

Preventing Team members from causing a fall

Using non-competition agreements, to protect your business.




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Limiting unfair competition


- Your employees, especially your field staff, are in a unique position.
- Your field staff can become like members of the client's family. This close relationship can be used against you.
- Your office staff has access to significant amounts of IP, PHI, financial information, marketing information, and other confidential information that can also be used against you.



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Limiting unfair competition


- ◆ Employees may be approached by competitors.
- ◆ Employees may approach competitors.
- ◆ In either case, both the competitor and your employee seek a benefit for themselves from your confidential information, company name and reputation, etc.
- ◆ This can happen in many ways:
 - ◆ Poaching clients.
 - ◆ Poaching staff (often an indirect way to poach clients).
 - ◆ Misappropriating trade secrets.
 - ◆ Misappropriating confidential information.



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Limiting unfair competition


- ◆ This is unfair competition.
- ◆ Providers who have not prepared in advance may find themselves find it difficult to protect themselves from this type of misconduct.
- ◆ There are several potential causes of action in these cases, but proof may be a problem.



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Potential Causes of Action


- ◆ Tortious interference with a business relationship
 - ◆ Applies to at-will employment relationships
 - ◆ Could be the employment relationship or the client relationship
- ◆ Tortious interference with a contractual relationship
 - ◆ Requires a written contract.
 - ◆ May be useful when clients have breached agreement.
- ◆ Misappropriation of trade secrets
 - ◆ Need information to qualify as trade secrets.
- ◆ Breach of duty, breach of confidentiality, and others



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Potential Causes of Action

- ◆ Each of these claims has specific elements and requires specific proof.
- ◆ Can be hard to prove.
- ◆ Litigating them can be expensive.



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Limiting unfair competition


- ◆ Non-competition agreements/restrictive covenants are a pro-active way to address unfair competition.
- ◆ Different types of agreements
 - ◆ Non-competition
 - ◆ Non-solicitation/Anti-Piracy
 - ◆ Non-disclosure/Confidentiality
- ◆ A brief overview



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Limiting unfair competition


- ◆ Non-competition Agreements. As the name implies, they limit the employee's ability to compete against you.
 - ◆ Limit an employee's ability to work within the industry.
 - ◆ May limit employee during period of employment and after employment.
 - ◆ Intended to prevent unfair competition by preventing employee from even working in the same industry.



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Limiting unfair competition


- ◆ Non-solicitation Agreement/Anti-Piracy Agreement
 - ◆ Prohibits an employee from soliciting employer's staff or clients to go to a competitor.
 - ◆ Former employee has information about your employees' pay, schedules, etc.
 - ◆ Former employee has information about clients as well.
 - ◆ This information can give a competitor an unfair advantage.



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Limiting unfair competition


- ◆ Confidentiality Agreement/Non-disclosure agreement
 - ◆ Limit an employee's ability to utilize the employer's confidential information.
 - ◆ May address both the employee's period of employment and post employment.
 - ◆ Protects employer from unfair competition arising when employee shares information with competitors.



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Confidentiality Agreements cont'd.


- ◆ Trade secrets v. confidential information.
 - ◆ Trade secrets are a subset of confidential information that meets the statutory definition.
 - ◆ Confidential information may be economically important or otherwise protected, but not meet the statutory definition.
- ◆ A confidentiality agreement can protect information that is confidential, but not a trade secret



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Legality of Noncompetition Agreements


- Under Michigan law, an employer “**may** obtain from an employee an agreement or covenant which . . . expressly prohibits an employee from engaging in employment or a line of business after termination of employment.”
 - M.C.L.A. § 445.774a
- In other words, non-competition agreements are legal.
- Any such agreement must meet the requirements of the statute.



