Did You Sign a Non-Compete Agreement?

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Non-Compete Agreements are becoming more and more common place in today's business environment. More and more companies are requiring their employees to sign restrictive covenant agreements as a condition of hiring or continued employment. NCA's are also often used in conjunction with the purchase and sale of a business to prevent the seller from "walking across the street" and setting up shop in a competing business to the one he just sold. These NCA's are governed by state law and each state that allows for NCA's has different (but somewhat similar) laws that govern their validity and application.

These agreements and the laws that govern them are designed to protect legitimate business interests and intangible assets of a business from being misappropriated or improperly utilized by a former employee or seller of a business.

Such agreements often contain non-competition provisions, which may provide that an employee or independent contractor is prohibited from working with a competitor of the employer or starting a competitive business during employment and for a period of time within a specified geographic location after his or her employment ends.

Individuals or businesses subject to Florida law who have signed non-compete agreements and are transitioning between employers or starting a new business venture must analyze the extent of the applicable non-compete restrictions and whether such restrictions may be enforceable under Florida law.

In addition, the prospective employers or business partners of such individuals must be equally diligent regarding those non-compete restrictions. Florida courts have noted that there are powerful public policies weighing against depriving people of their ability to earn a living, but have also held that non-competition agreements are enforceable so long as they meet certain criteria such as reasonableness

For a non-compete restriction to be deemed reasonable under Florida law, it must meet each of the following four conditions:

1. The NCA must be in writing and signed by the party who it will be enforced against;

2. The time period of the restriction is no greater than is required for the protection of the legitimate business interest of the employer or business seller ;

3. The geographic restriction is no greater than is required for the protection of the legitimate business interest of the employer or business seller.

4. The restriction is not against public policy.

In addition to the above items, former employers seeking to enforce a non-compete agreement will need to evidence that the employee was given consideration, i.e., something of value, in exchange for agreeing to the non-compete restriction. Examples of consideration include new employment, a promotion, garden leave payments, a raise or any form of bonus compensation. Continuing employment ("sign this or you're fired") is also valid form of consideration for "at will" employees.

The value of consideration given to the employee will influence any determination of the reasonableness of the non-compete restriction.

In that regard, an additional critical issue is the skill set of the employee. New York courts will generally uphold a non-compete restriction against a former employee whose services are "unique or extraordinary". To meet that standard, it would need to be shown that the services are irreplaceable or that the loss of services would cause irreparable injury to the employer. Florida law presumes irreparable injury in certain circumstances and presumes the time of the restriction reasonable depending on if enforcement is against a former employee, former distributor, seller of a business or involving trade secrets.

As previously stated, geography, duration and scope of the restriction are important factors for establishing the reasonableness of the non-compete restriction. None of those factors, however, should be reviewed independently.

For example, a Florida court upheld an non-compete restriction in a case where the restraint was limited to only a small geographic area in Florida. The scope of the restriction, however, generally cannot be overbroad, such as the restricting of employment in an entire major industry.

Employees in transition, along with their future prospective employers or business partners, should carefully assess any applicable non-compete agreements with a qualified attorney to minimize or avoid any potential liability.

Each situation is different and will require its own considerations in evaluating the reasonableness and extent of enforceability of the non-compete restriction.

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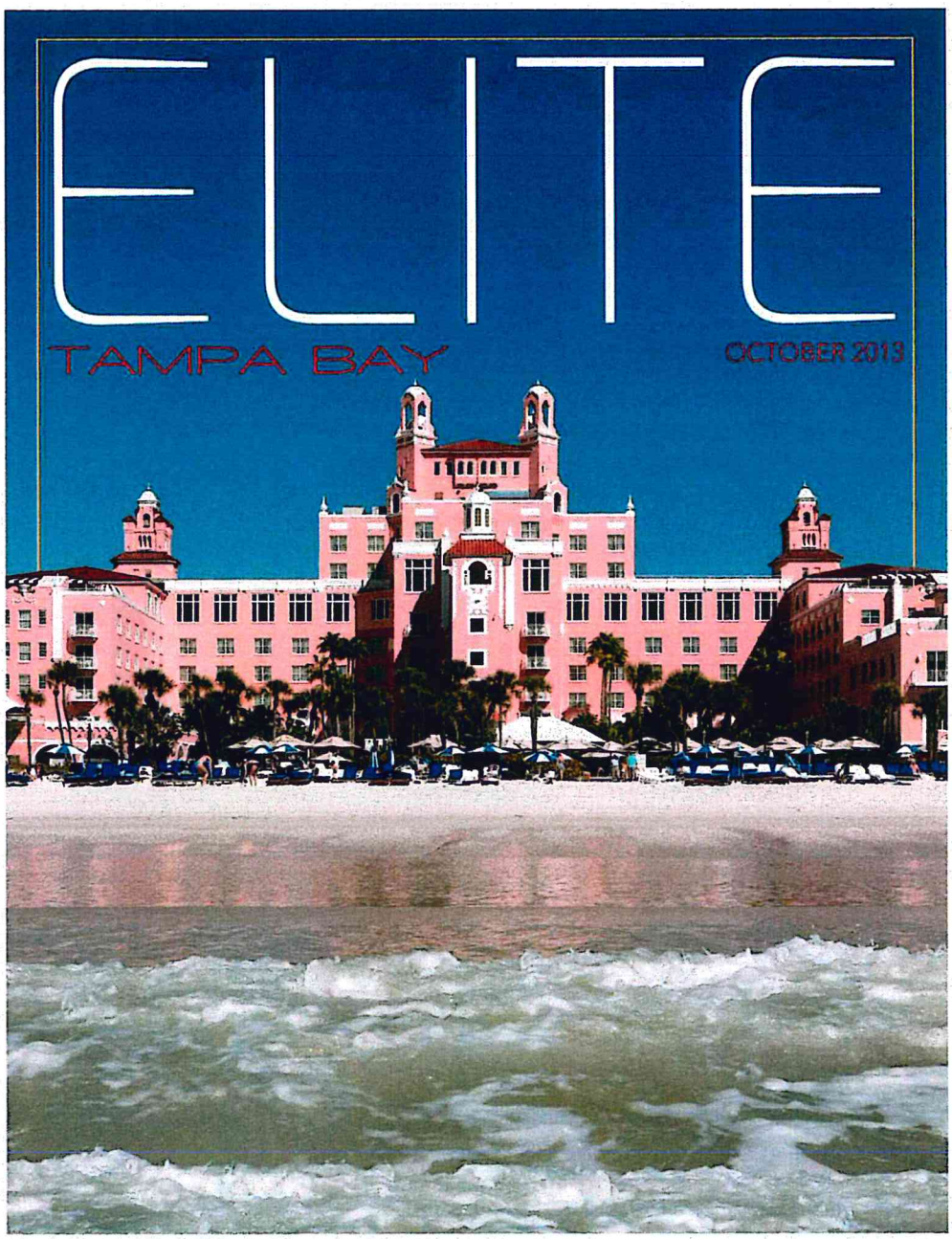

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