenarios. The following discussion provides guidance for counsel to business owners, large or small, to help them evaluate whether it is a worthwhile investment of time and money to create an agreement not to compete (a/k/a noncompete/noncompetition agreement) and to enforce such an agreement if and when it is violated.

Is It Legal? What Does It Really Do? Why Is It Important?

As with any business expense, the most effective means of determining the value of a noncompete agreement is an objective cost-benefit analysis. This process is relatively simple in jurisdictions where noncompete agreements are not permitted, such as California, or as related to professions for which a noncompete is explicitly not allowed.¹ Additionally, there are professions, such as medicine, dentistry, and law where clients may have more subjective discretion to choose whom they want to provide the required services.²

In Florida, section 542.335, *Florida Statutes*, sets out the black-letter law on “covenants that restrict or prohibit competition.” This statute establishes the types of information that may be protected pursuant to a noncompete agreement, guidelines for the reasonable duration of restrictions based on the parties’ relationship, burdens of proof for the parties seeking and opposing enforcement and general instructions on how such agreements are to be interpreted by the court.³

Some generalities may apply across businesses but, to be truly effective, there is no “one-size-fits-all” noncompete agreement. An individualized evaluation into the unique features of a business is necessary to provide the most efficient protection and is, necessarily, a fact-intensive exercise. Although litigation is generally the chronological endpoint of a dispute, an evaluation of the information necessary at that state is instructive as to how to draft effective restrictions. Accordingly, the general procedural and practical implications of an enforcement proceeding, as well as the trends that have developed from the interpretation and application of Florida’s statutory parameters, are discussed below to provide a framework of the creation of such an agreement.

While one cannot anticipate every contingency, preparation in the context of litigation will hopefully avoid the dreaded hindsight phrase, “I wish I had included that term.” An enforcement-based analysis will also hone the particularly important interests to be protected and restrictions imposed and allow the business to eliminate those marginal interests that would be an inefficient use of resources. Further, by drafting an agreement with an eye towards enforcement, a business may be able to avoid litigation by establishing a favorable negotiating position from the outset. Should litigation ultimately become necessary, an effective noncompete agreement will allow the employer to maintain firm control over the process. Finally, if after reading the information below, the process does not seem worth the initial investment, you may be able to avoid the expense associated with attempting to create a noncompete agreement that ultimately is not enforceable.

Enforcement Considerations

For a noncompete agreement to be worth more than the paper on which it is written, the agreement must focus on what will be required to enforce its terms, both from a practical and a legal standpoint. Although allowed by statute, noncompete agreements in Florida are subject to different standards as to what is considered reasonable, based on the bargaining positions that exists in different business relationships.⁴ Further, vestiges of monopoly-type price control concerns associated with improper restrictions of trade have led courts to analyze such agreements carefully to distinguish restrictions of unfair competitive efforts from fair, market-based competition.⁵

Assuming negotiations with a former employee or owner have failed, enforcement of a noncompete agreement is most often through a civil lawsuit alleging a breach of contract.⁶ However, it is possible to include provisions requiring reasonable alternate dispute efforts be attempted first.⁷

1. Legal Standards

As a threshold issue, Florida law requires a noncompete agreement be in writing and signed by the person against whom it is to be enforced.⁸ An oral noncompete agreement or oral amendment to such an agreement is not enforceable.⁹ Additionally, section 542.335(h) specifically directs a court not to interpret a noncompete agreement liberally in favor of either party, but in a manner that protects all legitimate interests established by the person or entity seeking enforcement.¹⁰

If a written agreement exists, the statutory scheme in section 542.335 creates a burden-shifting process whereby the person enforcing a noncompete agreement must both demonstrate one or more legitimate business interests and establish a prima facie case that the restraints to be enforced are reasonably necessary to protect such interests.¹¹ Legitimate business interests are defined in the statute and include, but are not limited to, trade secrets; valuable or confidential information other than established trade secrets; relationships with existing or specific prospective customers; customer goodwill associated with an ongoing practice or name, geographic area, or particular trade; and extraordinary or specialized training of employees.¹² Additionally, if the party enforcing the noncompete can demonstrate some form of continuing effort to secure business from identifiable past customers, those customers may also be considered off limits to the opposing party.¹³