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Legality of Noncompetition Agreements

- To be enforceable a noncompetition agreement must:
 - protect an employer’s reasonable competitive business interests
 - be reasonable as to its duration
 - be reasonable as to its geographic scope
 - be reasonable as to the type of employment or line of work



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Legality of Noncompetition Agreements


- When a court finds the agreement to be unreasonable a “court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.”
 - M.C.L.A. §§ 445.774a
- This allows a court to revise an overly broad non-compete to be reasonable. The court can then enforce the narrower non-compete.



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Consideration

- ◆ In addition to the foregoing elements, a non-competition agreement, like any contract, must be supported by consideration.
- ◆ Consideration – “Consideration is ‘a bargained-for exchange’ with ‘a benefit on one side, or a detriment suffered, or service done on the other.’”
 - ◆ *Vulic v. Dep’t of Treasury*, 909 N.W.2d 487, 491 (2017)




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Consideration

- ◆ Sufficient consideration for an employment non-compete:
 - ◆ Initial employment-sign non-compete as a condition of being hired.
 - ◆ Continued employment, if employment is at will.* Not clear for how long employment must continue.
 - ◆ Note, employer could also pay current employee to sign non-compete.


* *Robert Half Int’l, Inc. v. Van Steenis*, 784 F. Supp. 1263, 1273 (E.D. Mich. 1991) Although Michigan Supreme Court has not expressly addressed



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Business Interest


- ◆ Restriction must relate to your company’s business interest.
- ◆ “To be reasonable in relation to an employer’s competitive business interest, **a restrictive covenant must protect against the employee’s gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill.** In a medical setting, a restrictive covenant can protect against unfair competition by preventing the loss of patients ..., or protecting an employer’s confidential business information or patient lists.”
 - ◆ *St. Clair Med., P.C. v. Borgiel*, 715 N.W.2d 914, 919 (2006)(internal citations omitted)



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Business Interest


- ◆ Home health agency non-compete would prohibit employee from working in home health, not healthcare, not hospice.
- ◆ Places where employee knowledge gained from your company would give them an advantage.
- ◆ Example: Noncompete that prohibited title insurance employee from working in insurance generally was overbroad.



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Business Interest

- ◆ A company cannot have an interest in a service they cannot provide.
- ◆ Example: Marketer leaves home health agency to recruit for a hospice. Home health agency may receive referrals from the same sources, but HHA cannot provide hospice care.
 - ◆ Hard to argue employee's activities harm HHA when they cannot provide the service needed.
- ◆ Need to think about limitation.




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Business Interest

“Under Michigan law, preventing the anticompetitive use of confidential information is a legitimate business interest. *Ram Products Co., Inc. v. Chauncey*, 967 F.Supp. 1071, 1091 (N.D.Ind.1997) (applying M.C.L. § 445.774a). On the other hand, “an employee is entitled to the unrestricted use of general information acquired during the course of his employment or information generally known in the trade or readily ascertainable.” *Follmer, Rudzewicz & Co., P.C. v. Kosco*, 420 Mich. 394, 402, 362 N.W.2d 676, 680 (1984) (footnotes omitted).


Whirlpool Corp. v. Burns, 457 F. Supp. 2d 806, 812 (W.D. Mich. 2006)



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Business Interest


- ◆ Need to distinguish between:
 - ◆ Information that is generally available within industry;
 - General knowledge employees gain through education, information easily obtained through conferences and publications
 - ◆ Confidential information that is not generally available.
 - Information that you have developed internally: PHI, marketing strategies, policies and procedures, pricing, pay scales, etc.



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Duration


- ◆ A non-competition agreement must be reasonable in its duration.
- ◆ How long will it take for any competitive advantage your employee gained by working for you to end?
- ◆ Example: When field staff leave, how long until risk of patient following subsides? Or, how long for the new caregiver to develop a relationship with the client?



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Duration

- ◆ Michigan courts generally find one year to be a reasonable duration.
- ◆ Some homecare providers conclude the restriction can be shorter.
- ◆ Be prepared to prove why your duration is reasonable.
- ◆ If you go beyond a year, court may scrutinize. Be prepared to explain need for longer period.




