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Question 2 What are some of the items to be aware of with regard to Non-Compete Agreements?

Answer:

AGREEMENTS in RESTRAINT OF TRADE

A Non-compete Agreement is a restraint of trade. Such restraints are disfavored in the law, but certain types restrictive covenants are tolerated. Before addressing the enforcement of Restrictive Covenants, it is important to distinguish between different types of covenants:

□ **TRADE SECRETS -**

You may agree to protect secret formulas, programs, processes, etc., for up to 10 years. Identify what you consider to be included.

□ **NON COMPETE -**

You may agree to prohibit people from competing for limited periods of time in limited areas. You may agree to protect certain "confidential business information" that does not rise to the level of a trade secret, such as a customer list.

□ **NON-SOLICIT -**

You may agree to prohibit people from soliciting your customers for limited periods of time. Define what you consider soliciting and define how customers can be identified at the time of any later dispute.

□ **NON PIRACY -**

You may agree to prohibit people from stealing your employees.

□ **CONFIDENTIALITY COVENANTS -**

Best laid out and included in a non-compete covenant, but may be separate. Although they often go hand in hand, they are not necessarily the same. If you want something in an agreement, Spell It Out. DO NOT presume it is included. All of the above tend to restrain trade. Agreements in Restraint of Trade are prohibited in the State of Florida, except as specifically permitted in exclusions to the statutes. Thus, it is important to read each statute carefully!

"Valid Restraints of Trade or Commerce."

(There are other relevant laws). This law tries to balance business' need to protect its investments against an individual's right to work and provide for his/her family. The law will not permit persons to contract away all competition. It will, however, permit them to contract against unfair competition. This particular statute was significantly revised in 1990 and again in 1996, so the date of an agreement is critical. The current law is quite detailed and permits enforcement of Restrictive Covenants (other than Trade Secrets, which are regulated separately) ONLY

1. if the employer can show Legitimate Business Interests AND
2. that the restraint it seeks is Reasonably Necessary to protect those interests. Consequently, there are two major hoops to jump through.

There is more than one way to skin a cat and you will likely need a Florida lawyer.

THE COURT WILL LOOK AT:

- The nature and scope of the agreement. Is it overbroad? (The court will not give you an elephant gun to kill a mosquito).
- Duration. The statute sets out reasonable time periods.
- Geographic Area. This must be reasonable and bear some relationship to your business.
- Position and function of employee. The mail boy is unlikely to present much of a threat.
- Length of employment. Long-term employees have more knowledge of your business and more substantial relationships with your customers.
- Extraordinary Training. What investment has the company made in the employee?
- Efforts at Secrecy. Did the company take special pains to protect or develop certain information or customer lists? You have no vested interest in what is apparent to any enterprising business. If anyone can target the same customers by use of the Phone book or County tax records, the Court will not prohibit others from soliciting them.
- Reasonableness. (Judicial Discretion) The court may choose not to enforce provisions it deems completely unreasonable. For instance, prohibitions that will be defined later and have no relationship to the employee's tasks.
- Scare Tactics. Financial Penalty clauses unrelated to real damages will not be enforced.

The statute sets out **rebuttable presumptions** as to time frames. A very boiled down summary of Florida law would look like this:

Restrictions with Former Employees -up to 2 years
Restrictions with Former Dealers, Franchisees, Licensees- up to 3 years
Restrictions on Seller of Business - up to 7 years

Unlike most other contracts, the Court has the power to modify non-compete provisions and enforce only so much of a covenant as it deems appropriate. For instance, the Court may feel that a prohibition against working in any computer software company is overbroad, but that a former employee should be restrained (enjoined) from a particular market such as hotel management software. Injunctions are controlled by special rules. TEMPORARY INJUNCTIONS will only be awarded where the Plaintiff seems likely to prevail at trial, and damage appears to be irreparable if the Defendant is not enjoined and the Plaintiff posts a bond.

There are numerous pitfalls or traps for the unwary, some arising from normal contract law, and some from a bias by the courts against any restraint on a person's right to earn a living.

Lastly, remember that attorney's fees are only awarded by Courts when they are provided for in a contract OR specifically provided for in a relevant statute. They are NOT automatic. Although, luckily, because Florida Statutes (at least as of 2006) regarding non-competition agreements do provide for attorney fees.

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