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לע"נ הרב יוסף ישראל
ב"ר משה גרוסמן זצ"ל

Dedicated in loving memory of HaRav Yosef Grossman *zt"l*

SUBORDINATE CLAUSE: ARE NONCOMPETE AGREEMENTS BINDING?

Adapted from the writings of Dayan Yitzhak Grossman

The Associated Press reports:

> The Federal Trade Commission proposed a rule Thursday that would ban U.S. employers from imposing noncompete clauses on workers, a sweeping measure that could make it easier for people to switch jobs and deepen competition for labor across a wide range of industries.
>
> The proposed rule would prevent employers from imposing contract clauses that prohibit their employees from joining a competitor, typically for a period of time, after they leave the company.
>
> Advocates of the new rule argue that noncompete agreements contribute to wage stagnation because one of the most effective ways to secure higher pay is switching companies. They argue that the clauses have become so commonplace that they have swept up even low-wage workers.
>
> Opponents argue that by facilitating retention, noncompete clauses have encouraged companies to promote workers and invest in training, especially in a tight labor market. The public has 60 days to submit commentary on the rule before it takes effect.
>
> During a Cabinet meeting, President Joe Biden called the FTC action "a huge step forward in banning noncompete agreements that are designed simply to lower people's wages.
>
> "These agreements block millions of retail workers, construction workers and other working folks from taking better jobs and getting better pay and benefits in the same

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The Bais Havaad on the Parsha
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PARSHAS BO

MIND MATTERS

Excerpted and adapted from a shiur *by Rav Moshe Yitzchok Weg*

They shall eat the flesh on that night—roasted over the fire—and matzos; with bitter herbs shall they eat it.

Shmos 12:8

The primary view in the Shulchan Aruch (O.C. 60:4) is that mitzvos *tzrichos kavanah* (mitzvos require that the performer intend to perform them). But the Shulchan Aruch (O.C. 475:4) also rules that one who was forced to eat matzah still fulfills the mitzvah. Why?

The Gemara (Rosh Hashanah 28a) distinguishes between the mitzvah of matzah, which can be fulfilled without *kavanah*, and that of shofar, which cannot.[1] Rashi explains that in the case of matzah, because one enjoys the eating, he fulfills the mitzvah without *kavanah*, but blowing shofar without intent is considered *misaseik*—the act is not attributed to him. The *Acharonim* explain that the standard way that a *ma'asei* mitzvah is attributed to the doer is for him to have *kavanah* to fulfill the mitzvah, but physically enjoying the mitzvah act can also accomplish this. In the case of shofar,

1. Although the Gemara makes this distinction in the *hava amina* (initial hypothesis) stage, it seems that the Shulchan Aruch (based upon the Rambam) understands it to be retained in the Gemara's conclusion.

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Q&A from the BAIS HAVAAD HALACHA HOTLINE
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A Sticky Situation

Q May I *tovel* a utensil in the mikveh with a sticker attached?

A All parts of an item that requires *tvilah* must contact the waters of the mikveh. An attached foreign object is considered a *chatzitzah* (obstruction) and disqualifies the *tvilah*. But not every sticker would pose a problem, because Chazal teach that unless the object covers most of the *kli,* only a *davar hamakpid* (something the user is particular about removing prior to use) is considered a *chatzitzah*.

Bar codes and price stickers are considered *davar hamakpid,* because people generally remove them. But stickers that display instructions may remain, because people often leave them on (Chut Shani, *Tvilas Keilim* p. 53).

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field," Biden said.[1]

Are noncompete clauses effective at binding those who sign them? In this article, we survey the halachic literature on this topic.

A primary source dealing with noncompete clauses appears as a brief and passing comment in a *teshuvah* of the Chasam Sofer. He is discussing a shochet who had signed a document swearing not to practice shechitah within the territory of his mentor, who had taught him shechitah and certified him as a shochet. While the bulk of the *teshuvah* is concerned with the laws of *shevuos* (oaths), the Chasam Sofer also declares the student's noncompete commitment to be binding under employment halacha, even in the absence of an oath:

> In the case before us, even had he not sworn, he would nevertheless be obligated to abide by his commitment, because it was on this condition that [his mentor] gave him his certification document,[2] and he would thus (by competing with his mentor) violate the prohibition of "You shall not cheat a poor or destitute hired person,"[3] because refraining from interfering with [his mentor's] livelihood is included in the employment compensation (that he promised his mentor), and if so, the court is obligated to compel him to fulfill his commitment.[4]