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Geographic Scope

- ◆ “Geographic limitations in non-competition agreements must be tailored so that the scope of the agreement is no greater than is reasonably necessary to protect the employer’s legitimate business interests.”*
- ◆ Must tailor geographic scope to your agency.
- ◆ A good starting place is your service area.
- ◆ Limiting by address and radius may be insufficient.


* *Superior Consulting Co. v. Walling*, 851 F. Supp. 839, 847 (E.D. Mich. 1994), appeal dismissed and remanded sub nom. *Superior Consultant Co. v. Walling*, 48 F.3d 1219 (6th Cir. 1995)



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Geographic Scope


- ◆ Employee may have competitive advantage within your service area.
- ◆ You likely do not have an interest outside of your service area.
- ◆ Remember: Reasonableness is the key.



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Line of Work


- ◆ Employee’s post-employment restrictions must be related to their employment.
- ◆ You cannot prohibit a home health nurse from working in a hospital.
- ◆ You are restricting them from unfairly competing, not from working.
- ◆ Has some parallels to your business interest.



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Other Terms

- ◆ There are other terms to consider in a non-compete.
- ◆ These additional terms can make it easier to enforce a non-compete.
- ◆ Several areas: jurisdiction, fees, liquidated damages.




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Other Terms

Jurisdiction/Venue.

- ◆ The parties can agree to Jurisdiction/Venue in advance.
- ◆ This means that everyone agrees which court is the correct court for any litigation.
- ◆ Employer can choose the county in which their main office is located. Makes litigation simpler.




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Other Terms

Liquidated Damages.


- ◆ A liquidated damages clause allows the parties to agree in advance to damages for a breach or a formula by which damages will be calculated.
- ◆ Eliminates the burden of proving damages in court.
- ◆ Liquidated Damages must be reasonably related to actual damages.



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Other Terms


- ◆ **Attorneys' Fees.**
 - ◆ An attorneys' fees provision allows the employer to recover their reasonable attorneys' fees if successful.
 - ◆ Without a contractual provision regarding attorneys' fees, each party will pay their own fees.
 - ◆ Helps to reduce the cost of having to enforce the agreement.



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Other Terms


- ◆ **Injunction/Bond**
 - ◆ In this provision, the parties agree that breach of the agreement would create irreparable harm to the employer and that an injunction is an appropriate remedy.
 - ◆ May also include agreement that no bond or surety needs to be posted to obtain an injunction.



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Clients

- ◆ Some homecare providers have included a non-solicitation provision in their agreements with their clients.
- ◆ Require patient to pay a finder's fee for soliciting the employee to work directly for client or for a new agency.



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Implementing Non-competes


- ◆ Have employees sign non-competition agreement at start of employment.
- ◆ Be clear that hiring employee is contingent upon signing non-compete.
- ◆ For current employees, be clear that their continued employment is contingent upon signing non-compete.



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Enforcing Non-competes


- ◆ When employee leaves employment, send a reminder to employee.
 - ◆ Friendly/professional letter to employee with a copy of the agreement. Letter explains the employee's obligations under the non-compete.
 - ◆ This can be a form letter that is prepared in advance and sent/given to every employee when they separate employment.



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Enforcing Non-competes


- ◆ When employee appears to have breached, talk to counsel.
- ◆ First step, send another letter to employee.
 - ◆ Remind them of non-compete.
 - ◆ Outline facts that demonstrate breach.
- ◆ Send letter to new employer. Explain that employee is subject to a non-compete and that employer must honor it or risk legal action.
- ◆ Be prepared to file a lawsuit.



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Enforcing Non-competes


- ◆ Selective Enforcement.
 - ◆ You want to be careful to enforce the agreement consistently.
 - ◆ Selective enforcement can lead to claims of discrimination and waiver.
 - ◆ Pursue every employee who breaches the agreement.