To create an agreement based on such a legitimate purpose, it is necessary to determine the range or scope of items that are to be protected and prepare an agreement with only that protection. Including additional unnecessary restrictions runs the risk of such restrictions creating unnecessary litigation expenses and ultimately having the terms excluded by the court. Identify with precision the legitimate business interest you seek to protect, avoid overreaching, and explicitly state those purposes. Such precision will increase your credibility with any opposing counsel and the court and avoid the need to present evidence on unimportant issues that will dilute the strength of the agreement.

Once the prima facie case is met, the person or entity opposing the terms of the noncompete agreement must demonstrate the specific terms are overbroad, overlong or otherwise unreasonable.¹⁴

The wrinkle that arises in enforcing a noncompete agreement in Florida and most other jurisdictions is the court's ability to reform or modify specific terms of the agreement not only in cases of ambiguity, but also to meet the court's interpretation of reasonableness.¹⁵ While this may lead to some uncertainty as to the expanse of the agreement, a court does not have the ability to refuse to enforce the agreement as a whole; if there are unreasonable terms, the court must modify the terms to a point that is reasonable, but lacks the discretion to void the entire agreement.¹⁶ As a result, the focus of the former employee, and the subsequent

employer if the new employee is sufficiently lucrative, is typically to argue that restraints related to the duration, geographic region, or scope of duties enumerated in an agreement are not reasonable so as to have them modified to as favorable a point as possible.

2. Evidentiary Considerations

To defend a restraint as reasonable, it is typically necessary to provide testimony or documentation regarding the issues of (1) the general market or commercial field for the business at issue; (2) the specific geographic market for the business; (3) the time period associated with the typical life of a product or service common to the former and subsequent employers; (4) the time required to renew or update any confidential information a former employee received during employment; and (5) the time required to train a new employee.¹⁷ A business owner or a management level employee, such as the president, chief financial officer, or chief operating officer, may be acceptable as the source of the necessary information. However, how market conditions relate to a product or service is a more fluid concept and it is important to create a proper evidentiary basis through the testimony of a qualified or expert witness.

The evidence described above is similar to what is necessary to demonstrate a breach of other contractual obligations. However, the person drafting a noncompete agreement based on the above strategy has the benefit of trying his or her case in theory beforehand to both create an agreement and the evidence to support it. The drafter, in other words, can both prepare the agreement and put in place the necessary systems to be able to meet his or her burden should litigation be required. For example, to establish his or her legitimate business interests, the employer can state what they are and can create documents such as client lists, a written process to identify prospective clients targeted with specific efforts, and/or written procedures for the protection of trade secrets and other confidential information.

In addition to such documentation, witness testimony as to the actual application of processes is imperative.¹⁸ Inconsistent or nonexistent application of protective procedures cannot support the evidentiary burden an employer has to demonstrate legitimate business interests.¹⁹ To fully support an employer's position to enforce a noncompete agreement, the employer will be best served by having evidence of both the processes and their consistent application. This will demonstrate to the court that the information the employer wishes to protect has been safe-guarded, and the related restraints are reasonable and not arbitrarily applied. Identifying persons who will provide this information early in the process, and providing them with the knowledge required, will later enable witnesses to testify with greater confidence and credibility.

Once the agreement is supported, it may also be necessary to demonstrate the violation of a legitimate agreement. Such evidence can take the form of correspondence between the employee and the subsequent employer, a contract with a subsequent employer describing similar job duties and territory, or even an advertisement for a position prepared by a competitor.²⁰ Witness testimony may also include the appropriate person at the subsequent employer to discuss the hiring, one or more witnesses from the former employer regarding prior activities and knowledge and potential customers of the former employer who can (and are willing to) testify to solicitation attempts or other activities in violation of the noncompete agreement.²¹

Evaluation of Specific Restraints

The primary restraints in a noncompete agreement, and therefore the largest targets for attack, are the duration, the geographic area and the scope of prohibited activities. As noted above, a court cannot avoid enforcing the agreement as a whole, but can adjust terms as it deems reasonable. Accordingly, evidence for each form of restraint needs to have a firm basis in fact and practicality to withstand such challenges in a hearing.