Various other authorities have endorsed the basic doctrine of the Chasam Sofer that noncompete commitments made as a condition of receiving training are binding, as commitments to pay for services rendered.[5] R' Yisrael Grossman adds that the trainee cannot release himself from his commitment by offering to pay money for his training in lieu of his original agreement to "pay" for it by refraining from competing against his trainer, since those original terms are binding and cannot be unilaterally altered by the trainee.[6]

These authorities are discussing scenarios where the noncompete agreement was entered into in consideration of the training received. Where it was merely a condition of employment, but no useful training was involved, the prohibition of "You shall not cheat a poor or destitute hired person" would obviously not apply. But perhaps the basic doctrine would still be applicable, in the sense that in consideration of receiving the agreed-upon compensation from the employer, the employee is agreeing both a) to perform the specified work and b) to refrain from competing against the employer. He is thus bound to honor his commitment to refrain from competition with his employer, just as he is obligated to provide him with the specified work.

Beyond this doctrine of the Chasam Sofer (and its possible extension as above), there is a general debate among halachic authorities about whether a commitment to refrain from doing something is halachically binding; an analysis of this question is beyond the scope of this article.[7] Even if such a commitment would not generally be binding, R' Chaim Halberstam of Sanz (the Divrei Chaim) suggests a novel reason that a noncompete agreement would be binding: The Gemara records a dispute about whether incumbent businessmen and professionals have the right to object to others competing with them.[8] Although the halacha follows the opinion that generally permits competition, the existence of a stringent view implies that an agreement to comply with that view is binding (even where such an agreement, in and of itself, would not normally be binding).[9] Others challenge this argument.[10]

Even if a noncompete agreement would not be binding as a matter of halachic civil law, it would still create a moral obligation to refrain from competition. The Gemara says:

> Rav says that reneging on a verbal commitment (that is not accompanied by a *kinyan,* an act of acquisition) does not constitute a lack of trustworthiness. R' Yochanan says that reneging on such a commitment does constitute a lack of trustworthiness. They challenged Rav from a *breisa:* R' Yosei the son of R' Yehudah says: What is the purpose of the *pasuk* saying that you shall have "a correct *hin*"?[11] Isn't a *hin* included in an *eiphah* (which was already mentioned in the *pasuk*)? Rather, it comes to tell you that your "yes" (*hein*) must be correct and your "no" must be correct.[12]

This is not just an aspirational ideal: One who reneges on his commitment may be called a wicked person (*rasha*).[13] According to some opinions, he has violated the *de'Oreisa* imperative of *hin tzedek*, but others maintain that the imperative is *mideRabanan*. Some even say that the court may compel a person to keep his word, just as it may compel him to abide by all the precepts of the Torah—despite the fact that the agreement is nonbinding and not enforceable as a matter of halachic civil law. (Others strongly reject this position.)[14] Rav Grossman accordingly asserts that one is obligated to abide by a noncompete commitment due to this general halachic imperative to keep one's word.[15]

All the above arguments in favor of mandating that noncompete agreements be honored would seem to apply even where an employer terminates an employee against his will. R' Tzvi Shpitz discusses a case where Reuven agreed to train and employ Shimon at a given wage for four years, and Shimon signed a noncompete agreement. Reuven fired Shimon during the term, but he still expected Shimon to honor the noncompete agreement. Rav Shpitz rules that he need not do so, because Reuven's breach of his agreement to employ Shimon releases Shimon from his corresponding noncompete agreement.[16] This argument, however, is obviously limited to where the employer has indeed made such a corresponding agreement to employ the employee for a particular term, but absent such an agreement, there does not seem to be any reason that the employee should not have to honor his agreement, despite being terminated.

1 Alexandra Olson and Michelle Chapman. FTC proposes rule that would ban employee noncompete clauses. AP News. https://apnews.com/article/biden-technology-politics-business-9fb699883788bf8ecd9c70dcf27699dcf.
I am indebted to R' Dovid Grossman for bringing this matter to my attention and suggesting an article thereon.

