

# OUTLINE OF COVENANTS NOT TO COMPETE

**Stewart S. Manela**  
**Arent Fox**  
**Washington, D.C.**

**Arnold H. Pedowitz**  
**New York City**

## **I. FUNDAMENTAL EMPLOYEE RIGHTS**

- A. Absent a covenant not to compete or breach of a confidential relationship, employees may plan to compete with their employer while still in its employ, and an employee is free to leave his employment and enter into competition with his former employer. *Metal Lubricants Co. v. Engineered Lubricants Co.*, 411 F.2d 426, 429-30 (8th Cir. 1969).

## **II. PROTECTABLE INTERESTS OF EMPLOYERS**

- A. An employer has the right to protect its established business including its customers, secrets, and other compilations of information.
1. When the character of a business and the nature of one's employment require the law to protect the established business against competitive activities by one who has become familiar with it through employment, restrictions that are reasonably necessary to protect the employer are valid. *Robert S. Weiss & Assocs. v. Wiederlight*, 208 Conn. 525; 546 A.2d 216 (1988); *May v. Young*, 125 Conn. 1, 6-7, 2 A.2d 385 (1938).
  2. An employer has a protectable interest against a former employee's competition by improper and unfair means, but not against ordinary competition by a former employee. *Vlasin v. Loen Johnson & Co.*, 235 Neb. 450, 455 N.W.2d 772, 776 (1990).
- B. Covenants not to compete will be enforced to prevent the misuse of employer trade secrets, customer routes, client lists, and established customer relationships. *Intelus Corporation v. Barton*, 7 F. Supp. 2d 635, 638 (D. Md.1998); *Becker v. Bailey*, 268 Md. 93, 299 A.2d 835, 838 (1973).
1. Employer protectable interests include trade secrets, customer contacts, and other confidential information. *Paramount Termite Control v. Rector*, 238 Va. 171, 380 S.E.2d 922, 925 (1989); *John G. Bryant Co. v. Sling Testing & Repair*, 471 Pa. 1, 8, 369 A.2d 1164 (1977); *Cape Mobile Mart v. Mobley*, 780 S.W.2d 116, 118 (Mo. App. 1989).

- a. An employer a need to protect trade secrets must demonstrate that it has taken steps to ensure the information's secrecy. Courts will hesitate to recognize claims that confidential information must be protected from disclosure by former employees if a company fails to adopt internal policies concerning confidentiality, nondisclosure, or noncompetition, and fails to convey to employees the confidential nature of the information it claims to be secret, or does not enforce any security measures that exist. *Omega Optical, Inc. v. Chroma Technology Corporation*, No. 1999-566 (April 12, 2002)
  - b. An employer has a protectable interest in at least current customers, if not all past customers. *Ellis v. James V. Hurson*, 565 A.2d 615 (D.C. 1989).
2. *Rogerscasey Inc. v. Nankof*, S.D.N.Y., No. 02 Civ. 2599 (April 23, 2002 S.D. N.Y.) (computer programs developed by investment advising firm qualify as trade secrets, but knowledge of clients' investment philosophy and strategy does not).
- C. Covenants in restraint of trade are not favored, will be strictly construed, and in the event of an ambiguity, will be construed in favor of the employee. *Richardson v. Paxton Co.*, 203 Va. 790, 795, 127 S.E.2d 113, 117 (1962). Employer bears the burden to show that the restraint is no greater than necessary to protect a legitimate business interest, is not unduly harsh or oppressive in curtailing an employee's ability to earn a livelihood, and is reasonable in light of sound public policy. *Roanoke Engineering Sales Co., Inc. v. Rosenbaum*, 223 Va. 548, 552, 290 S.E.2d 882, 884 (1982).

### III. STATUTORY RESTRICTIONS

- A. A number of jurisdictions have enacted legislation limiting the right of employers to restrain competition.
  1. The scope of some such legislation reaches all employers in the state, *see, e.g.*, CALIFORNIA BUSINESS & PROFESSIONAL CODE § 16601; FLORIDA STATUTES ANN. § 542.33; NEVADA REVISED STATUTES, § 613.200; OREGON REVISED STATUTES § 653.295; TENNESSEE CODE ANN. § 47-25-101; WISCONSIN STATUTES ANN. § 103.465.
  2. Other states focus upon specific professions or circumstances, *see, e.g.*, ALABAMA CODE § 8-1-1 Contracts Restraining Business Void (professionals); COLORADO REVISED STATUTES § 8-2-113(3) (physicians); MASS. GEN. LAWS CH. 112, § 12X, (prohibits imposition of covenant not to compete on physician who leaves established practice) OKLAHOMA STATUTES, Title 15, § 218 (sale of business).

