



## No Notice? No Compete.

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Give me ninety days notice, or sit on the sidelines for ninety days. That's what a financial services firm just said to a former employee who resigned to join UBS Financial Services with support from the United States District Court for the Northern District of New York.

In *The Ayco Company, L.P. v. Brian D. Feldman*, Ayco successfully obtained a preliminary injunction enforcing a ninety-day non-compete clause after Feldman failed to provide ninety days notice as required by his employment agreement. Ayco is a financial services company that provides comprehensive financial counseling and education services for corporate executives, employees and wealthy individuals. As a subsidiary of The Goldman Sachs Group, Inc., Ayco is not a broker-dealer itself, but it is an affiliate of Mercer, a broker-dealer primarily involved in the sale of variable annuities and variable life insurance.

Brian Feldman began employment with Ayco in 2005 and had no prior industry experience and brought no clients with him to Ayco. His employment agreement contained a provision requiring him to provide Ayco with ninety days notice of termination, during which time he would remain with Ayco and continue to be paid his base salary. Although it is unclear whether Feldman would be permitted to continue working with clients during the notice period or whether he would be paid to stay home in the nature of a Garden Leave provision, the point became moot when Feldman resigned without notice to join UBS. Feldman's agreement stated that if he terminated employment prior to the end of the notice period, he would not work for a competitor anywhere in the United States for ninety days or for the unfulfilled balance of the notice period. Feldman's agreement (as well as another agreement he signed) acknowledged that Ayco's customer list and related information was a trade secret, and noted Ayco's legitimate interest in protecting such information and customer relationships.

After Feldman resigned without providing notice, Ayco sought a temporary restraining order and preliminary injunction to preclude him from working for UBS or any other U.S. competitor for ninety days. To support its case, Ayco noted that Feldman retained a list of customer names, addresses, telephone numbers, and email addresses after he left. Feldman argued that his conduct was consistent with the Protocol for Broker Recruiting, but the Court rejected this argument because Ayco was not a signatory to the Protocol.

Feldman also argued that the agreement was unenforceable because its terms were unreasonable and because it prevented clients from working with the broker of their choice. These arguments

and because it prevented clients from working with the broker of their choice. These arguments likewise fell on unsympathetic ears as the Court found the ninety-day limitation to be “well within what has been found to be a reasonable time frame for non-compete provisions.” The Court also noted that Ayco had offered to continue to pay Feldman his salary during the non-compete period. As for the argument that the non-compete prevented clients from working with the broker of their choice, the Court noted that Ayco did not seek to interfere with the transfer of any customer’s accounts and seeks only to enforce the non-compete for ninety days.

In short, the Court showed no reluctance in granting a preliminary injunction to preclude Feldman from working for a competitor for ninety days, and it directed Ayco to continue paying Feldman his salary retroactive from the date of the temporary restraining order.

A copy of the Court's opinion is available in pdf format below.

As always, please feel free to share your thoughts and questions in the comment space below. And if you have a topic or a case you believe we ought to address in an upcoming post, please let us know.

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