

# Non-Compete Agreements

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# In General, What is a Non-Complete Agreement?

- Black's Law Dictionary: "A contractual provision ... in which one agrees to refrain from conducting business similar to that of the other party."

# General History of Non-Compete Law Prior to 2008

- Trend for Idaho Courts to limit enforceability of non-compete agreements
- Non-compete contracts generally disfavored and strictly construed against employer

# Non-Compete – Idaho Legal History

- Effective July 1, 2008 - Idaho Legislature Passes Law Regarding Non-Compete Agreements
- Idaho Code 44-2701 – 2704
- Title of Law: “Agreements and Covenants Protection Legitimate Business Interests”

# Non-Compete Agreements in Idaho

- Employers may use written agreements to protect their “**legitimate business interest**” by precluding “**key**” employees or independent contractors “**from engaging in employment or a line of business that is in direct competition with the employer’s business after termination of employment**”

# Employee v. Independent Contractor

- Idaho statute allows non-compete agreements with independent contractors, but unclear if will be treated exactly the same as employees
- Some states treat the same
- Other states analyze the relationship
  - The more independent, the more difficult to enforce

# Definition of “Key” Employee or Independent Contractor

- Because of employer actions, such as investment of money and time ...
- Employee gains a high level of knowledge, influence, credibility, notoriety, etc. ...
- As a result, have the ability to harm or threaten an employer’s “legitimate business interest”

# Employer's “Legitimate Business Interests”

Shall include, but not limited to:

- Goodwill – good relationship with customers
- Technologies, intellectual property
- Business plans
- Business processes and methods of operation
- Customers
- Customer lists
- Customer contacts and referral sources
- Vendors and vendor contracts
- Financial and marketing information
- “Trade secrets”

# Dilbert



# Non-Compete Agreements Must be Reasonable

- Reasonable “Duration”
- Reasonable “Geographical Area”
- Reasonable “Type of Employment or Line of Business”
- “Must not impose a greater restraint than is reasonably necessary to protect the employer’s legitimate business interests”

# Rebuttable Presumption RE: “Duration”

- **18 months or less** postemployment restriction is presumed reasonable
- **More than 18 months** postemployment restriction:
  - Need “consideration,” such as additional payment or benefits
  - Employment or Continued Employment Not Enough

# Rebuttable Presumption RE: Geographic Areas

- Presumed to be reasonable if restricted to geographic area in which “key” employee or independent contractor provided services or had a significant presence or influence

# Rebuttable Presumption RE: “Type of Employment or Line of Business”

- Presumed to be reasonable if limited to “type of employment or line of business conducted by the key employee or key independent contractor while working for the employer.”

# *AMX International v. Battelle Energy*

- 744 F.Supp.2d 1087 (2010)
- When hired, AMX employees sign non-competition agreements that prohibit them from “directly or indirectly working as or for an Active Client” for a period of 12 months following employment with AMX

# *AMX International v. Battelle Energy*

- AMX defined “Active Client” as “a person, business or entity that AMX has sent an invoice to or concerning within the prior 24 months and who is listed in the invoice as the client or under the “Bill to””

# *AMX International v. Battelle Energy*

- AMX Non-Compete Agreement Not Reasonable
- Too broad as to clients with whom former employee is restricted from contacting
- Failed to define the work its employees were prohibited from performing
- Failed to restrict the geographic area

# Enforceable Non-Compete

- ***NON-SOLICITATION, NON-COMPETITION.*** Contractor shall not disclose and is prohibited from disclosing information with any other person, entity or agency regarding any product, customer, trade secret, marketing technique, or any other proprietary information regarding the business structure or any business information of Now Disc ... Contractor is prohibited from soliciting or performing any work or duty in the sale or production of optical media products for himself, others, other entities, or competitors of Now Disc outside of this [Agreement] or following termination of this [Agreement] for a period of two years. The scope of said non-competition provision shall be the United States east of the Mississippi River. The same is based upon the scope of the territory which the Contractor has or can influence during the term of this contract.
- For the purposes of non-competition, the same shall mean induce or attempt to persuade any former, current or future employee, agent, manager, consultant, director, or other participant in Now Disc's business to terminate such employment or other relationship in order to enter into any relationship with the Contractor, any business organization in which the Contractor is a participant in any capacity whatsoever, or any other business organization in competition with Now Disc, or use contracts, proprietary information, trade secrets, confidential information, customer lists, mailing lists, goodwill, or other intangible property used or useful in connection with Now Disc's business.

*Now Disc, Inc. v. Munn*, 2010 WL 4853380 (D. Idaho Nov. 19, 2010)

# Rebuttable Presumption RE: “Key” Employee or Independent Contractor

- Presumed “key” employee if among the highest paid 5% with employer
- To rebut, employee or independent contractor must show that it has no ability to adversely affect the employer’s “legitimate business interests”

# Construction and Enforcement

- If unreasonable “a court shall limit or modify the agreement or covenant as it shall determine necessary to reflect the intent of the parties and render it unreasonable in light of the circumstances in which it was made and specifically enforce the agreement or covenant as limited or modified”

# *Idaho Trust Bank v. Ross*

- Case No. CV 2013-1285;  
2013 WL 3766899 (Idaho Dist.)
- Discussion of current pending litigation in  
Kootenai County, Idaho

# Damages

To establish liability for breach of a non-compete agreement:

the law does not require accurate proof with any degree of mathematical certainty. Damages need be proved only with a reasonable certainty, and this means that the existence of damages must be taken out of the realm of speculation. The mere fact that it is difficult to arrive at an exact amount of damages, where it is shown that damages resulted, does not mean that damages may not be awarded; it is for the trier-of-fact to fix the amount. The profits realized by the defendant may be considered by the trier-of-fact, if shown to correspond with the loss of the plaintiff.

*Flsmidth Spokane, Inc. v. Emerson*, No. 1:13-CV-00490-EJL, 2014 WL 2711790, at \*5-6 (D. Idaho June 16, 2014)

# Attorney Fees

- “Prevailing party” in a lawsuit where a central issue in a non-compete agreement likely is entitled to recover attorney fees under I.C. section 12-120(3).
- *Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 111 P.3d 100 (2005).

# Practical Pointers - Employees

- Employees should be careful what they sign and make sure properly compensated if significant restrictions

# Practical Pointers - Employers

- Review non-compete agreements
  - May want to revise to take advantage of employer friendly presumptions
- Direct non-compete at “key” employees
- Make sure protecting “legitimate business interest”
- Make sure reasonable in duration, geographic area, type of work restricted

# Thank You

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