1. Reasonable Time

Florida provides general guidance for four different scenarios as to the duration of an agreement in section 542.335(1)(d). That section creates rebuttable presumptions for reasonable time periods based on the apparent equality or lack of equality in the parties' bargaining positions. Generally, the greater the apparent inequality of the parties' bargaining positions, the shorter the period presumed reasonable in the statute. In situations in which an employee has no ownership in the business entity, section 542.335(d)1. creates a rebuttable presumption that six months or less is reasonable, while anything more than two years is presumed unreasonable.²²

In contrast, where a business is being sold at arm's length, any time period less than three years is presumed reasonable and any period greater than seven years is presumed unreasonable.²³ Regardless of bargaining position, however, a noncompete agreement based on a trade secret has its own parameters, with anything less than five years presumed reasonable and anything greater than ten years presumed unreasonable.²⁴

In each of the time parameters in the statute, however, a significant amount of grey area exists and can lead to litigation. To craft an agreement that can survive a court challenge, it is necessary to state a duration that is demonstrably specific to the business. The most effective means to demonstrate a reasonable duration for a noncompete agreement is to establish a time frame associated with either confidential or trade secret information specific to the company or the reasonable life span of the service or product the business provides.²⁵ Further, factors such as time required to train a replacement or a regular cycle for sales information distribution may provide the appropriate basis for evaluating a defensible duration of the agreement.²⁶

As an example, a health club or massage business may have a contract for its members that lasts for a period of one year. To continue relationships with existing customers, such a business would make an effort to retain those customers before the expiration of the agreement. Further, the business would have specific strategies and confidential information related to customers and methods to implement its strategies put in place weeks or months in advance. It would be critical to prevent former employees with knowledge of those strategies from attempting to offer similar services to the employer's customers for as long as it would be necessary to retain customers or replace outgoing customers with new ones. Accordingly, a noncompete agreement lasting one to two years for an employee with sufficient knowledge would likely pass the duration test based on the length of the relationship between an existing customer and former employer.²⁷

Another factor that can support a "reasonable" time period is the typical life of the product or service. For a product or service that a customer uses for a year, a reasonable noncompete duration may be 6-18 months, depending on the lead time invested in maintaining the existing relationship with a customer. If the business is a recognized, quality provider of such a good or service, it may only require six months for the general public to no longer recognize a former employee as the "face" for the company, depending on personnel levels and training requirements for a new employee.

A newer product or service, or new organization providing either, may require a greater time period to establish the former employee's successor as the established contact. In either case, assuming the former employee does proceed with a competing business after the agreement term, it is reasonable to expect some customers to be more loyal to the former employee, regardless of the agreement duration.

If an employer can protect its business with a shorter time period, the shorter time period will be easier to enforce. This may be true for two reasons: (1) the former employee may be more willing to wait out a shorter time period and comply with the agreement; and (2) that shorter period without competition may be sufficient to maintain the business' position in the marketplace. However, with the sliding scale of reasonableness, it

is crucial to establish a measurable time period where the effectiveness of the former employee through his or her specialized, company-specific knowledge will be diminished based on the factors above. This “unfair threat” period will usually be what the court considers reasonable.

