

NON-COMPETE AGREEMENTS

in Louisiana – and Some Lagniappe

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Why Have a Non-compete Agreement?

Protect Confidential Information

- Often in conjunction with confidentiality agreement

Retain Key Employees

Help Ensure “Return on Investment”

- Avoid training employees for *other* employers

Can We Talk Here? To Avoid Competition!

- Limit competition from current employees
- Restrict competition following sale of business



The Most Important Practical Consideration:

Get a Louisiana Lawyer to Draft/Review Your Louisiana Non-competes!

- Non-competes are *Disfavored* - if not done correctly, courts will NOT enforce
- Rules vary *Widely* from State to State
- Avoid Forms from “the Main Office”!



Louisiana Law on Non-competes

Primary Source of Law: Louisiana Revised Statute 23:921

Secondary Source of Law: *Numerous* Court Decisions



The “Default Setting” for Determining Enforceability of a Non-compete

La. R.S. 23:921(A)(1): Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void.

- This is the *opposite* of the general principle that parties are free to contract unless prohibited by law.
- Strict compliance with non-compete statute required or agreement is *unenforceable*.
- In addition to technical requirements, **courts generally favor the employee.**
- Jurisdictions vary, but the “default setting is similar in many states.



LA Non-competes in Connection with Sale of Business - The Basics

The seller of a business may agree to refrain from carry on or engaging in business similar to the business of being sold or from soliciting customers of the sold business...

...within a specific parish or parishes, or municipality or municipalities...

...so long as the buy carries on a like business therein...

...not to exceed a period of two years from date of sale...



LA Non-competes In Connection With Sale of Business - The Basics (cont'd)

Note the very specific geographic description required

Non-compete only valid if there is *actual* competition - cannot “contract around” the requirement that you “carry on a like business” in the restricted geographic area.

Physical presence may not be required to “compete” advertising and solicitation may be enough. *H2O V. Marquette (La. App. 5th Cir. 2007)*

Courts are more sympathetic to parties seeking to enforce a non-compete in connection with a sale of business. *See In re Gulf Feet Holdings, (Bankr. W.D. La. 2011)*



LA Non-competes for Employees - The Basics

An employee (or independent contractor working under a written contract) may agree to refrain from carrying on or engaging in a similar business and/or from soliciting customers...

...within specified parish(es) or municipality(ies)...

...so long as the employer carries on a like business therein...

...not to exceed two years from termination of employment.



LA Non-competes for Employees - The Basics (cont'd)

The employer's "business" should either be accurately defined or track statutory language regarding "similar business" to avoid being "overbroad":

- Agreements do not have to include a description of the employer's business. *Vartech Systems* (La. App. 1st Cir. 2006).
- *Baton Rouge Computer Sales v. Miller Conrad* (La. App. 1st Cir. 2000) ("a business similar to that of [the employer]" was sufficient to support the non-compete agreement)



LA Non-competes for Employees - The Basics (cont'd)

LaFourche Speech & Language Svcs. v. Juckett (La. App. 1st Cir. 1995) (overbroad description of what speech pathologist did - agreement null and void).

Drafting techniques can help: sever ability, reformation clauses.
See In re Gulf Fleet Holdings (Bankr. W.D. La.)

BUT cannot “rewrite” agreement or add omitted language.
Ferrellgas, L.P. v. McConathy (W.D. La. 2010)



LA Non-competes for Employees - The Basics (*cont'd*)

The Third Circuit has held that an “identifiable” area is sufficient, but the better practice is to specify parishes BY NAME. *See PHI v. Untreker* (La. App. 3rd Cir. 1990); *Aon Risk Svcs. v. Ryan* (La. App. 4th Cir. 2002).

Again, non-competes only valid if there is *actual* competition - cannot “contract around” the requirement of a “like business” in the restricted area. *H. B. Rentals, LC v. Bledsoe* (La. App. 3rd Cir. 2008)

As a practical matter, courts seem much less sympathetic to parties seeking to enforce a non-compete against an employee.



A Management Attorney's Perspective: Problems With the LA Non-compete Statute

Geographic limitations / specifying parishes do not fit modern business - geography may be irrelevant - relationship are often more important.

Many states allow a “customer restriction” to substitute for a geographic restriction

E.g., “Employee agrees not to compete for IT services contracts from ABC Corp., the customer whose account employee serviced while employed by XYZ Corp.”

In Louisiana a geographic restriction is essential - a customer restriction may complement but not take the place of identifying parishes.

At least Louisiana courts have shown some flexibility in construing “competition within a geographic region.”



Louisiana's Non-compete Statute vs. Other States:

“Napoleonic Code” - La. is civil law state

Other states (even if they have non-compete statutes) are rooted in the “common law.”

This distinction is *critical* in determining whether a valid non-compete (or other agreement) exists.



Louisiana's Non-compete Statute vs. Other States (cont'd)

In common law states, agreements must be supported by “**consideration.**”

Even if consideration is generally sufficient, it may not **support the purpose of the non-compete** unless something like confidential information is disclosed - money is not sufficient consideration for a non-compete under Texas law as it is unrelated to the purpose of the non-compete. *Strickland v. Medtronic, Inc.* (Tex. App. - Dallas 2003)

Note: \$\$ may be sufficient in other states.

“Consideration” and related common law concepts do not impact La. non-compete law.



Louisiana's Non-compete Statute vs. Other States *(cont'd)*

“Reasonableness” is key concept in common law states - flexible but difficult to predict enforceability.

La.'s more rigid statute can be unforgiving but is more predictable.



Multi-Jurisdictional Application of Non-competes

Modern business interests are rarely limited by state borders.

Although subject to “choice of law” fights, most states’ laws are more readily applied across state lines than Louisiana’s law:

Are the restrictions “reasonable”?



Multi-Jurisdictional Application of Non-competes (cont'd):

La. R.S. 23:921(A)(2) expressly *prohibits* choice of law and forum selection clauses in employment contracts. (OK to have such clauses in business sales contracts)/

You can name counties/municipalities outside of La. *Hose Specialty & Supply Mgmt. v. Guccione (La. App 5th Cir. 2003)*.

May also be able to craft agreement such that the law of another state applies to competitive activities in the state (even though he employee worked primarily in La.).

Multi-jurisdictional application presents a challenge for the legal draftsman but it is possible.



Suits to Enforce Non-competes

Threat of suit may be sufficient to achieve objectives.

Both TRO/injunctive relief and damages/lost profits may be recovered. (La. R.S. 23:921(H)).

Beware Not to Overreach: An employee may be able to recover damages for an employer's attempt to enforce an unenforceable/illegal noncompetition agreement. *Preis v. Standard Coffee Service Co.* (La. 1989)

Also, the agreement may provide attorney's fees to "prevailing party."



Related Issues: Confidentially and Employee-Raiding

Confidentiality obligations are *not* subject to rigors of the non-compete laws.

Agreements not to solicit other employees have also been found *not* to be non-compete agreements.

These provisions may be enforceable even where the non-compete obligation is not.





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QUESTIONS

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