

# Employer Update

## **Where Do We Go From Here?**

### **How Idaho Courts and Employers are Dealing With Clarification in the Law Related to Non-Compete Agreements.**

*By Tamsen L. Leachman and Dana M. Herberholz*

For many Idaho businesses, the most valuable employees are those who: (1) generate and maintain client or customer relationships; (2) develop or plan processes, strategies, and/or pricing schemes; and (3) hold leadership positions that are highly visible to the public, making him or her the “face of the company.” By virtue of their exposure to strategic, financial, proprietary and confidential information, or because of their relationships with others, these are also the same employees who can harm the company the most when they leave.

Prior to March 2005, many Idaho employers believed they could easily limit the exposure created by the departure of valuable employees by requiring them to sign Confidentiality, Non-Disclosure, Non-Solicitation and/or Non-Competition Agreements (generically referred to as “Non-Competition Agreements”). This feeling of security was greatly undermined, however, after the Idaho Supreme Court decided the case of

*Freiburger v. J-U-B Engineers*,<sup>111 P.3d 100 (2005)</sup>. Since then, we have discovered that not all companies have recognized the significant clarifica-



tion in the application law and may not yet have harmonized their standard agreements with the courts’ current view of Non-Competition Agreements. Given this, we believe it is worthwhile to revisit the *Freiburger* decision and share our observations and lessons learned in the aftermath.

#### **What Happened?**

As you may recall, in *Freiburger*, the Idaho Supreme Court evaluated a broad and non-specific Non-Competition Agreement signed by one of J-U-B’s engineers:

... I agree that for a period of two years following any date of termination of my employment with JUB, I would not attempt

**Next month’s** topics include comments on FMLA regulations, and an update on the *Faragher/Ellerth* defense.

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to take, take or join with anyone to take, (without the written consent of JUB) any of past or present clients or projects or any pending clients or projects, for which JUB has or would be providing professional services. (emphasis added).

The problem arose after the employee resigned and advised J-U-B that he wished to solicit business from one of the clients with whom he worked while at J-U-B. The employee made several attempts to seek from J-U-B an identification of which clients it claimed were covered by the Non-Competition Agreement. No response was ever received. Ultimately, the employee filed a declaratory judgment action, asking the Court to strike down the Agreement as void and unenforceable. The employee in *Freiburger* prevailed at every stage of the proceeding, including the decision to award full attorney fees and costs. In the end, failing to respond to the employee's request for clarification as to which clients were "off limits" turned out to be a costly decision by J-U-B.

### What Changed?

In looking at the various issues, the Idaho Supreme Court began by pointing out that Non-Competition Agreements are not favored in Idaho. It added that these Agreements will be viewed narrowly and all inferences will be drawn against the employer. In addition, these agreements will be disregarded entirely if they are overly aggressive and lacking in fundamental limitations, such as a reasonable geographic area or a definable scope of prohibited activities. Finally, the Court clarified that any Agreement that completely precludes re-employment in the industry or with a competitor will not be upheld, except in special circumstances where, for example, an employee could not perform the duties of the new position without utilizing protected trade secrets or confidential information, or without soliciting customers of his/her former employer. In short, after *Freiburger*, Idaho employers should no longer rely on

broad language in agreements, should not preclude post-employment activity altogether, and should not assume a court will fix any problems that arise in a defective agreement.

### What Does This Really Mean?

Since *Freiburger* was decided, Idaho's trial courts have struggled to apply the broad principles established by the Idaho Supreme Court to the much more narrow and specific facts at issue in most unfair competition disputes. Not surprisingly, there have been some unpredictable and inconsistent results. Often, the outcomes seem linked to how onerous the Agreement is and how poorly the employee behaved prior to and after leaving the company.

Our experience since *Freiburger* has shown us several key things:

- Judges usually will ignore absolute prohibitions against re-employment unless there is compelling evidence that the former employee is actually luring away customers or disclosing trade secrets/proprietary information, and must continue to do so as part of his/her current position;
- Protection will be extended to a company's legitimate business interest, especially related to customer relationships established by the employee, or to areas of information where the employee had meaningful involvement; and
- The extent of protection afforded will depend upon how long the information continues to create a competitive advantage, and the extent of harm that will result absent intervention by the court.

What we know, more than anything, is that certainty of outcome in an action to enforce a Non-Competition Agreement is a thing of the past. There are, however, several things a company can do to maximize the protection of its important customer and information-based assets.

