

A Few Basics About Unfair Competition and Restrictive Covenants:

1. ABOUT UNFAIR COMPETITION CLAIMS:

Disputes involving claims for unfair competition and/or for violation of a restrictive covenant ordinarily arise as part of the end of an employment or other business relationship. As a general proposition, if there is no written restrictive covenant as part of an employment or business relationship, upon the termination of that relationship, the parties are completely free to compete with one another. Such freedom of competition includes the ability to solicit prospective or former customers except to the extent that there is a violation or misappropriation of trade secrets. If such trade secrets exist, they are protected as a matter of law, even in the absence of a restrictive covenant. Under certain circumstances, a list of customers may be considered to be a trade secret, and, in that event, such customers are protected against competition even in the absence of a restrictive covenant.

2. ABOUT DETERMINING ENFORCEABILITY OF A RESTRICTIVE COVENANT:

If a restrictive covenant exists, a court will determine whether or not to enforce it based upon (1) whether or not it was a part of an original contract of employment or contract for the sale of a business or was added to such a contract as part of a significant change in the relationships of the parties; (2) whether or not the restrictive covenant is reasonably limited in geographic scope; (3) whether or not the restrictive covenant is reasonably limited in its duration; (4) whether or not the restrictive covenant is reasonably necessary for the protection of the person or entity in whose favor it runs; and (5) whether or not the restrictive covenant is supported by some independent consideration.

3. ABOUT REMEDIES FOR VIOLATION OF A RESTRICTIVE COVENANT:

As a general proposition, if there has been some violation of a restrictive covenant or other unfair competition, a court may enter an order, called an injunction, which prohibits the offensive conduct from continuing. In addition, a court may order that the offending party give up all profits or pay other damages resulting from the offensive conduct.

4. ABOUT THE NEED TO ADDRESS A RESTRICTIVE COVENANT:

Whether in forming or ending a business or employment relationship, it is important for all involved parties to seek the advice of counsel so that they can determine what their respective rights, obligations and remedies are as between or among one another. A failure to adequately address restrictive covenant or other competition issues at the inception of a relationship may create uncertainties and problems later on. A failure to adequately address such issues at the end of a relationship may result in uncertainties and problems in new ventures that are established.

Mark H. Scoblionko has been drafting complex employment and business agreements and has been involved in litigating restrictive covenant and other unfair competition issues since he graduated from law school in 1968. He has represented both employers and employees and sellers and buyers of businesses. He has addressed these issues on numerous occasions in the context of representing physicians and counseling clients on protection of trade secrets. If you have a potential legal matter pertaining to a restrictive covenant or other aspects of unfair competition, please call Mark H. Scoblionko for an appointment at 610-434-7138, extension 12.



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