

To: Corporations, Securities and Financial Services Committee
From: Stuart Cohn
Re: Reform of Fla. Stat. 542.335 (Non-Compete Covenants)
Date: December 24, 2018

Dear Committee,

I recommend that our committee request the Chair of the Business Law Section to create a special ad hoc committee to consider amending Florida Stat. 542.335 dealing with covenants not to compete. This issue overlaps with other committees and therefore would be best handled by a special committee. I am bringing this to our committee initially to request that our committee support the formation of such a study.

Our statute has substantial flaws and is out of step with the jurisprudence in most other states. More than one court outside Florida has refused to enforce our statute on grounds that our statute is contrary to public policy. A New York court found our statute to be “truly obnoxious.” *Brown & Brown, Inc. v. Johnson*, 34 N.E. 3d 357 (CY 2015). The statute was recently very carefully critiqued by Hank Jackson of Shutts & Bowen in an article, “*Noncompete Agreements in Florida: “Reasonable” or “Truly Obnoxious.”*” 92 Fl. Bar. J. 10 (2018), to which I commend all interested in the subject.

I will be pleased to discuss the statute’s background and problem areas at our January meeting. In brief, the principal areas of concern are (1) specific negation of consideration for economic or other hardship imposed on the employee (1)(g)(1) ; (2) courts are mandated to modify an otherwise overly broad restraint on time or area (1)(c); (3) if a legitimate business interest has been established, the burden of proof regarding the time and area shifts to the employee (1)(c); and (4) courts cannot apply rules of contract construction that might cause a covenant to be interpreted narrowly against the drafter (1)(h).