

# Jumping Ship or Walking The Plank? Drafting and Enforcing Non-Compete Agreements and Other Restrictive Covenants

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# Basics of Non-Competes in Louisiana

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“Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void.” La. R.S. 23:921(A).

**BUT....**

There are always exceptions.



# Exceptions to Prohibition on Non-Competes

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Any person, including a corporation and the individual shareholders of such corporation, who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment . . . La. R.S. 23:921(C)

So what does that mean?

# Rules for Enforceable Non-Competes

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Per the plain language of La. R.S. 23:921(C):

1. A person may agree with his or her employer
2. To refrain from carrying on “business similar to that of [his or her] employer”
3. Within specific parishes, municipalities, or parts thereof
4. For a period not to exceed 2 years.

Simple enough, right?

# The Agreement

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The statute does not prescribe any particular form for the agreement.

Typically, a non-compete agreement will be included in a broader employment agreement.

Where an employer chooses not enter into an employment agreement, a standalone non-compete agreement is also acceptable.

Best to have the employee sign the non-compete at the beginning of employment to avoid questions regarding proper consideration. Louisiana courts have held agreements valid where the only consideration to an employee in exchange for the non-compete is continued employment.

There is no one-size fits all solution for the written agreement. Whether included in an employment agreement or not, each agreement should be individually tailored.

# The Business

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An employee can only agree to not compete with the legitimate business interests of his or her employer – in other words, refrain from carrying on “business similar to that of [his or her] employer.”

An employer cannot have an employee refrain from all work.

Do you have to describe the type of business or work in the agreement?

Best practices?



# The Location

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Section 921 requires that a non-compete agreement specifically identify the parishes, municipalities, or parts thereof where it will apply.

The failure to include geographic boundaries will render the non-compete unenforceable.

Location is often a hotly-contested issue in non-compete cases.



# The Location

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Nevertheless, a particular parish may be off limits to the employee only if the "employer carries on a like business therein." In view of the statutory history of the Statute and the nature of commercial business activity that generally does not abruptly end at the parish line of the principal location of a business, the lack of an actual business facility in Morehouse in this case is not the only measure for the geographic test of the Statute. Its language of "carrying on" "business" allows for the employer to demonstrate significant business activity which might be competitively impacted in a parish outside of the location where the employee worked. The customer "territory" concept is therefore still a business interest of the employer recognized under the Statute.

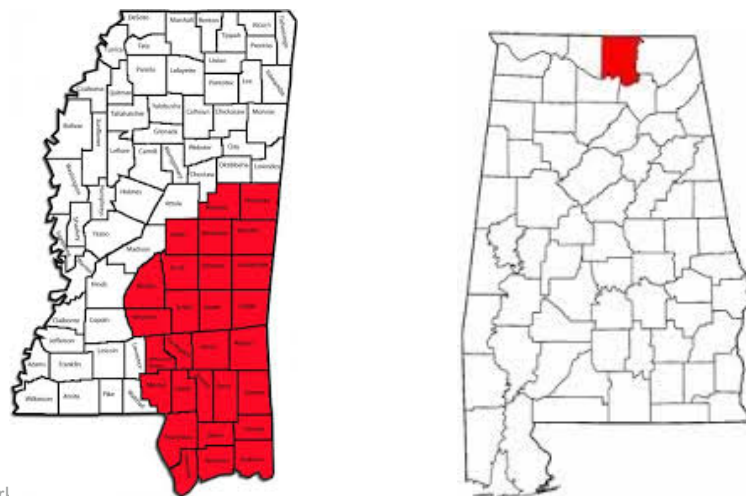
*West Carroll Health System v. Tilmon*, 92 So.3d 1131 (La. App. 2 Cir. 2012)



# The Location

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We find there is no significant difference between "parish or parishes" as used in the statute and "county or counties," for both refer to the same type of geographic subdivision of a state. What is important is that the geographic limitation be express and clearly discernable. The agreement here satisfied that requirement by specifically listing the counties in Mississippi and Alabama to which the agreement applies. For this reason the geographic limitation is enforceable. *Hose Specialty & Supply Management v. Guccione*, 865 So.2d 183 (La. App. 5 Cir. 2006).



# The Location

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Don't get cute.

Be realistic.

Be specific.



# The Time

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The statute strictly limits the non-compete period to no more than 2 years.

**No exceptions.**



# Overbroad Agreements

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Common issues with non-compete agreements:

- Too many parishes listed – employer doesn't actually do business in all locations
- Non-compete period of more than 24 months
- "Business" is defined in an overbroad manner

Can a court reform an overbroad agreement?

What can be reformed?



## Sample Provisions – Spot the Problem

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In exchange for continued employment with the Company, Employee agrees that during her employment with Company and for a period of twenty-four (24) months after her separation from Company, she will not engage in the business of selling widgets for any other person or entity. If Employee is terminated for Cause, she acknowledges and agrees that this period will be extended to thirty-six (36) months.



