



ALERT

EMPLOYMENT LAW UPDATE

Employers Can Sue Employees for Breach of Promise Not To Compete While Still Employed

California law generally holds that covenants not to compete and other contracts through which employers seek to prevent employees from going into direct competition with employers after they leave employment are void and unenforceable. However, a court recently held that employees owe a duty of loyalty to their employers while they are employed, and employees who promise not to compete with their employers but who do so while still employed can be liable for fraud. The case is entitled *Techno Lite, Inc. v. Emcod, LLC* (2020) 44 Cal.App.5th 462.

The defendants in *Techno Lite* were Techno Lite employees who formed a separate corporation. They specifically promised their employer that they would not compete with the employer, claiming that their business would sell a different product. After they left, Techno Lite discovered that the defendants had, while still employed, solicited Techno Lite's customers and sold the same products to Techno Lite's customers that Techno Lite was selling. Techno Lite sued the defendants for fraud and other causes of action. Defendants argued California's ban on non-compete agreements meant that they could not be sued for fraud because their promise not to compete was unenforceable. The trial court found in Techno Lite's favor, and the Court of Appeal for Second Appellate District upheld judgment in the employer's favor on the fraud claim. The Court held that employees may form separate corporations or companies on their own time while still employed, and they may even "prepare to compete" as long as they do not use the employers' time, facilities, or proprietary secrets to build a competing business. Employees may not, however, directly compete with their employer while still employed. The Court held that employers are entitled to "undivided loyalty" from their employees, and that employees may not "bite the hand that feeds them." On that basis, the Court held that the defendants' promise not to compete was enforceable, and their breach of that promise was fraud.

TAKEAWAY - Written employment contracts can, and should, include provisions stating that employees promise not to compete with the employer during the term of employment; to devote all of their time while working to the benefit of the employer; and promise not to use the employer's facilities and/or resources to build a competing business. Such provisions are enforceable against former employees if the employees breach them while still employed.

If you have any questions about these provisions, please do not hesitate to contact us.

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