2. Reasonable Area

As with duration, supporting the geographic component of a noncompete agreement also requires specific information to educate the court. Some challenges have focused on the failure of the noncompete agreements to establish any geographic area in the terms whatsoever.²⁸

Factors in establishing the reasonableness of the geographic restriction include the business location(s) and the region(s) such business affects.²⁹ If the business can define, through customer information, market information, or other means, one or more key geographical areas, it is more likely that the court will view that area to be a reasonable restriction.³⁰ Further, it is important to examine the market and customer information periodically to be able to define more accurately the key geographic areas and expand or contract them to allow for the growth of the business.³¹

The reasonableness of the geographic area can also be tied to the position of the employee and the geographic territory the employee serves.³² Few companies can demonstrate that a global or even a national geographic restriction is reasonable to protect their interests for all employees. Such a restriction could, at some level and if sufficiently broad, be viewed as an attempt to create monopolistic markets.³³ Additionally, such a large geographic restriction would likely be construed as too burdensome on a former employee who spent considerable time and effort to become educated in that field. Finally, enforcement and litigation across such a broad spectrum is likely to result in significant legal expense for such efforts (the “win the battle, lose the war” approach).

As an alternative, a geographic location defined by the location of the former employer’s customers may provide sufficient specificity without stating a certain measured area.³⁴ The language in such restrictions has a similar effect to a geographical limitation because of the typical market area for the former employer. For businesses with a specific customer base contained within a specific region, there may not be a need to spell out definitive geographic metes and bounds. Such language is usually viewed as reasonable also because it is similar to a more specific nonsolicitation agreement.

Further, an employer can establish protection as appropriate for certain markets based on where the business generally provides its products or services without regard to the location of the employee. For example, purveyors of thick, wool clothing do not often focus their marketing efforts on the southeast part of the country.

To establish a reasonable geographic area based on such factors, it is important to understand where and what those markets are. For city-sized or regional businesses, the extent of the protection is likely to be more limited to a specific area. For larger businesses, such a protected area may be greater depending on the degree to which the employee is involved in providing those products or services in different or numerous regions.

Accordingly, in establishing a reasonable geographic area it is critical to know, understand, and be able to demonstrate the locations where the above foci exist to be able to show the court where the restrictions fit. This may require efforts as simple as a review of a customer database that has addresses and other meaningful information; to a survey related to the product or service, to a more formal market study. In any case, without that information, the focus may be no more than a guess and may be as difficult to establish in any litigation. This will also be apparent in any pre-suit efforts to resolve a breach if the business cannot credibly demonstrate this restriction.

3. Reasonable Activities

The third primary element to a noncompete agreement is the scope of the prohibited activities. Depending on the level of the employee to whom the agreement applies, this can be broken down into general tasks covered by the agreement as well as specific restricted tasks when that employee separates. Generally, for a noncompete agreement to be enforceable, the employee to whom it applies must be an employee with specialized knowledge or access to confidential information.³⁵ An employer cannot prohibit an employee from using general knowledge gained on the job.³⁶ Absent specialized knowledge or training, the employer does not have significant business interest to avoid competition and such a restraint will be difficult to enforce.

Typically restricted activities in noncompete agreements focus on contact with existing customers or the use of other specialized information obtained from the former employer. In conjunction with nonsolicitation agreements, it is typically reasonable for employers to restrict any contact with existing or identifiable prospective customers, prohibit the use of sales data, information, or specific techniques used by the business to develop additional sales, and prohibit the use or practice of specific specialized skills the former employee gained from the employer.³⁷

The second aspect of an activity issue is the restriction's effect on the former employee's ability to find work. Courts will consistently impose requirements that restrict solicitation of the employer's customers and prevent disclosure of confidential information. However, courts are reluctant to completely prohibit a former employee's ability to pursue his or her line of work entirely in any location.⁸ In order to determine whether the complete affect of the agreement is too restrictive, courts will consider the factors as a whole as they relate to the scope of the restricted activity to prevent unreasonable agreements from controlling the marketplace and eliminating any possibility of a former employee locating gainful employment in his or her chosen field.³⁹

Additionally, the greater the geographical area covered by the agreement, the more limited the scope of restricted activities may be. This is a sliding scale, based in part on practicalities. A person with nationwide coverage will not be able to wear the same number of hats as a person with local responsibilities. He or she is likely to have more specific knowledge or confidential knowledge, but on a different scale than a regional representative of the same company. When creating a reasonable activity restriction, it is important to establish the number of activities the former employee affects in such a region and prepare the agreement accordingly. Otherwise, litigation is more likely and the court may very well shape the agreement as it should have been drafted.