- B. The Uniform Trade Secrets Act, adopted in many jurisdictions, prohibits misappropriation of trade secrets by wrongful means, and defines trade secrets which employers may protect as information that derives value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means, by other persons who can obtain economic value from its disclosure or use, and which is the subject of reasonable efforts to maintain its secrecy.

#### IV. CONSIDERATION FOR ENFORCEABLE COVENANTS

- A. A covenant must have consideration flowing to the party agreeing not to compete. *Sherman v. Pfefferkorn*, 241 Mass. 468, 135 N.E. 568 (1922).
- B. Accepting employment at-will is sufficient consideration to support a restrictive agreement by an employee. *Morgan's Home Equip. Corp. v. Martucci*, 390 Pa. 618, 136 A.2d 838, 846 n.14 (1957).
- C. There is a divergence of views on whether a covenant to compete must be signed at the beginning of the employment relationship in order for it to be supported by consideration and enforceable.
  - 1. Some jurisdictions hold that even though an employer makes no mention of any restriction on post-employment competition, a covenant signed after the employment commenced provides sufficient consideration for an enforceable covenant. *See, e.g., Herr v. Heiman*, 75 F.3d 1509, 1514-15 (10<sup>th</sup> Cir.1996); *Ellis v. James V. Hurson*, 565 A.2d 615, 620 (D.C. 1989)(substantial period of employment following signing of covenant); *Paramount Termite Control*, 380 S.E.2d at 926; *Marine Contractors Co. v. Hurley*, 365 Mass. 280, 310 N.E. 2d 915 (1974)(subsequent covenant is ancillary to original employment contract); *Arthur Young & Co. v. Galasso*, 142 Misc.2d 738, 538 N.Y.S.2d 424, (Sup. Ct. 1989); *Puritan-Bennett Corp. v. Richter*, 8 Kan.App.2d 311, 657 P.2d 589, 591 (1989).
    - a. Since the employment at-will relationship is mutual and either party can terminate it any time, there is no reason to distinguish between the employee's consent to continue under new terms from the employer's consent not to terminate unless the employee accepts the new terms. *See Simko, Inc. v. Graymar*, 55 Md. 561, 567, 464 A.2d 1104 (1983).
  - 2. Other jurisdictions hold that an agreement not to compete that is not included in the original employment agreement, but added subsequently in a contract for continuance of employment, is void for lack of consideration. *Universal Hosp. Serv. Inc. v. Henderson*, D. Minn., No. 02-951, 5/20/02 (denying employer's request for restraining order to prevent former employee from working for competitor, finding non-

compete agreement may be invalid because not signed until five days after employment commenced); *Pacific Veterinary Hosp. v. White*, 72 Or.App. 533, 696 P.2d 570, 573 (1985), citing 1983 OREGON LAWS CH. 828, § 1; *Morgan Lumber Sales Co. v. Toth*, 41 Ohio Misc. 17, 321 N.E.2d 907 (1974).

- a. A non-competition agreement signed after an employee has begun working can be sustained only if supported by independent consideration. *Insulation Corporation of America v. Brobston*, 446 Pa. Super. 520, 529; 667 A.2d 729, 733 (1995); *Satellite Indus. v. Keeling*, 396 N.W.2d 635, 639 (Minn.App. 1986).
  - b. Continuation of employment is not sufficient consideration for a covenant despite the fact that the employment relationship was terminable at-will. *George W. Kistler, Inc. v. O'Brien*, 464 Pa. 475, 347 A.2d 311, 316 (1975).
- D. A beneficial change in an employee's status is sufficient consideration to support a restrictive covenant agreed to after employment commences. *M.S. Jacobs & Assocs. v. Duffey*, 452 Pa. 143, 303 A.2d 921, 922 (1973).

