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Protecting Your Company's Trade Secrets. The Balance Of Non-competes And Other Employee Restrictive Covenants

Non-competes and restrictive covenants are premised on the employer's desire and interests to protect their confidential information, trade secrets and success. From the company's perspective, they are looking to hire new people, continue growth and develop unique techniques and detailed customer lists. From the employee's perspective, they are trying to make a living, develop their skills and better themselves in the marketplace. However, the two collide when an employer wants to protect its business with a non-compete or other restrictive covenant and an employee wants to avoid restricting its future rights and potential job opportunities by executing such restrictive covenants.

Florida law generally states that covenants that restrain trade are invalid. However, that same statute and Florida case law does provide for the enforceability of such restrictive covenants to protect the confidential and proprietary information of an employer. It is a delicate balance that starts with the actual wording and drafting of the non-compete and restrictive covenant. The underlying document and business practice of the employer would govern the basic first test of validity for a non-compete. The Courts consider the "legitimate business interests" of the company in enforcing the non-compete. Typically, there are five business interests that are recognized:

1. Those trade secrets recognized under Florida's Trade Secret Act;
2. Valuable confidential information that does not qualify under Florida's Trade Secret Act;
3. Substantial relationships with prospective or existing customers;
4. Customer goodwill associated with a geographical location for trade; and
5. Extraordinary or specialized training.

These basic legitimate business interests should be incorporated properly into a written document executed by the employee to have an enforceable non-compete. Further, the non-compete must be reasonable in geographical area, restrictive trade/field (scope) and time. There are numerous misconceptions given regarding general principles that would make a non-compete unenforceable. By example, Florida law does not require the non-compete to be signed on the first day of the job; it may be signed anytime during the employment.

Typically, the first move by an employer after an employee has allegedly breached the non-compete restrictive covenant, is to write a demand letter setting forth the details surrounding the restrictive covenant, the breach of that restrictive covenant and demand that the former employee cease and desist all further breach of the agreement. Typically, it is in the best interests of the employer to act swiftly to enforce the non-compete by seeking emergency injunctive relief requesting that the Court enter an Order restraining the competition by the former employee temporarily until a final hearing on the matter.

Non-competes and restrictive covenants have their place in the market to protect most companies that have a legitimate technology advantage, invested substantial time in developing customer lists and/or provide specialized training to its employees. Employers should consider having a focused non-compete and restrictive covenant in order to protect its business interests and its valuable investment, while the employee should consider its future opportunities and not simply think that such agreements are not valid or will not be enforced. The employer should seek advice at its earliest convenience about how to properly protect its business through non-competes and other business methods, and an employee should seek advice prior to executing the non-compete or at least prior to leaving its current employment with a restrictive covenant and not wait until the cease and desist letter has been received.

Paul K. Silverberg is a shareholder at Silverberg & Associates, P.A. as the firm practices both Business Law (transactional) and Commercial Litigation, including representation of employers and employees in non-compete agreements and restrictive covenants. To contact Mr. Silverberg, call (954) 384-0998, e-mail to psilverberg@pkslegal.com or visit the firm website at www.pkslegal.com.