4. Additional General Considerations for Enforcement

In addition to the reasonableness analysis, it is important for the enforcement of a noncompete agreement to be uniform. Failure to enforce a noncompete agreement consistently, regardless of the former employee, can expose the business to claims of waiver, or worse, potential discrimination or retaliation. In most situations, a noncompete agreement can be enforced regardless of whether the employee separated from employment voluntarily or not. In the event separation is due to termination of the employee, an inconsistently applied noncompete agreement can add fuel to the potential discrimination or retaliation claim that may follow such a termination and, if there is potential for exposure with regard to such a claim, can appear to a jury as the former employer rubbing salt in the wound of the aggrieved former employee. Further, a cease and desist letter will carry significantly more weight if a similar noncompete agreement has been successfully enforced and upheld by a court of law.

As an additional consideration, the statute provides a court authority to award attorneys' fees to the prevailing party, even in the absence of such a provision in the noncompete agreement, and any provision attempting to limit the court's ability to do so is void.⁴⁰ As a result, the absence of a fee provision in a noncompete agreement may not prevent an award of fees against the nonprevailing party in an enforcement action.

Conclusion

As with all facets of litigation, the best case is one where the attorney and the client are prepared for as many contingencies as possible. There have been countless lawsuits where counsel for a client wishes he or she could go back in time and prevent certain events or ensure certain precautions were taken to strengthen the case. A proper noncompete agreement, created using factual, supportable evidence, provides the foundation for a strong position for enforcement from pre-suit negotiation to litigation. It is hoped that the above considerations will assist readers in focusing their inquiries to determine whether a noncompete agreement is necessary and, if so, by providing a framework for the preparation of such agreement.

¹Cal. Bus. & Prof. Code § 16600. Further, noncompete agreements are consistently prohibited in the fields of broadcasting and, in some states, security guards. *E.g.*, C.G.S.A. § 31-50a; C.G.S.A. §31-50b.

²*Kephart v. Hair Returns, Inc.*, 685 So. 2d 959 (Fla. 4th DCA 959). *But see Scarborough v. Lib. Nat'l Ins.*, 872 So. 2nd 283 (Fla. 1st DCA 2004) (stating failure to define term "solicit" allowed trial court to prohibit former employee from selling insurance to customers that followed him). Despite this discretion, agreements that focus on preventing the employee or partner leaving a medical business from soliciting the existing customers of the former business have been determined to be acceptable. *Cf. Univ. of Fla., Bd. of Trustees v. Sanal*, 837 So. 2d 512 (Fla. 1st DCA 2003).

³*See generally* § 542.335, Fla. Stat. (2011), applicable to noncompete agreements effective after 1996.

⁴*See generally* §§ 542.335(1)(d), (e), Fla. Stat.

⁵*See e.g., Advantage Digital Sys., Inc. v. Digital Imaging Svcs., Inc.*, 870 So. 2d 111,116 (Fla. 2d DCA 2003).

⁶Other causes of action, such as a breach of the duty of loyalty or violation of statute related to the protection of trade secrets, may also be at issue, but a noncompete agreement is a contractual matter. *See St. Johns Inv. Mgmt. Co. v. Albanese*, 22 So. 3d 728 (Fla. 1st DCA 2009) ("In employment agreements, as with all contracts, courts must apply the 'the most commonly understood meaning' with respect to the subject matter and circumstances of the contract.")

⁷*Cf. Tech. Aid Corp. v. Tomaso*, 814 So. 2d 1259 (Fla. 5th DCA 2002) (employee, but not new employer, who was not signatory to noncompete agreement, was required to arbitrate issue of breach).

⁸*See* § 542.335(1)(a), Fla. Stat.

⁹*Cf. Sanz v. R.T. Aerospace Corp.*, 650 So. 2d 1057, 1060 (Fla. 3d DCA 1995).

¹⁰*See* § 542.335(1)(h), Fla. Stat.

¹¹*See* § 542.335(1)(c), Fla. Stat.

¹²*See* § 542.335(1)(b), Fla. Stat.

