

# Florida Non-Competes: Trends and Best Practices

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# Our Footprint

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# Reasons for a Non-Compete

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PEST CONTROL DOWN TO A SCIENCE.

- Protect your existing customer or client relationships
- Protect your technical or proprietary business information
- Protect your investment in employee training and development
- Prevent *unfair* competition

# Florida Non-Compete Statute

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## Section 542.335(1),

**Fla. Stat:**

*“ . . . [the] enforcement of contracts that restrict or prohibit competition . . . , so long as such contracts are reasonable in time, area, and line of business, is not prohibited.”*



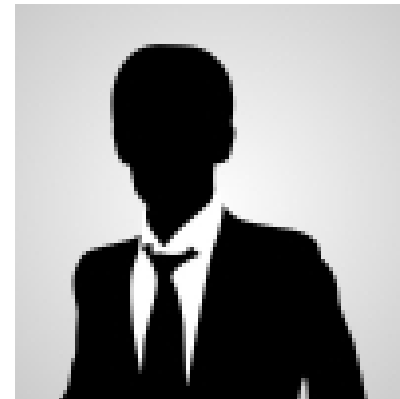
# Requirements for Enforcement

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The non-compete must be signed by the party against whom enforcement is sought.



The party seeking enforcement must plead and prove one or more “legitimate business interests.”



# Examples of Protectable Legitimate Business Interests

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- Trade secrets, as defined in [688.002\(4\)](#), Fla. Stat.
- Other (non-trade secret) valuable confidential business or professional information
- Substantial relationships with specific prospective or existing customers, patients, or clients

# Prospective Relationships

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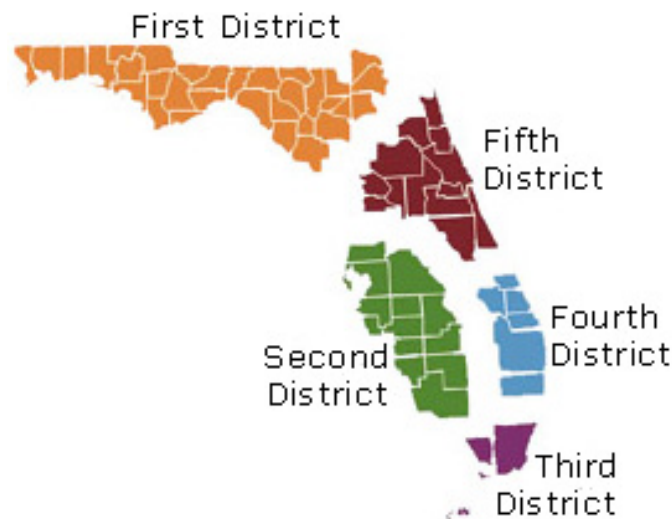
- Prospective Patients: *University of Florida v. Sanal*, 837 So. 2d 512 (1<sup>st</sup> DCA 2003).

“Upon termination of your employment with the University, whether through your resignation, your retirement from employment with the University, or the non-renewal or termination of this or any succeeding agreement, you (including an organization in which you are a shareholder, partner, employee or agent) agree that for a period of two years from the termination, you will not engage in a community based clinical practice within a radius of fifty miles from any location which has been the situs of your major faculty clinical teaching assignment with [sic] the two years preceding the date of termination.”

## Prospective Relationships cont'd.

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- *Florida Hematology & Oncology Specialists v. Tummala*, 927 So.2d 135, 139 (Fla. 5th DCA 2006) (following *Sanal's* and finding that referral physicians do not constitute a legitimate business interest because they supply a stream of unidentified prospective patients)
- *Southernmost Foot & Ankle Specialists v. Torregrosa, P.A.*, 891 So. 2d 591 (Fla. 3d DCA 2004) (referral physician relationships protectable)





## Examples of Protectable Legitimate Business Interests cont'd.

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- Trade secrets, as defined in 688.002(4)
- Other (non-trade secret) valuable confidential business or professional information
- Substantial relationships with specific prospective or existing customers, patients, or clients
- Customer, patient, or client goodwill associated with:
  - an ongoing business or professional practice, by way of trade name, trademark, service mark or “trade dress”
  - a specific geographic location;
  - a specific marketing or trade area
- Extraordinary or specialized training

# Setting Up a Non-Compete for Success

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- A non-compete cannot be used to prevent “ordinary competition.” It must be “reasonably necessary to protect your legitimate business interest(s).”
- Understand and define your legitimate business interest(s).
- Be realistic about timing, scope and geography, or the court will step in.

# Going At It Alone, Sigh, If You Must

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- Changes in corporate structure
  - General assignment clause
- Attorney's fees
- Are you protecting your “confidential information?”
- Change in employment status
- Deferred compensation
- Subsequent non-compete
- Multi-state employers or employees

# Going At It Alone, Sigh, If You Must, cont'd.

- [Baker Donelson's Quick and Easy Guide to Labor and Employment](#)



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LOUISIANA

**Welcome!** When you have labor and employment needs, you want a firm that listens to you, understands your business, and services your entire company. **Baker Donelson's** labor and employment attorneys are the resource in human resources. We are dedicated to meeting your needs, and we understand that your company's operations and aspirations often reach beyond the borders of any one state.