# Sample Provisions – Spot the Problem

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In exchange for continued employment with the Company, Employee agrees that during her employment with Company and for a period of twenty-four (24) months after her separation from Company, she will not engage in the business of selling widgets for any other person or entity within a 100-mile radius of Company's headquarters.



## Sample Provisions – Spot the Problem

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Employee agrees that during her employment with Company and for a period of twenty-four (24) months after her separation from Company, she will not compete with the Company within the parishes specified in Exhibit A.



# Specific Issues

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## Physician Non-Compete Agreements

Can a physician be prohibited from practicing for a competing provider?

Lastly, Dr. Price argues that we should nullify the noncompetition and non-solicitation agreement between the Members of Regional Urology for being against public policy. This we decline to do. The considerations raised by Dr. Price are compelling, particularly concerning the freedom patients should have to obtain treatment from a physician of their own choosing. However, these considerations were apparent when Dr. Price and the other physicians of Regional Urology signed the Amendment and put their own material concerns above that of patient choice. We find nothing in Louisiana's public policy that would require us to nullify the agreement at issue. The policy concerns raised by Dr. Price are, as observed by the trial court, a matter for the legislature to address.

*Regional Urology, L.L.C. v. Price*, 966 So.2d 1087 (La. App. 2 Cir. 2007)



# Specific Issues

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## Physician Non-Compete Agreements

The non-compete agreement requires Dr. Abel “not to carry on or engage in the business of the practice of medicine in the sub-specialty of cardiology” in the Parish of St. Mary, where the Prevention Plus clinic is located, for a period of two years following his departure from CIS. While Dr. Abel's practice at Prevention Plus may not have been identical to his practice at CIS, we find the practice conforms to the language of La. R.S. 23:921(C) in that it is “a business similar to that of the employer.” Whether Dr. Abel chooses to call his practice “internal medicine,” “preventative medicine,” or “wellness,” the district court's ruling was clear enough to restrict Dr. Abel from performing services and procedures one would receive at CIS.

*Cardiovascular Institute of the South v. Abel*, No. 2014-1268 (La. App. 1 Cir. 3/9/15)

# Enforcement

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Any agreement covered by Subsection B, C, E, F, G, J, K, or L of this Section shall be considered an obligation not to do, and failure to perform may entitle the obligee to recover damages for the loss sustained and the profit of which he has been deprived. In addition, upon proof of the obligor's failure to perform, and without the necessity of proving irreparable injury, a court of competent jurisdiction shall order injunctive relief enforcing the terms of the agreement. Any agreement covered by Subsection J, K, or L of this Section shall be null and void if it is determined that members of the agreement were engaged in ultra vires acts. Nothing in Subsection J, K, or L of this Section shall prohibit the transfer, sale, or purchase of stock or interest in publicly traded entities.

La. R.S. 23:921(H).

# Other Restraint of Trade

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- Independent contractors – La. R.S. 23:921(C)
- Sale of business
- Choice of law/Choice of forum clauses
- Non-Solicitation Agreements
  - Customers
  - Employees
- Confidentiality



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# Practical Approaches and Considerations

## Issues to Consider

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- What interests does my company want to protect?
- How do we counterbalance business concerns with employee morale?
- How far do we want to go to enforce restrictions?
- How do we respond to hypothetical conversion/competition scenario?
- Pointers



# What Interests Do We Want to Protect?

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- Customers/Clients
  - Everyone
- Employees
  - Specialized training/customer relationships
- Trade Secrets
  - Proprietary processes, Software, Equipment
- Competition



# What Interests Do We Want to Protect?

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- Perpetual
  - Employees
  - Trade Secrets
- 2-year/Geographic Limitation
  - Competition
  - Customers
  - Enforceability Inside/Outside Louisiana



# How Do We Counterbalance Business Concerns with Employee Morale?

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## **Sliding Scale**

- How large is your Company?
  - Executives v. staff?
  - Management v. “line” employees?
- How Large is Your Market/Industry?
  - “Small pond” – more difficult to find replacement employment
    - Reluctance of employees to agree
  - “Large pond” or multi-faceted industry
    - More likely for employee to find suitable alternative arrangement
  - Standard in industry
    - Restrictions expected
  - Strategic goals
    - Perhaps mere threat of enforcement is sufficient



# How Do We Counterbalance Business Concerns with Employee Morale?

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- Are employees in position to know/obtain or use?
- Is concern truly competition/solicitation or merely disclosure?
  - Requiring restrictions on areas of concern may be overkill and result in unnecessary monitoring/enforcement
- Is there something we can give in return?
  - Not required
  - Can make employees feel they are getting the benefit of a bargain
  - Make non-competition a provision of executive employment agreements

# How Far Do We Go to Enforce the Restrictions?

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## Considerations:

- Cost/time
- Enforceability
  - What restriction has been violated?
  - How do we/can we prove it?
- What will we ultimately obtain?
  - Money judgment?
  - Injunction?
  - Restrictions on competitor?



