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***Firing A Warning Shot Across the Bow – Sending An Effective Cease & Desist or
Warning Letter In Non-Compete/Non-Solicitation Disputes***

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I. Covenants Not To Compete/Not To Solicit Under AK Law

-Enforceable unless void for public policy reasons.

-Alaska follows the “reasonableness” approach. If overbroad, court may reasonably alter it to render it enforceable unless court finds that it was not drafted in good faith. *Data Management, Inc. v. Greene*, 757 P. 2d 62, 64 (Alaska 1988)(citing RESTATEMENT (SECOND) OF CONTRACT. §184 (2)).

-In an employment context, will be “scrutinized with particular care” because they are “often the produce of unequal bargaining power.” *See Wenzell v. Ingram*, 228 P.3d 103 (Alaska 2010)(citing RESTATEMENT (SECOND) OF CONTRACT §188).

-In the sale of a business, this level of scrutiny is not applied. *Wenzell v. Ingram*, 228 P.3d 103 (Alaska 2010) (restrictive covenant ancillary to sale of business is construed liberally not to favor either party) ; *see also Aviation Associates Ltd. v. Temsco Helicopters, Inc.*, 881 P.2d 1127 (1994).

-Enforcement rights are likely assignable. *See* RESTATEMENT (SECOND) OF CONTRACT, §317, comment (d)(although an employee’s duty to perform under an employment contract generally is not delegable, the right to enforce a covenant not to compete generally is assignable in connection with the sale of a business).

II. Key Components For Enforceability

- Timeliness
- Consideration
- Reasonable & Clear Scope of What’s Covered



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- Reasonable in Scope (Geographic, Industry, Activities, People, etc.) & Duration
- Assignments Addressed
- Fully Executed & Distributed

III. Suggestions For Avoiding Dispute

A. During Employment

- Restrict Access/Limit Distribution
- Clear Written Policies
- Clarification & Acknowledgement Throughout Employment (Verbally/Writing)

B. Departure

- Verbal Reminder
- Provide Duplicate Copy of Agreement
- Written Reminder
- Address the Elephant in the Room
- Confirm Any Carve Outs in Writing
- Require Return of Confidential Information
- Document Personnel File

IV. Components Of An Effective Cease & Desist Or Warning Letter

A. Former Employee/Seller of Business

- Describe Position/Access
- Reference Consideration Given In Exchange For Covenant
- Use Contract & Policy Language (Include Copy of All/Part)
- If Appropriate, Reference UTSA¹ and/or Implied Covenant of Good -Faith/Fair Dealing

¹Alaska's Uniform Trade Secrets Act (AS 45.50.940) gives statutory protection to trade secrets; the statute defines "trade secrets" as information that (a) 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

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- Reference Specific Concerns
- State What Behavior/Response Is Expected
- When Appropriate, Set Appropriate Deadline
- Identify Intended Follow Up/Next Steps
- Reservation of Rights
- Copy To New/Potential Employer, Solicited Client/Employee, Other Party?
- Be Strategic When Choosing Delivery Methods

B. New Employer/Other Relevant Party

An interference with contract claim may arise if a competitor acts with an improper means or purpose in causing a new employee to violate his/her non-compete, non-solicitation or other contract. Wrongful purposes include: destroying competitor's business, defamation, fraud, stealing competitor's trade secrets, threats, physical violence, and misrepresentation. The new employer (or prospective employer), however, must have notice of the non-compete, non-solicitation or other contract. Indeed, Alaska courts have confirmed that in order to establish a claim of tortious interference with a contract, plaintiff must show: (1) an existing contract between it and a third party; (2) defendant's knowledge of the contract and intent to induce a breach; (3) breach; (4) wrongful conduct of the defendant causing the breach; (5) damages; and (6) absence of privilege or justification for defendant's conduct. *See Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427 (2004); *K&K Recycling, Inc. v. Alaska Gold Company, et al.*, 80 P.3d 702 (Alaska 2003); *Odom v. Fairbanks Memorial Hospital*, 999 P.2d 123 (Alaska 2000). Alaska courts have confirmed that the tort of intentional interference applies to terminable at-will contracts. *See Kinzel*, 93 P.3d at 443.

Thus, sending a letter to a new employer/prospective employer/other relevant party can be appropriate. The letter must be carefully drafted in a way that does not inappropriately interfere with the former employee's/seller's efforts to obtain new employment or that defames

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(b) is the subject of efforts that are reasonable under the circumstances to maintain secrecy. Restatement of Torts provides a similar definition: "a trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." RESTATEMENT (FIRST) OF TORTS § 757, comment b; *see also State of Alaska v. Arctic Slope Regional Corporation, et al.*, 834 P.2d 134 (Alaska 1991).



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or disparages former employee/seller. Here are a few tips for preparing a letter to the new/prospective employer:

- Be Strategic When Identifying Addressee
- Describe Position/Access
- Reference Consideration Given In Exchange For Covenant
- Use Contract & Policy Language (Include Copy of All/Part)
- If Appropriate, Reference UTSA and/or UTPA²
- Reference Specific Concerns
- State What Behavior/Response Is Expected
- When Appropriate, Set Deadline
- Identify Intended Follow Up/Next Steps
- Reservation of Rights
- Copy To Former Employee, Solicited Client?
- Be Strategic When Choosing Delivery Methods

**This handout is provided for educational purposes only. It is not a substitute for legal advice.*

²Alaska's Unfair Trade Practices Act (AS 45.50.471) applies to unfair practices in business to business transactions as well as business to consumer transactions. *See AIC LLC v. Pacific Diversified Investments, Inc., et al.*, 279 P.3d 1156 (Alaska 2012).