## V. REASONABLE RESTRAINTS

- A. If a restrictive covenant is supported by adequate consideration and is ancillary to an employment agreement, an employee's agreement not to compete against his employer upon leaving employment will be upheld if the restraint is confined within limits which are no wider as to area and duration than are reasonably necessary for the protection of the business of the employer and do not impose undue hardship on the employee or disregard the interest of the public. *Concord Orthopaedics Professional Association v. Forbes*, 142 N.H. 440, 444-45; 702 A.2d 1273 (1997); *Smith, Batchelder & Rugg v. Foster*, 119 N.H. 679, 406 A.2d 1310, 1312 (1979); *Becker v. Bailey*, 268 Md. 93, 299 A.2d 835, 838 (1973); *Knoebel Mercantile Co. v. Siders*, 165 Colo. 393, 439 P.2d 355, 358 (1968).
- B. Section 186 of the RESTATEMENT (SECOND) OF CONTRACTS provides that a promise is unenforceable on the grounds of public policy if it is unreasonably in restraint of trade.
  1. A promise is in restraint of trade if its performance would restrict the promisor in the exercise of a gainful occupation. Such promises are unreasonable if they are greater than needed to protect the employer's interests or the employer's need is outweighed by the hardship to the employee or the likely injury to the public. RESTATEMENT § 188. See *Ellis v. James V. Hurson*, 565 A.2d 615, 618 (D.C. 1989).
  2. Courts will consider the surrounding circumstances, including the nature of the employer's business, the subject matter, the purpose served, and the

situation of the parties. *A.B. Chance Co. v. Schmidt*, 719 S.W.2d 854, 857 (Mo.App.1986). Virginia courts examine the legitimate, protectable interests of the employer, the nature of the former and subsequent employment of the employee, whether the actions of the employee actually violated the terms of the non-compete agreements, and the nature of the restraint in light of all the circumstances of the case. *Modern Environments, Inc. v. Stinnett*, Record No. 011268 (Va. April 19, 2002).

3. Some of the factors considered in determining the enforceability of a covenant not to compete include whether the employee is an unskilled worker whose services are not unique; whether the covenant is necessary to prevent the solicitation of customers, disclosure of trade secrets, or use of assigned routes or customer lists; and whether there is any exploitation of personal contacts between the employee and customers. *Budget Rent A Car of Washington v. Raab*, 268 Md. 478, 302 A.2d 11, 13 (1973).

C. Lack of durational and geographic limitations renders a covenant void. *Ackerman V. Kimball International, Inc.*, 634 N.E.2d 778, 781-82 (Ind. App. 1994); *College Life Insurance Co. of America v. Austin*, 466 N.E.2d 738 (Ind.App. 1984). *Prudential Ins. Co. v. Sempetreat*, 171 Ill.App.3d 810, 525 N.E.2d 1016, 1020 (1<sup>st</sup> Dist. 1988).

## **VI. REASONABLE GEOGRAPHIC RESTRAINTS**

A. Where the employer's clientele consists of the general public, it is ordinarily reasonable to devise the geographic restraint in terms of the employer's normal market. *Moore v. Dover Veterinary Hosp.*, 116 N.H. 680, 367 A.2d 1044, 1048 (1976).

B. When the primary concern is the employee's knowledge of customers, the territory should be limited to areas in which the employee made contacts during his employment. *Manpower of Guilford County v. Hedgecock*, 42 N.C.App.515, 257 S.E.2d 109, 114 (1979).

1. A court will accept as *prima facie* valid a covenant related to the territory where the employee was employed as a legitimate protection of the employer's investment in customer relations and good will, but not where the employer does business because the employer wants to avoid competition with the employee in that area. *W. R. Grace & Co. v. Mouyal*, 262 Ga. 464, 466; 422 S.E.2d 529, 532 (1992); *Howard Schultz & Assocs. v. Broniec*, 239 Ga. 181, 236 S.E.2d 265, 268 (1977).

## **VII. REASONABLE TEMPORAL RESTRAINTS**

A. The reasonableness of the temporal limitation depends upon the time required to obliterate in the minds of customers the identification formed during the period of

employment. *Pollack v. Calimag*, 157 Wis.2d 222, 458 N.W.2d 591, 599 (Wis. App.1990).

