

MAY 2006

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## PLEASE JOIN US FOR AN EMPLOYMENT LAW SEMINAR MAY 19, 2006

Due to the tremendous response to our recent Employment Seminar, the Houston office of Gordon & Rees, LLP is pleased to announce an encore presentation of its Employment Law Seminar to be held on Friday, May 19, 2006, from 8:30 a.m. to 11:30 a.m., at the offices of Gordon & Rees LLP, 1900 West Loop South, Suite 1100, in Houston. Breakfast will be provided. Cutting edge presentations will be given, including the following:

### Employment Cases at the Courthouse: What are the Recent Trends?

- Learn about the most common employment claims
- Current verdicts and judgments against employers
- Procedural trends in limiting liability for employers

### How to Prevent Wrongful Termination Claims

- Overview of wrongful termination claims
- Evaluate your exposure
- Tips to avoid liability

### Non-compete Agreements: What You Need to Know

- Learn why you need Non-Compete Agreements for your Employees
- Are your Non-Compete Agreements enforceable?
- Learn how to handle hiring employees with prior Non-compete Agreements

### Sexual Harassment Update

- Find out the latest in this evolving area of the law
- Learn how to protect yourself and your company from harassment charges and lawsuits

There is no charge for this seminar; however, space is limited and reservations are required, so please contact our Office Manager, Alissa Brackin at (713) 490-4815 to reserve a spot today!

**\*CPE Credit hours are available for CPA's in attendance.\***

## NON-COMPETITION AGREEMENTS: PROTECTING YOUR COMPANY'S LIFE BLOOD

BY GLENN LEMAY



A growing and loyal customer base is the “life blood” of any company. When employees leave your company, they take with them not only the knowledge of how your business successfully competes in the marketplace, they take with them years of relationships with your customer base. If

an employee leaves your employment with the intention of taking another job in a company competing against your company, by leveraging *your* customers’ comfort and confidence in having dealt with them, your company risks losing some (or potentially a large part) of its customer base. The good news is that your company can protect against this risk through the use of non-competition agreements.

Non-competition agreements are designed to restrain ex-employees from competing against your company, for a specified time period (usually 1-3 years, depending on the business), and in a defined geographic area (usually the market area from which your company actively draws customers). In order to gain this protection, your company needs to have in place (1) written agreements signed by the employees, (2) which are executed at the appropriate time, and (3) which contain properly worded and enforceable non-compete language.

Texas law generally disfavors such restraints, as they tend to inhibit citizens’ free choice in pursuing career and employment opportunities. However, where certain stringent requirements are met, the law permits non-competition agreements. As a result of these stringent requirements, the wording of non-competition agreements is critical to their enforceability.

To be enforceable, a non-competition agreement must contain (1) a non-compete covenant, which is (2) ancillary to or part of (3) an “otherwise enforceable agreement,” (4) at the time the agreement was made. Texas statutes fail to define what is meant by the term “otherwise enforceable agreement,” or by the term “ancillary.” Generally, where the agreement contains an express promise by the employer to convey trade secrets and/or confidential information (“TS/CI”) to the employee, and also contains a return promise by the employee not to disclose or use such information during or following employment, those promises will be deemed to be an “otherwise enforceable agreement” which is “ancillary to” a non-compete covenant.

Perhaps the most common enforceability issue concerns the proper wording of the employer’s promise to provide TS/CI to the employee, where an “at will” employment relationship exists. Under Texas law, all employment relationships are presumed to be “at will,” meaning that either party can terminate the employment relationship at any time for any reason (or no reason). This “at will” presumption does not apply, however, where the parties enter into a written employment agreement which limits either of the parties’ rights to terminate the relationship.

Where an employment agreement provides that the employer has the right to terminate the employee without reason (or “cause”), then the employer’s written promise to provide TS/CI to the employee may be considered “illusory,” causing the non-competition agreement to be declared unenforceable. The courts reason such a promise is “illusory” because, in an “at will” relationship, the employer has the option at any time to terminate the relationship in lieu of providing the TS/CI to the employee. Where the employment relationship has been determined to be “at will,” some courts require that the written promise by the employer expressly provide that the employer will provide the TS/CI to the employee “immediately upon execution of” the written agreement.

Another common enforceability issue concerns the timing of the execution of the non-competition agreement. To be enforceable, the employer must actually provide the TS/CI to the employee after the non-competition agreement is signed by the parties. Where the employee executes the non-competition agreement after being employed by the employer for some period of time, enforceability will turn on whether the employee was already provided the TS/CI prior to signing the non-competition agreement. If so, the court may find that the employer's promise to provide TS/CI to the employee was an empty promise (i.e., a promise for something already given), resulting in an unenforceable non-competition agreement. However, where the employer can demonstrate that it provided new, additional TS/CI to the employee following execution of the non-competition agreement, the fact that the agreement was not signed at the inception of the employment relationship will not be fatal to enforceability.

Non-competition agreements involving physicians require additional clauses for enforceability, including the provision of a "buyout" clause, providing that the physician can cancel the non-competition agreement by paying the employer a stated sum of money, which the law requires must be a "reasonable" amount. In addition, other clauses must be included which provide the physician access to, and the right to obtain copies of, certain patient records.

In all cases, an enforceable non-competition agreement must contain restraints as to scope of activity, time, and geographic area, which must each be reasonable. Courts determine the reasonableness of restraints on a case-by-case basis, by evaluating the market areas from which the company draws its customers, the time required to acquire new customers (including bidding cycles), and the types of duties and responsibilities the employee had with the company. If all three restraints (scope, time and geographic area) are not included in the non-competition agreement, the agreement is unenforceable. Where the restraints are included, but the court determines that one or more of the restraints is "unreasonable," the agreement will remain enforceable, but the court

modify any such "unreasonable" restraint so that it is reasonable and does not impose a greater restraint on the ex-employee than is necessary to protect the goodwill and other business interests of your company.

Because of the pitfalls surrounding the enforceability of non-competition agreements, it is important that your company have in place non-competition agreements which are properly drafted. With properly drafted and enforceable non-competition agreements in place, your company will not only protect its customer goodwill, it will minimize problems involving the use of the company's TS/CI by ex-employees.

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