



Non-Compete & Non-Solicitation Agreements – Are They Enforceable? *By Lauraine Bifulco*

Non-Competes Generally Invalid in California

Legal developments continue to make it increasingly difficult to enforce non-compete agreements for employees in California. Most other states allow employers to use non-compete agreements to prohibit employees from going to work for competitor firms. However, The California Business and Professions Code Section 16600 makes such agreements invalid in many cases, stating that “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is void.” The California courts have generally agreed and have ruled that non-compete language which takes the form of a statement barring the employee from taking a job with a competitor is a violation of public policy. Additionally, in a recent decision, the courts threw out the concept of “inevitable disclosure,” which argued that by the very nature of certain companies and industries, an employee could not go work for a competitor firm without inevitably

disclosing his/her prior employer's trade secrets. The court found the doctrine incompatible with California law.

Recent Case Law

In the case of D’Sa v. Playhut, the employee in question was terminated for his refusal to sign a confidentiality agreement that contained a non-compete clause. A California Court of Appeals rejected the company’s argument that the non-compete agreement represented a restraint against the disclosure of their trade secrets. In addition, the confidentiality agreement contained a “severability” provision that said if any part of the agreement was invalid, the other portions remained enforceable. Playhut argued that even if the non-compete clause was invalid, the remainder of the confidentiality agreement was still enforceable and as such D’Sa’s refusal to sign was grounds for termination. The Court disagreed and said that the signing of any employment agreement which contains an unenforceable covenant not to compete cannot be made a

condition of continued employment.

Many employers still require employees to sign such agreements. With this recent decision, employers need to consider two important issues. Not only are many non-compete agreements unlikely to be legally enforceable, but firing an employee who refuses to sign one may subject the company to a costly wrongful termination suit.

Non-Solicitation

With regards to non-solicitation agreements, the law is somewhat more unclear. An employee has the right to notify customers that he/she is leaving the employ of his company before the actual time of the termination. However, the employee may not solicit his/her employer’s customers while still employed by the company. What actually constitutes “solicitation” is subject to interpretation on a case-by-case basis. After an employee is no longer employed by the company, he/she is generally free to solicit the business of the former

employer's customers for whom such employee had previously provided services, so long as he/she does so without using the former employer's trade secrets. The definition of what constitutes "trade secrets" is where additional uncertainty arises. Generally, a trade secret is information that is closely guarded by the company, cost the company a considerable amount of effort and expense to develop, and is not generally available to the public. In some cases, an employer's customer lists may be considered trade

secrets. As such, an employer might be able to enforce a non-solicitation agreement that prevents former employees from using the company's customer lists to solicit their business.

If your company wants to establish or revise a non-compete or non-solicitation agreement, it would be advisable to seek the assistance of an HR professional or an attorney experienced in this area of the law.

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Lauraine Bifulco is President of Vantaggio HR, a full-service human resource and management consulting firm headquartered in Southern California with offices in Atlanta, GA and Tampa, FL. Vantaggio's services include: HR outsourcing, labor law compliance, employee handbooks, HR hotline, on-site HR services, performance reviews, new employer set up, new hire paperwork, employment posters, employee discipline & terminations, training & development, software vendor evaluation, sexual harassment programs, recruiting, HR audits, compensation planning, payroll administration, bookkeeping services, employee benefit & retirement plans, safety, affirmative action plans, labor commissioner complaints, expert witness testimony, organizational development, merger & acquisition consulting. For more information call (949) 425-1262 or email: info@VantaggioHR.com.