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Potential Future Issues


- ◆ In 2023, Michigan legislature considered amending the Michigan statute that governs non-competes.
- ◆ Proposed legislation would have limited use of non-competes in Michigan.
 - ◆ Would ban use of non-competes with minors and low wage employees. Low wage means earns less than 138% of federal poverty level.
 - ◆ Requires certain notifications to employees prior to non-compete.
- ◆ This legislation did not pass, but the legislature is considering changes.



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FTC Proposed Rule


- ◆ On January 5, 2023, FTC announced a Proposed Rule that will prohibit non-competition agreements.
- ◆ FTC concluded that non-competition agreements:
 - ◆ Limit Employee's ability to move to other positions or start a new business.
 - ◆ Negatively impact competition in labor markets.
 - ◆ Reduce wages for employees, even those who are not bound by non-competition agreements.
 - ◆ Negatively impact competition in product and service markets.



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FTC Proposed Rule


- ◆ Proposed rule would ban:
 - ◆ Entering into or maintaining a non-competition agreement with an employee.
 - ◆ Representing to an employee they are subject to a non-competition agreement when one does not exist.
- ◆ Non-competition agreements: “contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker’s employment with the employer.”
- ◆ Uses a “functional test.”



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FTC Proposed Rule


- ◆ Functional test also prohibits defacto non-competition agreements. Examples include:
 - ◆ Non-disclosure agreements that are written so broadly as to effectively preclude the employee from working elsewhere.
 - ◆ A requirement to repay training costs which is not reasonable related to the employer’s actual training costs.
- ◆ The impact of a clause is what controls.



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FTC Proposed Rule

- ◆ Proposed Rule would require employers to rescind current non-competition agreements.
 - ◆ Must be rescinded within 180 days after publication of the Final Rule.
 - ◆ Must notify current and former employees of rescission
 - ◆ Notice must be sent to employee within 45 days of rescission.
 - ◆ Notice must be in an individualized communication to the employee. Communication may be in paper, e-mail, or text.



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FTC Proposed Rule


- ◆ Proposed Rule contains a narrow exception for non-competition agreements related to sales.
 - ◆ Allows non-competition agreements as part of the sale of a business with an individual who is a substantial owner of the company.
 - ◆ Substantial Owner: individual with at least a 25% ownership interest.



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What does it mean?


- ◆ This rule is not law, yet. Only a proposal.
- ◆ FTC expected to vote on this rule in April.
- ◆ Not clear that FTC has the authority to promulgate this rule. Any rule likely to meet with court challenges.
- ◆ FTC has pursued actions against employers for non-compete issues.
- ◆ However...



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What does it mean?


- ◆ FTC comments indicate that the proposed rule would not apply to non-disclosure agreements (that are not defacto non-competes), non-solicitation agreements (that are not defacto non-competes), anti-piracy agreements (that are not defacto non-competes), and other arrangements that “do not prevent a worker from seeking or accepting work with a person or operating a business after the conclusion of the worker’s employment with the employer” but only “affect the way a worker competes with their former employer.”



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What does it mean?


- ◆ Even if rule takes effect, employers may be able to continue some restrictions:
 - ◆ Cease use of traditional non-competes.
 - ◆ Focus on non-solicitation, anti-piracy, and non-disclosure agreements.
 - ◆ Ensure agreements are narrowly tailored. (Avoid “de facto” non-competes.)
- ◆ You can protect your business using alternative restrictive covenants.



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NLRB GC Opinion


- ◆ NLRB’s General Counsel has also issued a memorandum expressing the GC’s opinion that non-competes violate the National Labor Relations Act, unless they are “narrowly tailored to address special circumstances justifying the infringement on employee rights.”
- ◆ Several cases now pending before NLRB regarding this theory.



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Conclusion

- ◆ Non-competes are legal under Michigan law and provide a valuable means to protect your agency from unfair competition.
- ◆ Non-competition agreements must be reasonable.
- ◆ Need to be aware of potential changes to state and federal law that may impact enforceability.



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Questions?

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