

What Exactly Does Your Non-Solicitation Agreement Prevent?

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Non-solicitation agreements are commonly used by employers to restrict former employees from soliciting clients following termination of the employment relationship. Courts throughout the country have different takes on the enforceability and application of non-solicitation agreements. Fortunately for Arizona employers, Arizona courts typically enforce non-solicitation agreements, so long as they: (1) protect a legitimate business interest; (2) are reasonable in both scope and duration; and (3) do not violate Arizona public policy.

Regarding legitimate business interests, there are several that may justify non-solicitation agreements. These include the protection of trade secrets, patents and intellectual property. In determining whether an agreement is reasonable in scope and duration, courts consider where the employer does business and whether the limitations are tied to a specific business need. Finally, when considering whether a non-solicitation agreement violates public policy, courts consider whether the agreement harms the public in a meaningful way. For example, an agreement that deprives an employee from performing any work in his or her field for even a small period of time would be against public policy. The same is true of agreements that deprive clients of the right to do business with the employee, even in the absence of solicitation.

Once a non-solicitation agreement that complies with these requirements is in force, the question becomes, what exactly does the agreement prevent? Does it prevent former employees from announcing their departure to clients? How about telling clients where they will be working? What about providing new contact information or asking the client to reach out to them? This is a developing area of law that all employers should watch so that they know what to do when clients report that a former employee called to announce his or her new employment.

Arizona courts are clear that an employee's conduct in merely informing clients of a change in employment, without more, is not solicitation. Discussing business with a former employer's client, upon invitation of that client, is also not considered solicitation. Nor is a willingness to discuss business upon invitation

of a client or another party. This conduct, however, can easily cross the line into solicitation.

In *Alpha Tax Services, Inc. v. Stuart*, 158 Ariz. 169 (Ariz. App. Ct. 1988) for instance, an Arizona Court of Appeal held that two former employees of a tax preparation company violated their non-solicitation agreements by mailing targeted fliers to the company's clients that announced the opening of their new company and offered discounts to clients who used their services. Of particular importance to the court was the fact that the mailings were personally directed at the former employer's clients and that they offered discounts.

Similarly, in *Compass Bank v. Hartley*, 430 F. Supp. 2d 973 (D. Ariz. 2006), an Arizona district court held that an employee's act in sending a letter to former clients that contained two telephone numbers, an e-mail address, and his new address constituted a solicitation. The court reasoned that this was solicitation "not only because it was a targeted mailing, but because it contained contact information initiating c[lients] to call/e-mail/write [him]."

In 2015, an Arizona district court held that an employee violated a non-solicitation agreement by contacting his employer's clients, informing them of his new position, and setting up appointments to meet with them. See *J.P. Morgan Securities, LLC v. Krich*, No. CV-15-00979-PHX-DGC, 2015 WL 3604199 (D. Ariz. June 8, 2015). The Krich court held that this conduct violated an enforceable non-solicitation provision, which required the employee to refrain from soliciting business from the employer's clients for a period of one year.

Earlier this year, an Arizona district court took this a step further in *E*TRADE Financial Corporation v. Eaton*, 305 F. Supp. 3d 1029 (D. Ariz. 2018).¹ In this case, the former employee testified that he contacted his former employer's clients, by telephone, to announce his new position and provide his new contact information. The former employee claimed that he was required, by certain rules applicable to certified financial planners, to provide his new contact information to the clients he previously serviced. The former employee

admitted, however, that if he was unable to speak with a client in "real-time," he did not send that client an e-mail, letter, flyer, or some other written communication to provide his new contact information. The court found that by "insisting on conveying the news about his switching firms only in a live and real-time conversation with the former client, and ... never following up to provide his new contact information to those former clients who did not assent to a telephone call, [the former employee's] primary purpose was to solicit their business to him and away from [his former employer]." This, the court held, constituted improper solicitation in violation of the agreement between the former employee and employer.

So, what is the take away for Arizona employers? First, if they operate in a sector where employees develop personal relationships with clients, they should consider entering into a non-solicitation agreement with employees that is reasonable in scope and duration. Second, if an employee resigns, employers should follow the employee's communications with clients carefully because what the employee says and the manner in which he or she says it (i.e., via e-mail, over the phone, face-to-face, etc.) are highly relevant to whether the non-solicitation agreement has been breached and whether enforcement measures should be taken. Third, employers who hire someone who entered into a valid non-solicitation provision with a former employer should ensure the client does not engage in impermissible solicitations.

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¹Rodney B. Sorensen and Rhianna S. Hughes of Payne & Fears LLP represented E*TRADE in this matter and were able to obtain a preliminary injunction in E*TRADE's favor, prohibiting the defendant from further using E*TRADE's confidential client information to solicit clients.