

PROMISES MADE, PROMISES NOT KEPT: SALESPERSON TERMINATED DUE TO PANDEMIC ALLEGES FIRM RENEGED ON PROMISE NOT TO ENFORCE NON-COMPETE

Insights
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Many employers utilize non-compete agreements and other restrictive covenants as a means to protect legitimate business interests. When a former employee violates a covenant, employers often race to the courthouse seeking emergency injunctive relief. During the past year, the layoffs and furloughs brought about by COVID-19 have raised questions about the enforceability of restrictive covenants against employees who have lost their jobs as a result of the pandemic. A new action in Alabama presents a unique twist on what is already an evolving area of law. A terminated sales representative filed an action alleging that his former employer initially promised that, because of the pandemic, it would not enforce his non-compete obligation, but then rescinded that promise after he filed a charge of discrimination.

Case Summary

Mark Ramey began working as an outside sales representative at H&E Equipment Services, Inc. in February 2020. As noted in his Complaint, the COVID-19 pandemic dramatically slowed down the economy and significantly impacted numerous businesses when it emerged the following month. Ramey alleges that H&E terminated him in April 2020 for lack of business generation and replaced him with a younger, less experienced employee.

Ramey alleges that, when it terminated him, H&E advised him that it would not enforce the non-compete agreement

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he signed at the start of his employment because of the COVID-19 pandemic and its impact on the national economy. However, Ramey claims that after he filed a charge of discrimination with the EEOC alleging age discrimination against H&E, his former employer reneged on its promise not to enforce the terms of his non-compete agreement.

What Employers Can Learn

While we currently know only the employee's side of the story, and every employment relationship is unique, this case can still serve a reminder of several key steps that you should take while navigating restrictive covenants in the COVID-19 pandemic.

In any situation where you make a decision to terminate an employee, you should work with legal counsel to develop a clear plan for communicating that decision to the impacted employee. This plan should include both talking points for conveying the decision to the employee as well as preparing to respond to any questions the employee may raise.

It is important to emphasize to managers speaking with the employee that no changes to the terms of employment, including restrictive covenants, should be discussed during the termination meeting that have not already been vetted and approved by legal counsel and human resources. While Ramey does not provide details regarding the alleged representation that H&E would not enforce the terms of his non-compete agreement, his allegations should make employers ponder the possibility of a – perhaps well-meaning and sympathetic – manager making statements during a termination meeting that have not been fully thought out or could be misinterpreted. You should take precautions to ensure that managers are prepared to address and respond to any inquiry from an employee during a termination meeting.

Further, you should be careful to document any changes the terms of employment, including restrictive covenants. In the context of a termination, severance agreements can serve as a useful vehicle to reduce any bargained-for changes to post-employment obligations to writing. Ramey does not cite to a written amendment to his non-compete agreement, and it is possible that no such document exists.

Finally, because requests for temporary restraining orders and preliminary injunctions seeking to enforce non-compete

agreements and other restrictive covenants normally involve fact-specific inquiries, you should be cognizant of the landscape and context in which you operate when asking for relief from a court. Historically, some courts have been reluctant to enforce covenants against employees who have been let go due to circumstances beyond their control. The COVID-19 pandemic has brought this issue to the forefront, and you should consider both the conditions brought on by COVID-19 as well as the unique circumstances of each employee when seeking to enforce restrictive covenants.

Conclusion

While this case remains in the early stages, you should use this opportunity to take a fresh look at how you will address the issues associated with restrictive covenant disputes that result from pandemic-related layoffs. [Fisher Phillips' Employee Defection and Trade Secrets Practice Group](#) includes team members who handle these types of cases and who can provide valuable advice on navigating restrictive covenants in the midst of the COVID-19 pandemic.

For further information about COVID-19-related litigation being filed across the country, you can visit our [COVID-19 Employment Litigation Tracker](#). Our [COVID-19 Employment Litigation and Class & Collective Actions section](#) also has a listing of our litigation-related alerts and team members handling these types of cases.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney. You can also review our [FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers](#) and our [FP Resource Center For Employers](#).

This Legal Alert provides an overview of developing workplace issues. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.