1. The higher in management and the more key and important the functions performed by the employee, the longer the time which could be justified for a non-competition covenant. *Mathieu v. Old Town Flower Shops*, 585 So. 2d 1160, 1161 (Fla. App. 1991); *Dorminy v. Frank B. Hall*, 464 So.2d 154, 158 (Fla.5th Dist Ct. App. 1985).

### **VIII. COVENANTS NOT TO SOLICIT CUSTOMERS**

- A. Customers developed by a sales employee are the property of the employer and may be protected by a contract under which the employee is forbidden from soliciting those customers for a reasonable time after terminating employment. *Whitaker Gen. Medical Corp. v. Daniel*, 324 N.C. 523, 379 S.E.2d 824, 826 (1989).
- B. A covenant will be valid if it restricts a former employee from soliciting the former employer's clients or accounts with whom the former employee actually did business or had personal contact. *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751, 756 (1987).
- C. Activity covenants designed not to prohibit competition, but to protect the employer's relationships with customers, do not require geographical limitations. *McRand, Inc. v. Van Beelen*, 138 Ill. App.3d 1045, 486 N.E.2d 1306, 1315 (1985); *Chapman & Drake v. Harrington*, 545 A.2d 645, 648 (Me. 1988); *Ellis v. James V. Hudson*, 565 A.2d 615, 620 (D.C. 1989).
- D. However, a covenant preventing any contact with any person who was a customer or client of a former employer may be deemed too broad and beyond any legitimate business interest.
  1. Similarly, an employer may be unable to demonstrate a legitimate business interest that is served by prohibiting a former employee from being employed in *any capacity* by a competing company. *Modern Environments, Inc. v. Stinnett*, Record No. 011268 (Va. April 19, 2002).
- E. Direct or indirect solicitation of customers may legitimately be prohibited, not casual contact with them. *Professional Liability Consultants, Inc. v. Todd*, 122 N.C. App. 212, 217, 468 S.E.2d 578 (1996).

### **IX. BLUE PENCILING**

- A. A restraint that otherwise meets a state's standards for enforceability may be denied enforcement if it is not confined within limits which are no wider as to area and duration than are reasonably necessary for the protection of the business of the employer.

- B. Many courts will modify overly broad restrictions by making them more narrow, rather than striking them in their entirety.
- C. Different approaches are taken by the courts in such circumstances.
  1. Some courts will "blue pencil", or cross out, the overbroad provision, and, if the agreement is otherwise reasonable without the excised portion, the agreement will be enforced. *Holloway v. Faw, Casson & Co.*, 78 Md. App. 205, 552 A.2d 1311, 1324 (1989), *aff'd in part and rev'd in part*, 572 A.2d 510 (Md., 1990).
  2. Other courts will actually revise the temporal or geographic restrictions agreed to by the parties.
  3. Still others will revise the prohibited conduct.
- D. In Illinois, courts have the discretion to modify covenants, but will not where to do so would be to create a new contract between the parties. *Lawrence and Allen, Inc. v. Cambridge Human Resource Group, Inc.*, 292 Ill.App.3d 131, 685 N.E.2d 434, 226 Ill.Dec. 331 (Ill.App. 2 Dist., 1997).
- E. In Iowa the court will impose a narrow enforcement of an otherwise broad restriction. *Moore Business Forms, Inc. v. Wilson*, 953 F.Supp. 1056, 1064 (N.D.Iowa, 1996).
- F. In New York courts can revise overly broad non-compete agreements to encompass only that conduct as to which a former employer has a legitimate interest in protecting. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 690 N.Y.S.2d 854, 712 N.E.2d 1220 (N.Y., 1999)(clause interpreted to allow accountant to solicit clients who came to firm because of his personal efforts and clients of the firm that he did not service to any significant extent while at the firm).
- G. Vermont will modify an otherwise overbroad clause. *A.N. Deringer, Inc. v. Strough*, 103 F.3d 243 (2d Cir., 1996).
- H. Maryland takes a flexible approach: if the covenant as a whole evidences an intention to place an unreasonable and oppressive restraint on the employee, the entire covenant will be invalidated; but if the covenant does not evidence such intent, though unreasonable, the court will modify the terms to align the parties' reasonable expectations with the requirements of the law. *Holloway*, 552 A.2d at 1327.
- I. Courts in the District of Columbia have enforced only portions of restrictive covenants, where severable from unreasonable portions and where the covenant is obtained in good faith. *See, e.g., Ellis v. James V. Hudson Assoc.*, 565 A.2d 615 (D.C.App., 1989).

