



MEMO

Date: October 20, 2003

Re: **May a former employee of a corporation, without knowledge of trade secrets and without a contract with the former employee forbidding working for another corporation, work for a competitor corporation?**

Under Florida law, a former employee is free to compete against a former employer absent a noncompetition agreement to the contrary. *Harlee v. Professional Service Industries, Inc.*, 619 So.2d 298 (Fla. 3d DCA 1992). In the absence of such an agreement, an employee, after his term of service has expired, is entitled to compete in business with his former employer on the same footing as a stranger. *Connelly v. Special Road & Bridge District No. 5*, 126 So. 794 (Fla. 1930). Generally speaking, competition for business by a competitor is to be expected from former employees who are not bound by a noncompete contract. *Langford v. Rotech Oxygen & Medical Equipment, Inc.*, 541 So.2d 1267 (Fla. 5th DCA 1989). Such competition is not actionable. *Id.* However, even in the absence of a noncompetition contract, where an employee acquires during the course of employment a special technique or process developed by the employer, the employee is under a duty not to disclose such skills, techniques or processes in his or her new employment for the employee's own or another's benefit to the detriment of the previous employer. *Lee v. Cercoa, Inc.*, 433 So.2d 1 (Fla. 4th DCA 1983).

Typically, as in the *Lee* case, a legal action may be possible when the employee has knowledge of trade secrets. *Id.* A "trade secret" is information, including a formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. *Fla. Stat. §688.002(4)*. If the employee has such knowledge of a trade secret, a court may only enjoin the employee from working for a competitor when the

employee has either divulged or is threatening to divulge trade secrets. *Del Monte Fresh Produce Company v. Dole Food Company, Inc.*, 148 F.Supp.2d 1326 (S.D. Fla. 2001); Fla. Stat. §688.003(1).

Under Florida Statute §688, which adopted the *Uniform Trade Secrets Act*, the misappropriation of trade secrets, meaning the acquisition, disclosure, and/or use of the information to the disadvantage of the owner of the trade secret is prohibited. See *Fla. Stat. §688.002(2)*. In order for a former employer to enjoin the former employee from working for a competitor, the employer must show that there is actual or threatened disclosure of a trade secret. *Id.* In Florida, in order to show threatened disclosure, a party must show that the former employee possesses knowledge of a trade secret, but that there is also a substantial threat of impending injury. *Id.* (citing *International Bus. Mach. Corp. v. Seagate Tech., Inc.*, 941 F.Supp. 98, 101 (D. Minn. 1992)). The reasoning for this rule is that in absence of a covenant not to compete or a finding of actual or an intent to disclose trade secrets, employees should be able pursue their chosen field of endeavor in direct competition with their employer. *Id.* Merely possessing trade secrets and holding a comparable position with a competitor does not justify an injunction. *Id.* In addition, the mere suspicion or apprehension of injury to the former employer will not merit an injunction. *Id.*

In addition, in order to obtain an injunction, the former employer must establish that the knowledge of the employee constitutes a trade secret. In order to establish the existence of a trade secret, the plaintiff must establish that:

1. The process is secret;
2. The extent to which the information is known outside of the owner's business;
3. The extent to which it is known by employees and others involved in the owner's business;
4. The extent of measures taken by the owner to guard the secrecy of the information;
5. The value of the information to the owner and to the owner's competitors.
6. The amount of effort or money expended by the owner in developing the information; and
7. The ease or difficulty with which the information could be properly acquired or duplicated by others. See *Thomas v. Alloy Fasteners, Inc.*, 664 So.2d 59 (Fla. 5th DCA 1995).

In conclusion, an employee should be aware of potential hazards when deciding to work for a competitor. The employee should make sure that he or she did not sign a non-competition agreement and that he or she is either unaware of any trade secrets or, if aware of trade secrets, will not be in a position where disclosure will be necessary. Heeding these warnings, an employee (and future employer) will likely be protected from future liability.