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Newsletter, January 2010 Non-Competition Agreements at 100mph

In this newsletter I give you a 100mph overview of non-competition agreements. You might try to use a non-competition agreement to stop your employees, contractors and others from competing against you. To give you my conclusion up-front, CA law generally voids a non-compete agreement, but permits you to use trade secret protections to stop unfair competition.

California Law Generally Voids Non-Compete Agreements.

The law of non-competes in California is simple on its face – a contract by which one is restrained from engaging in a lawful trade or business is to that extent void (CA B&P §16600). That is, a contract is void if it prohibits one from engaging in a particular industry. The law applies to all types of relationships, including employer / employee, client / contractor and franchisor / franchisee.

In-Term and After-Termination Non-Competes.

A non-compete can apply during the term of the relationship (“in-term”), and/or after termination of the relationship (“after-termination”). For example, the non-compete can try to restrict a contractor’s competition while he is under contract, and after termination of the contract. CA law is slightly different for in-term and after-termination non-competes.

In-Term. CA law on in-term non-competes is as clear as mud. CA courts will void an in-term non-compete if it cuts off competition in a “substantial share of a business, trade or market.” This is a fact-driven determination and it is impossible to predict the outcome of any given case.

After-Termination. Most non-compete cases occur after-termination of the employment or contractor relationship, when the former employee or contractor tries to stay in the industry on his own. CA law will void nearly every non-compete that applies after termination of the relationship.

Don’t Be Too Aggressive -- Clients frequently tell me they want the non-compete agreement to scare the employee or contractor, even though the client knows it’s unenforceable. This is not smart.

CA courts have permitted punitive damages against companies that are overly aggressive in their use of non-competes.

The Big Backdoor - Trade Secrets

When your non-compete fails, use trade secret law for protection. Even though CA courts void non-competes, they protect trade secrets. You can use trade secret law to stop unfair competition, that is, prevent the employee or contractor from using your business methods and other secret information to compete against you.

A trade secret is information that is secret and that has competitive value. Any information can be a trade secret so long as it meets these two requirements – secrecy and value. The formula for Coca-Cola is the classic example of a trade secret. Other information can be a trade secret too, for example, a customer list. A customer list can be a trade secret if the information is not easily obtained from public sources (e.g. a phone book) and contains valuable information developed through effort and expense (such as customer preferences and purchasing tendencies).

If your employee or contractor plans to compete against you, he might use your trade secrets to do so. It might be hard for him to start over completely from scratch. This is especially true if you taught him how to do business in the first place or you introduced him to all the important contacts in the industry. CA law will stop the employee or contractor from using your trade secrets against you. This in turn will help prevent him from unfairly competing against you.

That's it for my short overview of non-competition agreements. California law on this subject is very complex, however. You need a competent business attorney to help you. Call me if you want to talk about this subject more.

Ideas

Perhaps instead of teaching manners, parents should teach the statistical probability that the person you are speaking to is just as good as you are. It is difficult to believe this; very few of us do, in our instincts, believe it. One's own ego seems so incomparably more sensitive, more perceptive, wiser and more profound than other people's. –*Bertrand Russell*

Rudeness is the weak man's imitation of strength. –*Eric Hoffer*

It is often easier to fight for principles than to live up to them. –*Adlai Stevenson*

Gore Vidal Quotes

A narcissist is someone better looking than you are.

The four most beautiful words in our common language: I told you so.

Style is knowing who you are, what you want to say, and not giving a damn.

We do not want the old to be sharper than we. It is bad enough that they were there first, and got the best things.

Never have children, only grandchildren.