- J. In Florida the Covenant Not to Compete Statute, FLA. STAT. ANN. § 542.335, states that

If a contractually specialized restraint is overbroad, overlong or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests.

**X. EFFECT OF TERMINATION**

- A. Some states deny enforcement following a termination.
1. Such courts typically look to see whether the termination was for cause or not.
  2. They also focus on the text of negotiated language.
  3. In some jurisdictions, courts will not enforce a restraint included in an employment agreement if the employer materially breaches that agreement in terminating the employee.
  4. In other jurisdictions, courts will not enforce restraints against employees terminated without cause.
- B. By statute the discharge of an employee without cause or in violation of a contract or other legal obligation is a factor for the courts to weigh when considering whether or not to enforce a covenant in Georgia. Ga. Code Ann. § 13-8-2.1 (Michie Cum. Supp. 1995).
- C. The courts in Indiana will enforce a covenant whether or not an employee is terminated for cause. *Gomez v. Chua Medical Corp.*, 510 N.E.2d 191 (Ind.App. 3 Dist., 1987).
- D. Mississippi will not enforce a covenant where the termination was arbitrary, capricious, or in bad faith. *Empiregas, Inc. of Kosciusko v. Bain*, 599 So.2d 971 (Miss., 1992).
- E. In New Jersey the material breach of an employment agreement by an employer will preclude enforcement of a covenant not to compete. *Platinum Management, Inc. v. Dahms*, 285 N.J.Super. 274, 666 A.2d 1028 (Law Div., 1995).
- F. In Pennsylvania the circumstances of the termination are an important factor to consider in determining whether or not to enforce a covenant. *Insulation Corp. of America v. Brobston*, 667 A.2d 729 (Pa.Super., 1995).

- G. In Maryland, the few cases to address this issue have suggested that enforcement would not be appropriate where the employer terminates the employee. *See, e.g., Ruhl v. FA Bartlett Tree Expert Co.*, 245 Md. 118 (Md., 1967).
- H. In the District of Columbia, the nature of, or reasons for, the termination can affect the enforceability of a restraint. *See, e.g., Gryce v. Lavine*, 675 A.2d 67 (D.C.Ct. App., 1996).
- I. An employer's breach of the employment contract will preclude enforcement of a non-compete in Missouri, Arkansas and New York. *Alexander & Alexander, Inc. v. Feldman*, 913 F.Supp. 1495 (D.Kan., 1996); *Colonial Life & Acc. Ins. Co. v. Sisco*, 1999 WL 328903 (Ark.App., 1999); *International Business Machines Corp. v. Martson*, 37 F.Supp.2d 613, (S.D.N.Y., 1999); *In re UFG Intern., Inc.*, 225 B.R. 51 (Bankr. S.D.N.Y., 1998) (court rejected argument that employer's poor financial condition constituted "cause" noting that employer's willingness to provide employment, absent a cause termination, was essential element for enforceability, and employer's failure to give required notice before termination constituted breach). However where the employee is discharged for cause the covenant not to compete will be enforceable. *Borne Chemical Company v. Dictrow*, 85 A.D.2d 646, 445 N.Y.S.2d 406 (2d Dept., 1981).
- J. Courts applying Virginia law have enforced restraints following the termination of employment. *See, e.g., Clinch Valley Physicians v. Garcia*, 414 S.E. 2d 599 (Va., 1992). However, these courts have looked to the specific language of the contracts at issue to determine whether the contract provided for enforcement after termination.