## Hypothetical

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I. Steeling, has just resigned as an employee for your organization. Rumors have it that Mr. Steeling has gone to work for your competitor, Your Ideas Utilized, Inc. Your IT department discovers that, immediately before he left, Mr. Steeling sent numerous emails from his company email account to personal email accounts belonging to himself and his spouse. Attached to those emails were proprietary company documents. While he was employed with your organization, Mr. Steeling executed an iron-clad Non-Competition and Non-Disclosure Agreement that you obtained from Baker Donelson. In addition, Mr. Steeling acknowledged your company policies regarding confidentiality and proper use of company email systems.

# What Do You Do Now?

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## Step 1:

### Determine the Scope of Conversion:

- Review work email
- Phone logs/recordings
- Interview Co-workers/managers
- IT level analysis (can recover “deleted” items)
- You need to know what was taken so that you can recover it



# What Do You Do Now?

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## Step 2 (Optional):

### Cease & Desist:

- Explain agreement/company policy terms/enclose copies
- List materials taken/competitive activities restricted
- Explain how Mr. Steeling's conduct violates applicable policies & agreements
- Demand immediate cessation of activity
- Tell them what you plan to do (even if you may not decide to do it)
- Require affidavit?
- Copy employer?

# What Do You Do Now?

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## Step 2:

### Advantages:

- Relatively inexpensive
- It may be sufficient – “I’m sorry” responses
- Sets up company as reasonable actor/victim in the event of subsequent proceedings
- Other uses for affidavit?
- Copy new employer
  - Sends message
  - Open a dialogue



# What Do You Do Now?

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## Step 2:

### Disadvantages:

- No absolute control over response
  - Short time limit for response to cease & desist letter can help mitigate this
- Typically will not (standing alone) result in a monetary payment, injunction or other judgment
- Defamation claims
  - Hard to prove
  - Lawyers for former employees and new employer typically more concerned about remedying immediate dispute

# What Do You Do Now?

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## **Step 3:**

### **Lawsuit:**

1. Potential Federal Court Venue
  - Diversity
  - Computer Fraud & Abuse Act
2. Request Temporary Restraining Order/Preliminary Injunction
  - Judges typically very responsive
  - Telephonic hearing
  - Put former employee/new employer on heels from initiation of suit



# What Do You Do Now?

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## Step 3:

### Lawsuit (cont.):

3. Direct route to monetary payment, injunction, other judgment
  - Judgment/injunction by court order
  - Consent relief via settlement
4. Additional relief available
  - Seize computers/hard-drives



# What Do You Do Now?

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## **Step 3:**

### **Lawsuit Advantages:**

- The ultimate avenue for relief
- Former employee/new employer compelled to action
- Success on TRO/preliminary injunction suggests adverse ultimate outcome for Defendant(s)
- Maintenance of status quo
- Begin imposing consequences for non-compliance
- Public record/word of mouth for potential bad actors

# What Do You Do Now?

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## **Step 3:**

### **Lawsuit Disadvantages:**

- Cost
- Outcome now in control of third party
  - Although parties always maintain settlement authority
- Counterclaims
- Outcome can hinge on TRO/Preliminary injunction hearing
  - Failure can set the tone of the proceedings
- Long road ahead
  - Even a victory on TRO/preliminary injunction does not guarantee cessation of litigation
- Sets precedent for “frequent fliers”
  - Cuts both ways

# What Do You Do Now?

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## Step 4:

### Settlement:

1. Parties go separate ways with certain specific caveats
2. Return/destruction of converted materials
3. Unauthorized competition by employee ceases
4. Negotiate collection of attorney's fees
5. Consent Judgment – potential contempt of court for violation



# Pointers

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- Ensure you have in place robust policies regarding use and access of Employer email, telephone, and other data systems
  - Cordon off access depending on position/job duties
- Ensure those policies provide for monitoring and inspection of employee activities/access with respect to those systems
  - If an issue arises – inspect!
- Adopt and maintain measures that actively ensure presentation and protection of confidential materials
  - This is an element of a claim for violation of the Louisiana Uniform Trade Secrets Act
  - Password protect sensitive information, limit and monitor access to that information

## Pointers (cont.)

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- Do not generally distribute or make available to all or substantially all employees information you will later seek to protect
  - Do not distribute hard copies of sensitive information
- Even if your Company does not have a separate non-disclosure, non-competition agreement, ensure that all employees acknowledge the Company's data use, access, and confidentiality policies
- if you do adopt a stand alone non-disclosure and/or non-competition agreement, include a liquidated damages provision in the event of a breach by an employee (assuming enforceable in your state)
  - Permits threat of monetary award in cease and desist letter
- Unless you intend your stand alone agreement to be an employment contract, do not prepare it as one
  - In Louisiana, no additional consideration is required
  - At-will employment relationship can be maintained despite non-disclosure/non-competition agreement

## The End

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Questions?