### Next Steps

How long has it been since you looked at your standard Non-Competition Agreement

or thought about who receives this document and why?

- (a) \_\_\_\_\_ More than 24 months
- (b) \_\_\_\_\_ Between 12 and 24 months
- (c) \_\_\_\_\_ Within the past year
- (d) \_\_\_\_\_ We review the agreements and the justification for them every year

If you answered with (a), chances are your Non-Competition Agreement predates *Freiburger* and may be partially or entirely unenforceable. If you answered with (b), your agreement may mirror the broad concepts of *Freiburger*, but may not take advantage of the lessons learned in its aftermath. If you answered with (c) or (d), you are well ahead of your peers.

Regardless of where you are in the review and evaluation process, there are some guidelines you may wish to consider. First, it is important to identify who in the organization actually has exposure to information or relationships worth protecting, and who could do the most harm if he or she began working for or operating a competing business. Many companies provide Non-Competition Agreements to all employees, regardless of the position held or duties performed. A company that does this risks a court viewing the Agreement as mere boilerplate, unimportant, and not specifically designed to protect a significant business interest. This will make enforcement much more difficult.

Second, once you have identified the persons/positions that should be covered by a Non-Compete Agreement, tailor the standard Agreement to fit the unique circumstances at issue. For example, it is important to delineate the employee's title and job responsibilities as a way to reinforce the level of trust and confidence placed with that individual. In addition, and perhaps most importantly, identify the types of confidential material to which the employee has access—for example, customer lists, sales strategies, growth plans, and pricing strategies—or attach as an appendix, a list of customers that would be subject to the no solicitation portion of the Agreement.

Third, review the Agreement regularly to ensure that the scope of the Agreement still reflects the areas of responsibility entrusted to the employee, and that the identification of confidential information or customers are up to date and accurate. Not only will the review process ensure that information in the Agreement is accurate, it also sends the message to the employee (and also to a court) that protection of confidential/proprietary information and preservation of customer relationships is a high priority and worthy of protection.

### Of Note

It appears that some Idaho businesses have become frustrated with the judicial position on Non-Competition Agreements, and have taken their fight elsewhere. We recently learned that several businesses are backing a bill known as the Protection of Employers' Legitimate Business Interests Act (SB1203).

The focus of the Act is to legitimize the use of Non-Competition Agreements as a means of protecting a company's investment of time and resources in its key employees, systems, information, products, and relationships, as well as prevent relationships or confidential information from being easily diverted to a competitor. The language of the Act is broad, and highly favorable to employers. It takes a quite different view of the equities of Non-Competition Agreements than the *Freiburger* Court did. If passed, this bill would represent a dramatic shift in the law of non-competes, and may create new issues and areas of uncertainty in future Non-Compete disputes.

We learned that the Act was heard in the Senate Human Resources committee on March 13. After discussion and debate, the bill was sent to the floor with a do pass recommendation, with a vote of seven to two. The bill must also be reviewed by the House of Representatives, which will likely occur in the very near future. We will track the progress of the bill, and if it becomes law, it will be featured in a future *Employer Update*.



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## Coming Events . . .

COEM is hosting another annual **FMLA Update** on **June 26-27, 2007**.

If you have missed this seminar in the past, or would like more advanced training regarding the Family and Medical Leave Act, we invite you to attend this year. For more information, visit [www.counciloned.com/seminars](http://www.counciloned.com/seminars) or call 1-800-942-4494.

Tamsen Leachman is speaking at the

**National Business Institute's Advanced Issues in Employment Law**

program on **July 11, 2007**. This is an all-day seminar covering topics such as employee privacy, wage and hour issues, practical strategies for handling terminations and reductions-in-force, preventing and handling employment claims, ethical issues such as confidentiality and conflicts of interest, and much more. For more information, call 1-800-920-5947, or visit [www.nbi-sems.com](http://www.nbi-sems.com).

*Fourth Annual*

**Labor and Employment Law Advanced Practices ("LEAP") Symposium**

See the enclosed flyer regarding this year's LEAP Symposium, **October 25-26, 2007** in San Diego. Candy Dale has been a speaker for the past several years and, while this year's program has not yet been finalized, Candy definitely plans to attend. If you are interested, you are eligible for a \$100 discount if you mention that you are a friend/client of Candy's. We hope many of you will be there!