2 There is some confusion as to whether the noncompete commitment in the case under discussion was made in advance of, and as a condition of, the training, or after the training as a condition of receiving the certification document; see Shu"t Chesed Le'Avraham (Te'omim) *cheilek* 1 Y.D. *siman* 69 s.v. *Od ra'isi lehadra'g shekasav*. (Note that the Chasam Sofer in the *teshuvah* we cited mentions having made the cited point in an earlier *teshuvah*, and it is apparently to this earlier one that the Chesed Le'Avraham is responding.)

3 Dvarim 24:14.

4 Shu"t Chasam Sofer Y.D. *siman* 9.

5 Chesed Le'Avraham ibid.; Mishpetei HaTorah *cheilek* 1 *siman* 46 p. 174.

6 Shu"t Netzach Yisrael *siman* 42.
Whether an employer who agrees to pay an employee with a particular form of compensation is bound to do so or may substitute other compensation of equivalent value is actually the subject of considerable discussion among the *poskim*; see Shu"t Maharam b. Baruch (Prague edition) *siman* 165; Rama C.M. 332:4; Machanei Efraim Hilchos *Sechirus siman* 14; Ketzos Hachoshen *siman* 332 *s.k.* 4; Nesivos Hamishpat *siman* 203 *biurim* s.k. 7; Divrei Mishpat *siman* 332 *se'if* 4; Shu"t Roshei Yesamim *siman* 84; Shu"t Dvar Yehoshua *cheilek* 3 C.M. *siman* 18 from *os* 4.
In our case, then, it is possible that the trainee actually would be entitled to pay his trainer cash in lieu of abiding by his agreement, but he would presumably have to pay the value (to the employer) of the agreement not to compete, which might be higher than the standard price for the training he received.

7 See Dvar Yehoshua ibid. (from the beginning of the *teshuvah*); Piskei Din Shel Batei Hadin HaRabani'im BeYisrael, Vol. 3 p. 338; Eimek Hamishpat *cheilek* 1 (*Dinei Chozim Veheskeimim*) *siman* 11 pp. 94-97.

8 Bava Basra 21b.

9 Shu"t Divrei Chaim *cheilek* 1 C.M. *siman* 31 s.v. *Al kol panim*.

10 See the extensive discussion in Piskei Din ibid. pp. 338-342, and see R' Avishai Natan Meitlis, *Niyud Lakochos Meiavodah Kodemes* (section "*Tekufas Tzinun*").

11 Vayikra 19:36.

12 Bava Metzia 49a. See Shulchan Aruch C.M. *siman* 204 *se'ipim* 7-8, 11.

13 Shu"t Maharam b. Baruch (Prague edition) *siman* 949, cited in Shu"t Maharam Mintz (Lvov 5611) p. 94a beginning of the second column and Mishpat Shalom end of *siman* 204 *Mishmeres* Shalom *os* 14.

14 See Minchas Chinuch end of mitzvah 251 and Minchas Pitim C.M. 204:11 end of s.v. *Behagaha—Raui le'adam*.

15 Netzach Yisrael ibid.

16 Mishpetei HaTorah ibid. Rav Shpitz rules that in his case, the trainee must compensate the trainer with money for the value of his training. This point is debatable, however: Perhaps the trainee can argue that he never agreed to make any monetary payment for his training, and if the noncompete agreement is void, he has no further obligation to the trainer.

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RAV ARYEH FINKEL

A brand-name sticker would generally be a problem, but the sticker of a high-end brand is not, because it confers value on the utensil (Mesores Moshe p. 227).

If a sticker was removed but residue remains—a common problem—the residue is a *chatzitzah* if it can be felt. If it cannot, even if it is visible, it is not a *chatzitzah* (see Chut Shani, *Nidah* p. 309).

If tangible residue cannot be completely eliminated, it suffices to remove enough that what remains is a *davar she'aino makpid* (Shiurei Sheivet Halevi, *Nidah* 198:17). One may be lenient about an unremovable sticker in an unnoticeable area, like the underside of the *kli*, because it is a *davar she'aino makpid* (Teshuvos Vehanhagos 2:406).

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with neither *kavanah* nor physical enjoyment, there is no *ma'asei* mitzvah that is attributable to him.

Note that the Mishnah Brurah cites some *Acharonim* who hold that matzah requires *kavanah* even *bedieved* (ex post facto).