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Non-Compete Agreements Halachic Deals & Documents: Part IV

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THE HALACHIC NON-COMPETE:

The final segment of this series will deal with the halachos of non-compete agreements. Such contracts differ from other *shtaros* in a number of ways, as we shall explain.

First of all, regarding most transactions, even legal documents usually have some halachic validity due to the concept of situmta, which means that the halacha follows the common practice; however, in the case of non-competes, the legal ramifications are very unclear. The U.S. court system generally does not support overly restrictive non-compete clauses, but individual judges are given quite a bit of leeway to determine what qualifies as overly restrictive. Since the legal outcome is itself ambiguous, it is very difficult for a bais din to rely on *situmta* to validate such a document.

Secondly, the goal a standard non-compete is trying to accomplish is not really doable in halacha. Non-competes seek to forbid someone from doing a certain thing – they try to command a worker not to work – and there is no real halachic mechanism that can be used to force someone not to do something in this manner, even if *situmta* could be applied.

The way halachic non-competes work, on the other hand, is that they place fines on employees for transgressing the terms of the deal. Charging someone money for doing a certain action is a halachically valid transaction, and, therefore, such a deal could be enforced as long as the *shtar* is written correctly.

It is likely that secular courts would usually not respect a non-compete written with a penalty for breaking the terms. Thus, it must be noted that the halachic non-compete would only work in a bais din, and not in a secular legal forum.

NON-COMPETING AS A PAYMENT:

The Chasam Sofer discusses a case where a shochet presented a *k'sav semicha*, certification to serve as a professional shochet, to a younger colleague, with a stipulation that the younger man refrains from competing with him in his area. Chasam Sofer rules that the young shochet is bound by the agreement, explaining that the older shochet is actually providing him with a service by granting his accreditation. Technically, he has the right to charge him a fee for this service – but instead of money, the price he is charging is the demand that the younger man not compete with him. Since he has the right to ask for this "payment", and both sides signed on to agree to this arrangement, the contract is valid.

This Chasam Sofer is a clear halachic basis for non-competes where the employee who is leaving a company received something of value from a company and, therefore, "owes" some form of payment. For example, if a company trained an employee into the business, the worker owes the employee something, as he is really obligated to pay for his training in some way. Therefore, he is beholden to pay him back by

abiding by the terms of the non-compete agreement he reaches with the employer.

HOW FAR DOES IT GO?

While the Chasam Sofer is a halachic source for the validity of many non-competes, it is unclear exactly what his intent is vis-à-vis the limits on what the employee can do. Does he mean that the employee is forbidden to work in his field if he signed a document stating that he will not compete, or does he simply mean that he must remit a certain fee to "reimburse" the employer for his services before he is allowed to compete?

It is very possible that the Chasam Sofer only meant that the worker must pay fair market value for his training before he can compete, but never meant that he must abide by an agreement that forbids him from working at all in his field.

The Bais Dovid writes that it was customary in his time for merchants to pay each other not to compete for the sale of specific merchandise. Bais Dovid rejects this arrangement, stating that standard contracts obligate someone to do something, such as to sell an item or to give a loan. They cannot obligate someone not to do something. Thus, this type of arrangement will not fall under the category of typical *shtaros* and will not be subject to the same laws and guidelines. Accordingly, it is not clear whether anyone can be forced not to compete on the basis of signing a contract. At most, one can be forced to pay fair market value to compete, but one cannot be forced to refrain from working at all.

FAIR AND UNFAIR PORTIONS OF THE NON-COMPETE:

Most non-competes consist of two distinct parts. For the sake of this discussion, we will refer to them as the "fair" part and the "unfair" part.

By "unfair", we mean the portion that the employee may view as unfair, i.e., the portion which forbids him to work in his field for a certain period of time. That portion of the agreement was discussed above and, as we said, is often very difficult to enforce.

By "fair", we mean the portion that forbids the employee from engaging in certain practices that would be harmful to his former employer, such as poaching clients from his former company. This portion of the non-compete is much easier to enforce, as there is a clear basis in halacha to prohibit such practices even in the absence of any non-compete agreement.

In halacha, there is a concept known as "*marufia*". This halacha refers to cases where someone opens a store in an area where a similar business already exists and wants to draw some of the customers away from him. The halacha of *marufia* details when such conduct is forbidden. The Pischei Teshuva rules that *marufia* does apply in contemporary society, and it is forbidden in modern times to poach customers from a competitor.

Frequently, the "fair" clauses in a non-compete fall under the category of *marufia*, which means that an employee leaving a business would not be allowed to take away clients from the business he is leaving. We may ask, however, if this would also apply to a customer that this same employee originally introduced to the business and who only came to be their client because of him. On the one hand, it could be argued that this customer is actually the employee's client, as he was the one who initiated the relationship with him. On the other hand, the employer can claim that the employee was working for them at that time and all his actions were on their behalf. This claim is in accordance with the idea in halacha that "*yad po'el k'yad baal habayis*", everything a worker does is on behalf of his employer, which seemingly would mean that when the employee found this client, he was acting as an agent of the business; accordingly, he would not be allowed to take this client away from the business.

The rule of *yad po'el k'yad baal habayis* applies to salaried workers; however, it is not clear if it also applies to a worker who only received training, but no actual pay, from a business, or even to a worker who was only paid on commission, and did not receive a salary.

The Rashba indicates that the concept of *yad po'el k'yad baal habayis* does apply to a commissioned worker. He discusses a case where two workers who offer a service reach an agreement to share their profits – for example, if two barbers agree that whenever one of them has a job, he will give half his pay to the other. The Rashba says that this is a valid way to make a partnership because essentially each

one is agreeing to work for the other when he has a job. He says that this partnership works with the concept of yad po'el k'yad baal habayis, as each one is the *baal habayis* of the other when they work for him. This seemingly indicates that the rule of *yad po'el k'yad baal habayis* applies even when there is no salary involved, and the worker simply receives a percentage of the profits, which is more or less the same concept as working on commission; therefore, *marufia* would also apply to a commissioned worker and he would be forbidden to poach clients from his ex-employer.

MAKE SURE TO SIGN ON THE BOTTOM LINE OF EVERY PAGE!

When finalizing a non-compete agreement, there is one very important thing to keep in mind.

With any *shtar*, it is important to have the contract signed on every page. This is important to ensure that neither party is able to claim they never signed onto the parts of the contract that don't bear their signature. This is even more important with a non-compete since the contract is usually the only documentation and proof of the agreement.

Most transactions usually have some emails or texts or other forms of correspondence that can be used as proof of the agreement, even if there is a problem with the actual *shtar*. When it comes to a non-compete, however, there usually is no communication about it at all, and the only paper that mentions it is the contract. Usually, the employee is reluctant to sign any non-compete, and the employer can only get him to sign it through face-to-face pressure, and not through email correspondence. Thus, usually, no email chain exists.

This means that if there is any problem with the document, the entire agreement will fall away. A non-compete relies heavily on a concept known as "*odisa*". This means that it is only enforceable because, with his signature, the employee admits to the agreement and binds himself to it. Should a non-compete only be signed on the last page, the employee always has the ability to say that he only admits that he signed that page, and there is no proof that he agreed to whatever is stated on the other pages. Because he technically could say this – even if he doesn't actually make this claim – the fundamental component of "*odisa*" is no longer there and the employer is left with no valid documentation of the agreement and, thereby, no way to force its terms. This could very well render the entire agreement null and void. Therefore, it is very important to make sure that every page is signed.