



Stopping the competition: What works and what's fair

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Covenants Not to Compete

- Should you have key employees sign?
 - Done before loss of contract
- Are they really enforceable?

Non-competition

- The solution:
 - Non-competition is more restrictive
 - Seeks to prevent employee from working in a particular field
 - Non-solicitation is less so
 - Seeks to prevent employee from soliciting clients or other employees

The Small Print

- 7.1. Non-Competition. The Employee hereby agrees that Employee shall not, during the Term and for a period of two (2) years after the Date of Termination, directly or indirectly, within any county (or adjacent county) in any State within the United States or territory outside of the United States in which the Company is engaged in business during the Term, engage, have an interest in or render any services to anyone or any business (whether as owner, manager, operator, licensor, licensee, lender, partner, stockholder, joint venturer, employee, consultant, advisor or otherwise) competitive with those services Employee performed for the Company during the Term.
- 7.2. Non-Interference. The Employee shall not, during the Term and for a period of two (2) years after the Date of Termination, directly or indirectly, take any action which constitutes an interference with or a disruption of any of the Company's business activities including, but not limited to, the solicitations of the Company's customers, distributors or vendors with which Employee had contact or dealing or persons listed on the personnel lists of the Company.
- 7.3. Non-Solicitation. Employee shall not, at any time while employed by the Company and for two (2) years after the termination of Employee's employment with the Company for any reason whatsoever, or for no reason, directly or indirectly (by assisting or suggesting to another, or otherwise) solicit, otherwise attempt to induce or accept the initiative of another in such regard, alone or by combining or conspiring with any employees, officers, directors, agents, consultants, representatives, contractors, suppliers, distributors, customers or other business contacts of the Company to terminate or modify its position as an employee, officer, member, manager agent, consultant, representative, contractor, supplier, distributor, customer or business contact with the Company or to compete against the Company.

The “You Should Have Read the Small Print” Letter

In that Agreement, you agreed to certain restrictions on your post-employment actions. Without waiving any provisions that you may have violated, we summarize the following obligations:

- 7.1. Non-Competition. Prohibiting you from directly or indirectly being employed by or providing services to any individual or entity, in the same or related capacity as you worked for the Company, whose business is in competition with the Company for a two-year period following the termination of your employment.
- 7.2. Non-Interference. Prohibiting you from taking any action that interferes with or disrupts of any of the Company’s business activities, including, but not limited to, the solicitations of the Company’s customers, distributors or vendors with which you had contact or dealing, or employees of the Company.
- 7.3. Non-Solicitation. Prohibiting you from directly or indirectly soliciting or providing services of the type offered by the Company to any customer or customer prospect of the Company for a two-year period following the termination of your employment, and prohibiting you from directly or indirectly recruiting any Company employee for a two-year period following the termination of your employment.

Public Policy

- Non-competition limits former employee from getting a new job
 - Must show “legitimate protectable business interest”
 - Could be use of confidential and proprietary information
 - Who owns “proprietary” information
 - Who owns the IP rights?
 - Is information really confidential?

Legitimate Protectable Business Interest

- Goodwill?
 - Protecting customer relationships
 - Traditionally sales people, financial advisor, doctor
 - Contractor with United States Government??
 - Public bidding
 - Key factors in selection are price and quality

Goodwill

- Hypothetical
 - Public information officer in Bosnia
 - Lead team of 40-60 expatriate and local personnel
 - Educate citizens on merit of privatizing state owned farms
 - Many years of experience; many contacts
 - Goodwill?

Goodwill (cont'd)

- Hypothetical 2
 - Trainers in Situation Awareness
 - Human behavioral analysis
 - Specialized training
 - Sole source contract
 - Legitimate protectable business interest?

Non-solicitation of Employees and Clients

- **Employees**: generally enforceable
 - Even with government contracts
 - Non-Displacement Rule
- **Client** (U.S. Government):
 - Depends on how well you define project

The Worker Adjustment and Retraining Notification Act (WARN ACT)

- Requires employers to provide employees 60 days' notice
 - Plant closing
 - Mass layoff
- Violation = Back pay and benefits

Exceptions to the 60-day Rule

- Unforeseeable business circumstances
- Faltering company
- Natural disaster

What Is Not Reasonably Foreseeable

- Sudden, dramatic, and unexpected action or condition outside the employer's control
- “A principal client's sudden and unexpected termination of a major contract with the employer . . . might be . . . considered a business circumstance that is not reasonably foreseeable.” (20 C.F.R. § 639.9(b)(1).)

What Is Not Reasonably Foreseeable

- *Carlberg v. Guam Industrial Services*, (D. Guam 2017)
 - Contractor operating ship repair facility loses contract
 - Told to vacate repair facility premises immediately
 - Employees terminated four days after receiving the notice
 - Employees file claim under WARN Act
 - Court denies summary judgment

- Ruling:
 - Question of fact existed as to whether sudden contract loss was foreseeable

Sequestration and WARN

- 2012 DOL guidance:
 - Unclear how long the furlough will last
 - No notice if furlough lasts less than 6 months
 - Unable to determine which contracts will be cut back
 - Would be sudden and dramatic if notice is less than 60 days

Questions



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