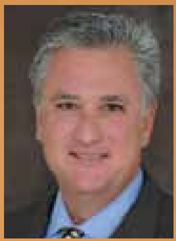

By
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Non-Competition, Non-Solicitation & Non-Disclosure Agreements

Considerations for Associations

Three scenarios to consider:

1. Your association competes with another association for the same members or associate members. Your at-will employee, in whom you have invested substantial time and resources as far as training as well as imparted significant strategic and confidential information, abruptly leaves your employ for a job with the competing association.

2. Your association develops a confidential strategic plan for critical legislation impacting your members. During the implementation of your plan your legislative director quits his or her job with the association to take a job with another association whose mission is at direct odds with yours.

3. Your association gathers confidential company information from your members and "masks" that information for generic use by the membership as a whole. Your employee responsible for that project leaves your employ. Subsequently he or she uses that confidential information acquired to the detriment of the association of one of its members.

How do you protect your organization against these scenarios? In Florida, by the use of non-competition, non-solicitation and non-disclosure agreements.

Each agreement is known as a restrictive covenant and they are contractual in nature between the association and its employees. They can be part of a formal employment contract or exist as a "stand-alone" agreement binding the employee from certain activities in a post-employment setting. The most common agreement is a non-disclosure agreement which merely prohibits an employee from disclosing certain information during and after employment. Non-solicitation agreements prohibit former employees from soliciting your members to become members of another association. Non-competition agreements prohibit former employees from either engaging in or being employed by other entities which compete with what your association does.

However, there are specific criteria which must be present in order to contractually enforce these agreements. (See FL Statute 542.335.) There must be a "legitimate business interest" justifying the covenant. Legitimate business interests include, but are not limited to: trade secrets, non-trade secret confidential or professional information, substantial relationships with prospective or existing customers, goodwill and extraordinary or specialized training.

If there is a legitimate business interest, then the courts will recognize a restrictive covenant as long as it is reasonable in time, area and line of business. For example, non-solicitation and non-competition agreements with former employees are generally enforceable within two years. Longer time periods are generally enforceable for non-disclosure covenants.

Geographic limitations don't typically play a major role in non-disclosure agreements but for non-solicitation and non-competition agreements, geographic considerations should be tied to the nature of the business. For example, a Florida-based association would likely limit a non-solicitation or competition covenant to the State of Florida, while a national association would be able

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A View from the Front Row

Bill Marriott always sits in the front row of any meeting he attends. One reason is out of respect for the speaker, the other is to focus on the message and get as much as he can from the presentation. I have adopted this practice myself and can speak to its efficacy. Perhaps I am imagining it but the speaker seems genuinely grateful to have someone closer than the 10th row with whom he/she can make eye contact, and more importantly it is much easier to stay engaged when sitting in the front of the room.

I mention this so you can test the theory yourself at this year's FSAE Annual Conference. The Education Committee, helped tremendously by Summer McKanstry, has put together a terrific line up of general session and breakout speakers!

We designed this year's line-up of breakout sessions to appeal to all our attendees – CEO/Executives, Meeting Planners, Technology/Membership managers and our Hoteliers and supplier members. We're confident that these sessions are going to be so phenomenal that you won't even *consider* eschewing a session in favor of a swim in the pool, or treatment at the spa.

Moreover, CAE credits can be earned at all of the breakouts and CMP credits earned at many of them!

The topics of this year's breakouts will be incentive enough for you to participate, but to add to the fun, there will be a drawing for a chance to win some great prizes for those who attend 4 out of the 12 breakouts. Look for a special treasure map in your conference packet and be sure to have it with you when you come to these wonderful sessions.

We understand the lure of beautiful host properties like the Tampa Marriott Waterside with amenities that are indeed worthy of indulgence, but we ask all our members to fully support FSAE and our knowledgeable speakers first and schedule spa appointments and pool dates outside the hours of FSAE functions – including the breakouts.

Thank you for your support of FSAE and the program that the Education Committee has developed for Annual Conference.

I'll see you in the front row. ■

Non-Competition, Non-Solicitation, Non-Disclosure Agreements continued ....

to justify a much broader area.

Restrictive covenants must be in writing and supported by consideration. That consideration may be hiring a new employee, or for existing employees, the continuation of employment and the training/specialized skill provided by the employer.

It is important that your employees are well-informed of the covenants they voluntarily and contractually enter into as a condition of hiring or continued employment. The covenant should include details of the types of information (if non-disclosure), the set of clients or members (if non-solicitation) or the types of employment (if non-competition) the employee is agreeing to be bound by. "Cookie-cutter" agreements which include everything under the sun are more likely to be frowned upon by a court reviewing them for enforceability.

You should also confirm with new employees (in writing) that they are not subject to a prior employer's restrictive covenant agreement. If they are, you will need to see the agreement and thoroughly understand its potential impact upon your association's operations. This will avoid potential third party issues once the employee is hired.

Many restrictive covenant agreements include "liquidated damages" provisions which are designed to contractually measure damages in advance of litigation, given the uncertainty associated with damage to an organization's good will or customer base. The amount of liquidated damages sought should also be carefully determined so that overall enforceability does not become an issue.

In many circumstances a former employee's breach of a restrictive covenant can result in the imposition of a temporary injunction prohibiting the employee from violating the agreement pending the outcome or litigation. Practically speaking, in a large number of cases, if a temporary injunction is granted, the former employee quickly decides to settle the matter.

The first step in determining whether restrictive covenant agreements should be part of your association's employment landscape is developing a thorough understanding of your own "legitimate business interests." Non-disclosure agreements may be more than sufficient, but if you have highly or uniquely trained employees operating in a competitive marketplace, then you may consider additional protection in the form of a non-solicitation or non-disclosure agreement. ■