## **XI. INJUNCTIONS**

- A. While breach of a restraint against competition can result in an award of damages, it is the ability to obtain a quick court injunction precluding the competitive behavior by the former employee that offers employers the best protection against competitive harm. *Advanced Marine Enterprises v. PRC, Inc.*, 256 Va. 106 (Va., 1998) (enforcing 8 month injunction against competition in specified geographic area).
- B. In general, an employer seeking to enjoin a former employee from competing pursuant to a contract must establish four elements:
  1. the likelihood that the employer will prevail on the merits (*i.e.*, that the former employee's activity will violate a contractual agreement);
  2. that greater injury would result from not enforcing the agreement than from enforcing the restrictions;
  3. that the employer will suffer irreparable harm unless the injunction is granted;

- a. Irreparable harm can be shown by demonstrating the unavailability or inadequacy of money damages. *Ticor Title Insurance Co. v. Cohen*, 173 F.3d 63 (2d Cir., 1999); *Lumex, Inc. v. Highsmith*, 919 F.Supp. 624 (E.D.N.Y., 1996); *National Interstate Ins. Co. v. Perro*, 934 F.Supp. 883 (N.D. Ohio, 1996), *Mettler-Toledo Inc. v. Acker*, 908 F.Supp 240 (M.D.Pa., 1995), *Frontier Corp. v. Telco Communications Group, Inc.*, 965 F.Supp. 1200 (S.D.Ind., 1997), *Allen v. Hub Cap Heaven, Inc.*, 225 Ga.App. 533, 484 S.E.2d 259 (Ga.App., 1997).
  - 4. and that the public interest would be served or would not be harmed by granting the injunction.
- C. Many courts will also require a showing that the employee acquired something from his employment needing the protection of the covenant, such as trade secrets, confidential information, significant training, or client relationships, before issuing an injunction.
- D. Jurisdictions are not uniform when it comes to deciding when an injunction should start. Some find that it should run from the date of the court's order. *National Interstate Insurance Company v. Perro*, 934 F.Supp. 883 (N.D. Ohio, 1996). Others start it from the date of the termination of employment. *American Express Fin. Advisors, Inc. v. Scott*, 955 F.Supp. 688 (N.D. Tex., 1996); *Buckley v. Seymour*, 679 So.2d 220 (Ala., 1996).

## **XII. DAMAGES**

- A. Former employees who are found to have breached a covenant not to compete can be held responsible for monetary damages.
  - 1. Some courts allow employers to recover “expectancy” damages, including the profits that the employer would have realized had no breach occurred. *Mercer Management Consulting, Inc. v. Wilde*, 920 F. Supp. 219 (D.D.C. 1996); *National Micrographics v. OCE-Indus*, 55 Md. App. 526 (Md., 1983).
  - 2. A former employee who competes with his employer in breach of a restrictive covenant can be liable to the former employer in an amount equal to the former employee’s gross income (less expenses) derived from the competition.
- B. In proving damages, it is generally the employer’s burden to prove the damages with reasonable certainty. *National Micrographics*, 55 Md. App. at 532.
- C. In Connecticut damages “...are measured by the loss suffered by the enforcing party.” *Van Dyck Printing Company v. DiNicola*, 43 Conn.Supp. 191, 201, 648 A.2d 898, 904 (Conn.Super., 1993).

- D. Many courts award lost profits. *Turbines, Inc. v. Thompson*, 684 N.E.2d 254 (Ind.App., 1997); *Lenco Pro, Inc. v. Guerin*, 1998 Mass.App.Div. 10 (Mass.App.Div., 1998); *Premix, Inc. v. Zappitelli*, 561 F.Supp. 269 (N.D. Ohio, 1983). *Hayes v. Altman*, 438 Pa. 451, 266 A.2d 269 (Pa., 1970).
- E. Tort damages, lost profits and incidental damages are available in New Jersey. *Platinum Management, Inc. v. Dahms*, 285 N.J.Super. 274, 666 A.2d 1028 (Law Div., 1995).
- F. Lost net profits and/or the disgorgement of the employee's profits may be recovered in New York. *Pencom Systems, Inc. v. Shapiro*, 193 A.D.2d 561, 598 N.Y.S.2d 212 (1st Dept., 1993).
- G. Breach of contract damages, liquidated damages, and lost profit are recoverable in Washington. *Perry v. Moran*, 111 Wash.2d 885, 766 P.2d 1096 (Wash., 1989).
- H. Lost goodwill damages can be recovered in Virginia. *Advanced Marine Enterprises, Inc. v. PRC Inc*, 256 Va. 106, 501 S.E.2d 148 (Va., 1998).

