



Non-Competition and Non-Solicitation Provisions: *Interpreting, Enforcing, Complying*

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PROTORÆ LAW PLLC
1921 Gallows Road, Suite 950
Tysons, VA 22182

Devon E. Hewitt, Partner
Government Contracts
Brian F. Chandler, Partner
Employment Law

Agenda

- **Non-Compete Clauses**
 - General
 - Employees
 - Independent Contractors
 - Subcontractors
- **Non-Solicitation Clauses**
 - Former Employer's Customers
 - Former Employer's Employees
- **Remedies for Breach**

Non-Compete Clauses - General

- Restraint on trade therefore typically not viewed favorably by courts
- Ability to enforce depends on state law – “choice of law” in noncompete agreements important
 - i.e., California *prohibits* the use of employee non-compete agreements
 - i.e., Florida has statutory presumptions
 - i.e., Maryland courts more likely to “blue pencil” vs. Virginia
 - i.e., “burden of proof” could be on employee or on employer depending on state
- May used only to protect employer’s “legitimate business interests”
 - Customer relationships
 - Intellectual Property
 - Proprietary Information
 - Company “goodwill”
- Specificity and factual context key
 - Restriction must be reasonable in:
 - Scope/Function
 - Duration
 - Geography
 - Must not violate public policy
 - Must not impose undue hardship on employee
 - Must consider factors (scope, duration, geography) *together*, not distinctly

Noncompete Clauses – Employees

- Generally part of an employment relationship
 - Often included with Confidentiality/ Assignment of IP agreements
- Based on valuable “consideration”
 - Employment offer vs. continued employment
- What is reasonable?
 - Scope
 - Did former employee perform “unique” services or was former employee unskilled (and, therefore, could be easily replaced)
 - Skills acquired by former employee during employment does not make employee unique
 - Is prohibited activity of the same type as that actually engaged in with the former employer
 - IT professional vs. janitor
 - Duration
 - Procurement cycle
 - Geography
 - What if employees are located across the US?
 - What if customer is located across the US?

Non-compete Clauses – Employees (cont.)

- Liability of New Employer
 - May be subject to claim of tortious interference with business or contract expectancy, which can result in punitive damages
 - Former employer had contract of expectancy (not = BPA)
 - New employer had notice of non-compete
 - New employer used “improper means” to interfere with that expectancy
 - Former employer suffered a loss from such interference
 - Employer Best Practices
 - Current employer
 - New employer

Non-compete Clauses – Employees (cont.)

- Violation of Public Policy – Government Contracting
 - Non-competes legitimate where former employee, through contacts or personal relationships, created “goodwill” on part of the company
 - But goodwill not an issue in competitively bid contracts, personal contacts (allegedly) irrelevant where competition based on quality and price of proposed goods or services
 - Importance of continuity of operations to the mission
 - FAR clause, 52.237-3, Continuity of Services
 - “The contractor shall allow as many personnel as practicable to remain on the job to help the successor maintain the continuity and consistency of the services required by this contract.”*
 - FAR clause, 52.222-17, Nondisplacement of Qualified Workers
 - Applies to successor service contracts performed at the same location as incumbent contract
 - Right of first refusal to predecessor employees whose jobs would otherwise be terminated for positions for which the predecessor employees are qualified
 - Numerous exceptions

Non-Compete - Independent Contractors

- Employees have a “duty of loyalty”
- Requiring an independent contractor to sign a non-compete agreement may indicate that contractor is really a “misclassified” employee
 - Employer therefore liable for unpaid taxes etc. typically paid by employer for its employees
- May use non-solicitation provision that focuses on targeting certain company customers instead

Non-Compete Clauses – Subcontractors/JV Members

- Teaming Agreements
 - Exclusive vs. non-exclusive
 - Restrictions on ability to team with anyone else
 - Unless terminated for reasons unrelated to default
- Subcontracts/Joint Venture Agreements
 - During term of contract
 - Following termination/expiration of contract
 - Set-aside vs. unrestricted procurements
 - IDIQ contracts
 - Policy expressed in FAR 3.503-1, unreasonable restrictions on subcontractor sales to the Government
 - FAR clause, 52.203-6, Restrictions on Subcontractor Sales to the Government

“Contractor shall not enter into any agreement with an actual or prospective subcontractor . . . which may have the effect of restricting sales by such subcontractors directly to the Government of any item or process made or furnished under this contract . . .”

Non-Solicitation Clauses – Former Employer's Customers

- Restriction on former employee's ability to solicit former employer's customers
- Also must be reasonable as to scope and duration
 - **Scope – definition of “customer”**
 - Former employer future customers
 - Former employer customers generally
 - Former employer customers to which former employee sold goods and services
 - Former employer customers to which former employee sold goods and services and about which former employee possess confidential information
 - *Challenge when customer is the Government*
 - **Duration**
 - Scope modified by “within the [six months] prior to termination of employment”

Non-Solicitation Clauses – Former Employer's Employees

- Indirect vs. direct
- Non-solicitation provision vs. a non-hire provision
 - Easier to police non-hire provision
 - Non-hire provision will garner more court scrutiny
 - Non-hire provision should have exceptions
 - General advertising
 - Voluntary approach
 - Employee terminated
- Limitations on type of employees off limits to competitor
 - Shouldn't apply to all employees but only those involved in the contract effort/program etc.
 - But consider including consultants, subcontractors and proposed personnel

Remedies for Breach

- Cease and Desist Letter
- Recovery of compensatory damages (lost profits)
- Injunctive Relief (include clause in non-compete agreement)
- Payment of % of Salary (Liquidated Damages)

Questions?



Devon E. Hewitt, Partner
Protora Law PLLC
703.942.6746
dhewitt@protoraelaw.com



Brian F. Chandler, Partner
Protora Law PLLC
703.749.6019
bchandler@protoraelaw.com