



BY ED TOBIN JR., ESQ.

Maynard, O'Connor, Smith & Catalinotto, LLP
 6 Tower Place • Albany, NY 12203 • 518 465-3553 • tobin@mosclp.com

Business Competition From Former Employees

So you've brought in a fledgling employee, provided training, gave access to your methods of operation, market and profitability data, access to all your clients/customers. Your employee excelled bringing in substantial revenues. Shortly thereafter the employee thinks: "Hey, I can go out there and do this myself, make lots of money, and not have to work for this schmuck any more." And that's exactly what happens – an all too common scenario. You hear that you can protect yourself with a non-compete agreement. You grab some boilerplate language and force all your employees to sign it. End of story?

Let's look at some of the ins and outs of these agreements. The first thing you should know is that non-compete agreements are generally disfavored by courts and are carefully scrutinized when enforcement is sought given what courts have deemed to be powerful considerations of public policy which facilitate against sanctioning the loss of one's livelihood. As such, the non-compete agreement has to be very carefully drafted. Typically the agreement prevents the employee from using a former employer's customers or customer lists, may restrict them from working in an area of the prior employer's business. This latter restriction, typically a 25 or 100 mile radius, can be enforceable, but will only be allowed by the courts when the restricted person is a professional providing very unique services, special skills. More generic type labor such as a sales representative, or ordinary laborer, will not be restricted. Also, if the restrictions are unreasonable, overreaching in scope, the court will not enforce them. I recently had a case where the non-compete agreement

prevented my client from working anywhere in the United States even though the company only did business in five states. That was found to be overreaching. Overreaching non-compete agreements can be subject to no enforcement at all. In other words, the courts may decide that it is not going to try to rewrite the agreement and define the competition area. However, the case law is mixed. Some courts are very willing to reinterpret the agreement and impose their own sense of fair play as to what the restriction should have been. Such levels of variation case to case, from judge to judge, make prediction of what could happen in any specific case for any specific client fairly difficult. The bottom line is that the tighter the agreement is drafted, the more likely it would be successfully enforced.

Really what you need to protect are your trade secrets, your marketing practices and your customers. Agreements preventing the solicitation of the customers of a former employer have been enforced but enforcement is variable. The more generic the customer, i.e., readily available in any phonebook, the harder it is to seek enforcement. Nor are the agreements unlimited in time, one or two years at most. For the departing employee, if clients/customers come to you, seek you out, as opposed to being solicited by you, you have a much better chance of keeping those customers and not having to pay the profits back to your former employer. Such customers should be willing to provide you with some sort of brief documentation that they were not solicited. For the employer, when the valued employee leaves, it's all

about the relationship that you have with your clients/customers and effective communications since you are free to contact your clients/customers anytime and with no penalty, maintaining and fostering the relationship.

A claim against a former employee may include the "faithless servant doctrine" arguing that the employee was engaged in activities in competition with the employer while still on the job and thus seeking to recoup, for example, commissions paid to the employee during that time frame. An employee merely getting their own business underway, not on company time, would not qualify under the doctrine. An employer may also have a claim for misappropriation of proprietary information, business secrets. However, case law has held that knowledge of the intricacies of a business corporation does not necessarily constitute a trade secret and customer lists are not necessarily secret and protected information where such customers are readily available from sources outside the former employer's business. On the other hand, a former employee's use of a proprietary process or method may be actionable.

The best step, whether you are the aggrieved employer or the employee about to head off on your own, is to seek legal intervention. Missteps abound either in inartful drafting of restrictive covenants which will later not be enforced, in whole or in part, or in engaging in inappropriate actions giving your former employee a valid claim that could have been prevented. Too often a client will come to me after the damage has been done.

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