

NONCOMPETITION AND NONSOLICITATION - STILL ALIVE AND WELL

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The enforceability of noncompetition and nonsolicitation agreements is consistently misunderstood by the general public. It is generally understood that a business owner may not be able to prevent a prior employee from competing against that business, but this concept is then mistakenly generalized to the premise that many other restrictions, such as soliciting customers, are also prohibited. Let's look at the difference between the two types of provisions.

California has a public policy against agreements which restrain trade or prohibit an individual from earning a living. Section 16600, et seq., of the *Business and Professions Code* sets forth certain provisions that prohibit noncompetition clauses except in certain instances. Those exceptions are very important and, in general, apply to the sale of a business and its goodwill, or the sale of the stock of a corporation or agreements among partners in buyout situations. The duration and territory in which the restriction can be enforced must be reasonable in nature.

On the other hand, other types of restrictions against competition, such as nonsolicitation agreements, have been enforced in many situations. One must keep in mind that the general rule is a prohibition against "unreasonable" restrictions with a total prohibition against competition generally held to be unreasonable except in those instances indicated above. Other, less restrictive types of prohibition, such as not soliciting a former employer's customers, have often been enforceable. It is a balancing act by the court and it must consider protecting the legitimate interests of the business owner and the hardship on the person upon whom the prohibition is being enforced, (as well as the general injury to the public since this business won't be selling) if the provision is enforced. As an example, if a business owner has been careful to clarify that the list of customers is confidential information which might be considered a "trade secret," or like one then there is a good chance the owner will be able to prohibit a departing employee from actively soliciting those customers. This would be accomplished through a

temporary restraining order which requires that a lawsuit eventually be filed seeking an injunction prohibiting the employee from soliciting such customers.

In what context do these matters arise, and to what should business owners and prior employees be alert?

(a) **New Employee.** When a business owner hires a new employee, the owner should inquire whether the employee and prior employer entered into any written agreements with regard to restrictions. The owner should inquire into the nature of the employee's prior occupation to determine if a trade secret or some restriction might be violated by the new employment.

The owner should have prepared in advance a written agreement requiring the employee to keep confidential all such information and trade secrets and, if appropriate, not to solicit customers for a reasonable period after termination. Such agreements should be executed upon the initial employment, since it is oftentimes difficult to have existing employees execute new agreements and, in some cases, they may not be enforceable without new consideration.

On the other hand, employees should try to avoid signing such agreements or otherwise limit their length and duration to reasonable terms.

(b) **On Termination of Employment.** The employee should especially be careful to analyze his or her situation before departing to determine whether he or she might be subject to any restrictions against soliciting former clients and customers. If necessary, some form of agreement can be entered into dealing with this matter so that all parties clearly understand their rights and obligations.

(c) **Leaving the Employment and Starting a New Business.** The employee who wants to strike out on his or her own should be especially careful while doing any advance planning not to violate his or her fiduciary obligation as an employee. Generally planning outside the workplace which does not affect the business is allowed, but actions such as advising a client of a pending departure is prohibited. ■