Our more than 70 labor and employment attorneys offer litigation defense services for administrative and court proceedings at the federal and state level, advice on pre-litigation strategies to reduce legal risks, policy analysis and drafting, compliance audits, management training and labor negotiation. Attorneys are spread across the Firm's seven southeastern states and Washington, D.C., are licensed in 19 states, and have handled matters across 40 states and the District of Columbia.

To the left and right are **Quick & Easy Guides** to the labor and employment laws of the identified states. We've also provided a summary of primary federal laws, which is available by clicking the icon below.

Should you need assistance maintaining or growing your local, regional, or national company, please contact one of **Baker Donelson's** labor and employment attorneys or your regular **Baker Donelson** attorney.



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Disclaimer: These materials do not constitute legal advice and should not be substituted for the advice of legal counsel.



MISSISSIPPI



NORTH CAROLINA



TENNESSEE



TEXAS



VIRGINIA

## Going At It Alone, Sigh, If You Must, cont'd.

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K. *Covenant Not to Compete*. The seller, and Doris Killian, covenant not to compete with the purchaser and purchaser's business by opening, operating, serving as an officer, director or other employee of any real estate brokerage business located within the geographical boundaries of Pinellas County, Florida, for a period of three years from the date of closing. Additionally, said noncompetitive agreement shall provide that neither seller, nor Doris Killian shall attempt to hire or contract with any of the real estate salesmen, salesmen/brokers or brokers or other employees of purchaser for a period of six months from the date of closing, and shall constitute a default under the terms of said noncompetitive agreement and this agreement.

## So You Have Decided to Engage Counsel

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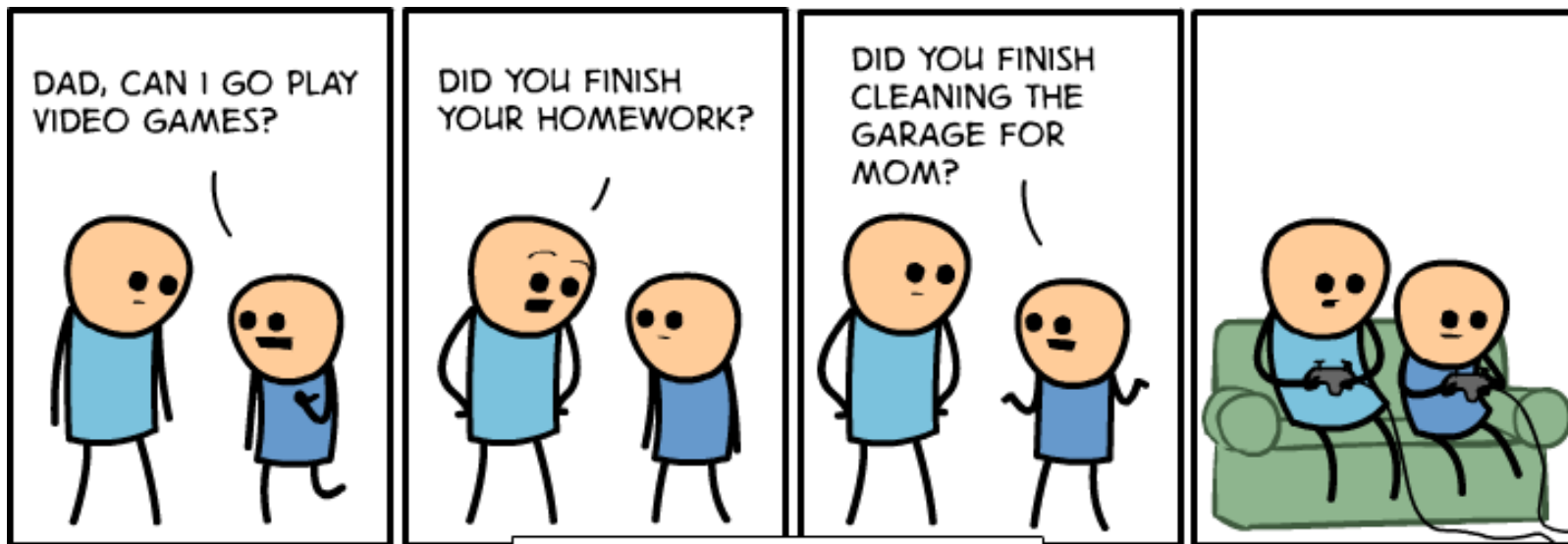
# Enforcement Challenges

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- Have you breached the contract?
  - Is your non-compete an independent covenant?
  - Unclean hands
- Can the damages actually be quantified?
- Risk of judicial modification
- Bond requirements

# The Shoe is on the Other Foot

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## The Shoe is On the Other Foot, Cont'd.

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- Hiring a new employee with a non-compete
  - Is there a suitable candidate without a non-compete?
  - Risk of tortious interference claim
    - existence of business relationship
    - knowledge of that relationship by defendant
    - intentional and unjustified interference with that relationship
    - damage
- Strategies
  - Avoid indemnifying new employee
  - Avoid collusion

# Q&A

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PRESENTATION



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## Upcoming Webinars:

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This program is part of a series of free webinar programs focused on Labor & Employment issues. See below for an upcoming webinar.

- **April 14, 2015** – Social Media in the Workplace