### XIII. LIQUIDATED DAMAGES

- A. In order to avoid issues of proof and to minimize uncertainty some agreements provide for liquidated damages in the event of a breach of a non-compete provision.
- B. Some jurisdictions will enforce liquidated damage provisions provided that they are not in the nature of a penalty. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 690 N.Y.S.2d 854, 712 N.E.2d 1220 (N.Y., 1999); *Weber v. Tillman*, 259 Kan. 457, 913 P.2d 84 (Kan., 1996); *Weber, Lipshie & Co. v. Christian*, 52 Cal.App.4th 645, 60 Cal.Reptr.2d 677 (Cal.App. 2 Dist., 1997); *Banderas v. Doman*, 224 Ga.App. 198, 480 S.E.2d 252 (Ga.App., 1997); *Imperial Dry Cleaners & Laundry, Inc. v. Imperial Carpet Cleaning & Sales, Inc.*, 693 So.2d 830 (La.App. 2 Cir., 1997).
- C. Others will not. *Wojtowicz v. Greeley Anesthesia Services, P.C.*, 961 P.2d 520 (Colo.App., 1997) (unenforceable as a penalty).
- D. In some jurisdictions the existence of a liquidated damage clause will preclude injunctive relief. *Blankenau v. Kern*, 1999 WL 759977 (Neb.App., 1999); *Ed Bretholet & Associates Inc. v. Stefanko*, 690 N.E.2d 361 (Ind.App., 1998); *Emergicare Systems Corp. v. Bourdon*, 942 S.W.2d 201 (Tex.App.-Eastland, 1997); *Bradley v. Health Coalition Inc.*, 687 So.2d 329, 332 n.4 (Fla.App. 3 Dist., 1997).
- E. In other jurisdictions a liquidated damage clause will not preclude injunctive relief. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 690 N.Y.S.2d 854, 712 N.E.2d 1220 (N.Y., 1999); *UARCO, Inc. v. Lam*, 18 F.Supp.2d 1116 (D.Haw.,

1998); *Zellner v. Stephen D. Conrad, M.D., P.C.*, 183 A.D.2d 250, 589 N.Y.S.2d 903 (2d Dept., 1992); *Cellular One, Inc. v. Boyd*, 653 So.2d 30 (La.App. 1 Cir., 1995); *McDonagh v. Moss*, 207 Ill.App. 3 62, 151 Ill.Dec. 888, 565 N.E.2d 159 (Ill.App. 1 Dist., 1990).

#### **XIV. EMPLOYEE SOLICITATION**

- A. Most courts will enforce contractual agreements between employers and employees restricting the employee's right to "raid" employees after the employment relationship ends. Such agreements, like covenants not to compete, must be supported by consideration.
- B. Anti-raiding clauses will be upheld. *Mercer Management Consulting, Inc. v. Wilde*, 920 F.Supp. 219 (D.D.C., 1996); *Balasco v. Gulf Auto Holding, Inc.*, 707 So.2d 858 (Fla.App. 2 Dist., 1998); *Arpac Corp v. Murray*, 226 Ill.App.3rd 65, 168 Ill.Dec. 240, 589 N.E.2d 640 (Ill.App. 1 Dist., 1992); *Intelus Corp v. Barton*, 7 F.Supp.2d 635 (D.Md., 1998).
- C. In the law firm context they may be viewed as interfering with the public's right to choose counsel and therefore may not be enforced. *Jacob v. Norris, McLaughlin & Marcus*, 128 N.J. 10, 607 A.2d 142 (N.J., 1992)(finding that solicitation of the law firms's paralegals by departing attorneys could not be stopped).

#### **XV. ASSIGNABILITY OF NON-COMPETE AGREEMENT**

- A. The employee-employer exception does not save a noncompete agreement unless the employee-employer relationship exists at the time the agreement is executed. *Clark Substations v. Ware*, Ala., No. 1010208, May 3, 2002. Under Alabama law, the purchase of a corporation's assets, without a valid assignment of specific contract rights will not give the purchaser all the rights of the sellers of those assets. Consequently, the purchaser of assets was not a successor entitled to enforce a non-competition agreement executed by employees in the course of their employment by a predecessor.