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WHAT EMPLOYERS AND EMPLOYEES SHOULD KNOW ABOUT CONFIDENTIALITY, NONCOMPETE AND NONSOLICITATION AGREEMENTS

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May an employer restrict employees from working for a competitor following termination? The answer is yes, so long as the employer has a protectable legitimate business interest. Whether your company is an employer seeking to restrict competition or you are an employee being asked to sign a noncompete agreement, it behooves you to understand when such agreements are enforceable and to consult with competent legal counsel first before requiring an employee to sign one or before you sign as an employee with your employer or prospective employer.

Many businesses in Florida use confidentiality, noncompete and nonsolicitation agreements to protect their confidential information and customer relationships. Of the three types of restrictive agreements, a confidentiality agreement is the least restrictive, the noncompete agreement is the most restrictive, and the nonsolicitation agreement is moderately restrictive. Each of these agreements seeks to restrict employees or former employees from participating in distinct activities.

A confidentiality agreement protects against the unauthorized disclosure of a company's confidential and proprietary information. Confidentiality agreements are enforceable in the state of Florida provided that they restrict only the unauthorized disclosure of truly confidential information. "Confidential information" means information that is not readily available in the public domain. Confidentiality agreements are generally not subject to specific duration requirements. Rather, a company's ability to enforce exists until the information is no longer confidential.[1]

A nonsolicitation agreement seeks to restrict a current or former employee from soliciting employees or customers of the company to leave the company and join or do business with a competitor. Nonsolicitation agreements typically have a post employment termination period of up to two years and they must be in writing.

[1] Note that confidentiality provisions that seek to prohibit employees from discussing their pay with each other generally violate the National Labor Relations Act.

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A noncompete agreement seeks to prohibit a current or former employee from competing with the company by opening a competing business or going to work for a competitor for a certain period of time. In Florida, noncompete agreements are governed by § 542.335, *Florida Statutes* and they must be in writing and signed. A company seeking to enforce a noncompete provision must establish that it has a protectable legitimate business interest. A protectable legitimate business interest includes things like trade secrets, substantial relationships with clients and good will.

If a company is seeking to protect an interest that does not comply with the requirement of the statute, a court will not enforce the restriction. Further, noncompete agreements are not enforceable if the sole purpose is to restrict generic competition. An example of a restriction on generic competition includes a provision that restricts a former employee from soliciting any person within a certain geographic region that might become a customer of the company in the future but with whom no current relationship exists.

Additionally, a company seeking to enforce a noncompetition restriction must also establish that the restriction is reasonable as to both geography and duration. Reasonableness is determined based upon the interest being protected.

A post-termination noncompete restriction in the employment context is presumed reasonable if the restriction is for six months up to two years. A post-termination noncompete restriction that exceeds two years is presumed unreasonable.[2]

Noncompete agreements are often drafted to include both confidentiality and nonsolicitation provisions. Even though all three restrictions may be included in one agreement, it is important to remember that each type of restriction seeks to protect a different business interest.

Are these types of restrictive agreements right for your business? Maybe. To determine whether any such agreement is appropriate, a risk analysis has to be completed that includes customer relationships, intellectual property, products and services. The higher the competitive risk, the more likely a company should consider requiring employees to sign noncompete agreements or, at a minimum, a confidentiality agreement. Note that noncompete agreements are not enforceable against every current or former employee. For example, rarely would a company have a legitimate business interest in restricting a former receptionist from going to work for a competitor. Further, an enforcement action to enforce a noncompete agreement against a former employee who had no access to confidential information, customer lists, or received no specialized training while employed would likely fail.

Because the stakes are high, noncompete agreements are litigated often in Florida. When deciding whether to require employees to sign these types of restrictive agreements, company management should seek the services of competent legal counsel and avoid the temptation to download such an agreement off of the Internet. Why? Because one size does not fit all and there is no guarantee that an agreement found on the Internet would comply with Florida law or even meet the needs of your company.

Lastly, companies that have implemented these types of agreements should have them reviewed periodically and updated to keep pace with this ever-developing area of the law.

[2] A longer restriction period is permissible in connection with the sale of a business and under certain circumstances a post termination restriction for longer than two years could be deemed reasonable.

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A note to the reader: This article is intended to provide general information and is not intended to be a substitute for competent legal advice. Competent legal counsel should be consulted if you have questions regarding compliance with the law.

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