¹³*Cf. Env. Svcs., Inc. v. Carter*, 9 So. 3d 1258, 1265-66 (Fla. 5th DCA 2009).

¹⁴*See* § 542.335(1)(c), Fla. Stat.

¹⁵*See* § 542.335(1)(c), Fla. Stat.

¹⁶*Healthcare Fin. Enter., Inc. v. Levy*, 715 So. 2d 341, 342 (Fla. 4th DCA 1998).

¹⁷*See generally* §§ 542.335(1)(d), (e), Fla. Stat.

¹⁸*Cf. Carnahan v. Alexander Proudfoot Co. World Headquarters*, 581 So. 2d 184 (Fla. 4th DCA 1991).

¹⁹*Id.*

²⁰*See T.K. Communications, Inc. v. Herman*, 505 So. 2d 484 (Fla. 4th DCA 1987).

²¹*Atomic Tattoos, LLC v. Morgan*, 45 So. 3d 63, 66 (Fla. 2d DCA 2010) (stating evidence presented at hearing included testimony of former employer that it researched whether the location population matched its customer base; that it considered factors such as age and income level to ensure it could be successful at the particular location; that it kept an extensive database of its customers, including how far they lived from the studio; and that this database illustrated that a majority of the former employers' clients lived within twelve to fifteen miles of any of its locations); *cf., Env. Svcs., Inc. v. Carter*, 9 So. 3d at 1265-66 (ample evidence offered to demonstrate that the former employees and their newly-created company were performing work for specific existing customers of former employer, including the transfer of many of the former employee's existing projects at former employer, which the court considered specific protected interests and not transient, distant clientele). *But see Gould & Lamb, LLC v. D'Alusio*, 949 So. 2d 1212, 1214 (Fla. 2d DCA 2007) (finding former employer's evidence insufficient to meet standard when employer "spoke in the briefest and most general terms of [former employer]'s desire to protect 'marketing plan, product plans, business strategies, financial information, forecasts, and the like'").

²²*See* § 542.335(1)(d)1, Fla. Stat.

²³*See* § 542.335(1)(d)3, Fla. Stat.

²⁴*See* § 542.335(1)(e), Fla. Stat.

²⁵*Cf. Henao v. Prof'l Shoe Repair, Inc.*, 929 So. 2d 723, 728 (Fla. 5th DCA 2006) (limiting noncompete agreement to term of service contract).

²⁶*Cf. Sarasota Beverage Co. v. Johnson*, 551 So. 2d 503 (Fla. 2d DCA 1989).

²⁷*Id.*

²⁸*Cf. Env. Svcs., Inc. v. Carter*, 9 So. 3d 1258, 1263 (Fla. 5th DCA 2009); *Santana Products Co. v. Von Korff*, 573 So. 1027 (Fla. 2d DCA 1991).

²⁹*Supinski v. Omni Healthcare, P.A.*, 856 So. 2d 526, 528 (Fla. 5th DCA 2003).

³⁰*Id.*

³¹*Id.*

³²*Open Magnetic Imaging v. Nieves-Garcia*, 826 So. 2d 415, 418-19 (Fla. 3d DCA 2002).

³³*Cf. Carnahan V. Alexander Proudfoot Co. World Headquarters*, 581 So. 2d 184 (Fla. 4th DCA 1991).

³⁴*Open Magnetic Imaging v. Nieves-Garcia*, 826 So. 2d 415, 418-19 (Fla. 3d DCA 2002).

³⁵*Id.* at 419; *see also Fla. Stat.* § 542.335(1)(b)5.

³⁶*Cf. Colucci v. Kar Kare Automotive Group, Inc.*, 918 So. 2d 431, 439-40 (Fla. 4th DCA 2006).

³⁷§542.335, Fla. Stat.

³⁸*E.g., Univ. of Fla., Bd. of Trustees v. Sanal*, 837 So. 2d 512 (Fla. 1st DCA 2003).

³⁹*Id.*

⁴⁰*See* § 542.335(1)(k), Fla. Stat.