SUBJECT: **MAYBE I SHOULD OPEN A BUSINESS TO COMPETE WITH MY BOSS – MAYBE NOT**

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DATED: **February 2021**

Employers, particularly in the Hi-Tech sector, are concerned about "hitting a homerun" before any competitor does so. A significant aspect of that concern is that their own employees could, utilizing knowledge and/or skills acquired in the course of their employment, either join a competitor or start up their own competing business. The "Non-competition Clause" has, therefore, become an integral provision in employment agreements. What is good for the employer, however, is likely not in the employees' best interests since by its very nature the provision is intended to limit the employees' flexibility and freedom to act thereby violating her "constitutional right" to earn a livelihood and conflicts with the general public favor and the free market policy. Courts have been tasked with balancing the "competing" interests, between the freedom of contracts and the freedom of employment, which both are constitutional rights. This article is intended to consider the ramifications of those decisions on the parties.

Before addressing the issues, we need to be clear as to what the clause looks like and where it can be found. Typically in an employment context, a non-competition clause will be part of an employment agreement, generally towards the last third of the document and somewhere near a confidentiality clause, or it can be included in a separate agreement – again, together with confidentiality provisions. The reason that the two provisions are usually found together is because they both deal with different aspects/concerns on the part of the employer. The confidentiality clause is intended to prevent the employee from disclosing or permitting the disclosure of the employer's confidential information while the non-competition provision is intended to prevent the employee from competing with his or her employer both during and after termination of her employment. Confidentiality clauses typically bind employees during their employment and either indefinitely or for an extended period of time after the end of the employment relationship. Non-competition clauses typically prohibit competition after the end of the employment relationship (usually 6 months to 2-5 years). Confidentiality provisions typically apply world-wide while non-competition provisions typically would apply to geographic areas where the employer does business or reasonably contemplates doing business. Some non-competition provisions prohibit direct competition while others seek to broadly prohibit work in the same field as the employer.

For decades, courts throughout the world have deliberated upon the enforceability of noncompetition provisions and generally had concluded that they were enforceable provided that their scope, geographic limitation and temporal restrictions were reasonable. Over the past several years, however, courts in jurisdictions such as California and Israel have been significantly limiting the enforceability of the provision regardless of the reasonability of the factors previously considered to be the litmus test. Israeli courts have recognized a person's right to earn a living and will only impinge upon that right under limited circumstances. Israel has addressed the issues in various venues – the Labor Courts, Israel's Supreme Court (e.g. "Checkpoint") and in the legislature (i.e. the Commercial Injustices Law (5759-1999)). The onus for justifying the

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enforcement of non-competition provisions, is now on the employer. The circumstances that a court will consider in determining whether to enforce a specific noncompetition provision can be briefly summarized as follows:

(1) that the former employee is using, or is reasonably expected to use, secrets obtained in his former employment in his new position. The employer will not only have to prove that the information, which the former employee is at risk of using, is indeed secret and not available in the public domain or easily accessible, but that the period of time and geographic area in which the non-competition provision is sought to be enforced is reasonable and deserving of protection. The former employer will have to also prove that he used reasonable means to protect the trade secret and exposed it only to a small number of people who needed to be exposed to the information, while obliging them to specific non-competition agreements.

(2) that the trade secret under scrutiny which the employer considers at risk has not become part of the general professional qualifications of the former employee. The courts have recognized the difficulty in deliberating this point and use, as an example, carpentry skills learned by an apprentice carpenter – while it may be true that the apprentice, having learned the skills of his mentor, could be at risk of competing with his former mentor, the courts would likely consider the skills acquired to have become part of the individual's professional skills and not to be a trade secret entitled to protection.

(3) that the former employer must justify limiting the former employee from working for a competitor notwithstanding the former employee's duty of confidentiality to the former employer. The employer would need to demonstrate that his ability to seek remedies for breaches of the former employee's duty of confidentiality is not enough to justify imposing a limitation on the individual's ability to work in his field. In Addition, The fiduciary duty that applies on the employee is broader than good faith. Due to that, the employee, for example, cannot sign an employment agreement while still working for another employer, in order to copy his employer's product (e.g. "Checkpoint").

(4) that the former employer made special investment in the employee and provided him or her with "extra" knowledge or special compensation in consideration for the individual's commitment not to compete.

The above four circumstances do not constitute a closed list and the tribunal must consider each case on its merits, in the light of all the circumstances.

In summary, while Israeli courts will no longer enforce non-competition provisions in an employment context to the same extent that they did previously, they will still do so if the employer can demonstrate that factors dictate and necessitate their recognition. Employees should not consider themselves free to compete with their former employers yet they should be aware that they may not be as restricted as they had been previously. Lastly, employers should be certain that under all circumstances, their employees are solidly bound in writing to their duty of confidentiality.

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This article is not to be considered as a legal opinion.
For legal advice, we suggest that you contact legal counsel directly.

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