

Blog Post

Florida Supreme Court: Referral Sources Can Be Protected By A Non-Compete

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Big news for home health agencies and others whose business comes from referral sources: the Florida Supreme Court just held that referral sources are the kind of protectable business interest that will support a non-compete agreement. Home health agencies, like other health care businesses, routinely use non-compete agreements to prevent marketing employees from leaving and going to work for direct competitors. But there have been conflicting rulings in Florida appellate courts as to whether those agreements can be used to prevent home health employees soliciting the physician practices and other referral sources of their previous employers when they go to work for a competitor. Under Florida Statute, 542.335, non-compete agreements can only be enforced if necessary to protect legitimate business interests, such as trade secrets and customer lists. Florida appellate courts had reached different conclusions as to whether referral sources could be protected interests, as they were not specifically listed in the statute. The Florida Supreme Court, in a decision published this week, has ruled that home health referrals sources **can** be a legitimate business interest worthy of protection under the statute.

The statute lists examples of what “legitimate business interests” can be protected through a non-compete. The example most similar to patient referral sources is “substantial relationships with

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specific prospective or existing customers, patients, or clients”. One Florida court held that this provision cannot apply to patient referral sources because “one cannot have ‘substantial relationships’ with prospective patients who are unidentified and unidentifiable”. However, the Supreme Court found that the list of protectable interests in the statute is not intended to be exhaustive, because it is preceded by the words “includes, but is not limited to”. The Court fundamentally states that the Legislature intended for the statute to apply to other protectable interests that are not listed in the statute. Further, the Supreme Court found that the purpose of the statute is to prevent unfair competition, and that referral sources are the life-blood of home health agencies. The Court ruled that it would encourage unfair competition to allow an employee to work for a home health agency for a short period, receive pay from that employer to cultivate referral sources using the agency’s resources, only to have the employee leave to work for a competitor stealing those referral sources.

It should be noted that the decision only concludes that patient referral sources **can** be protectable interests, not that they **are** in every situation. In fact, each case has to be analyzed based on its own set of facts. Non-compete agreements should be carefully drafted to address the potential for enforcement. Competent legal counsel should be consulted for drafting and for advice on documentation of efforts and resources used to develop referral sources.

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