Heightened Scrutiny of Noncompete Agreements During the Pandemic Continues

Insights
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Since the onset of the COVID-19 pandemic, many courts have been more reluctant to find noncompete agreements reasonable – and therefore enforceable – as record unemployment levels plague the national economy. Generally disfavored by the courts and subject to a high degree of scrutiny by many state legislatures (and perhaps soon at the national level under the Biden/Harris Administration), noncompetes are being evaluated like never before on whether they are reasonable in scope and duration, supported by adequate consideration, and designed to protect employers' legitimate business interests. A recent lawsuit filed in Texas provides an informative glimpse into the pandemic-era enforceability of noncompete agreements – and might provide you with an important lesson you can apply to your own business.

Brief But Important Background Into Noncompetes

In many industries, employers require their employees to enter into employment agreements that prohibit them from competing against their former employers for a period of time following termination. Enforcement of these agreements, commonly referred to as noncompetes, can be very important to an employer, particularly where an employee was in a role where they had access to trade secrets or proprietary information.

However, noncompetes are subject to a higher level of scrutiny than your standard agreements. In addition to meeting the typical requirements for an ordinary contract – offer, acceptance, and consideration – a noncompete agreement also must be "reasonable" in order to be enforced. But what is deemed to be reasonable varies from state to state, from court to court, and even from judge to judge. And even as the pandemic begins to wind down, courts are applying careful scrutiny that might cause you to reassess your own business strategy when it comes to these types of restrictive covenants.

Recent Texas Case Serves As Prime Example

In one recent matter filed earlier this year in Harris County, Texas, the court issued a temporary restraining order prohibiting an employer from enforcing a noncompete provision against its former employee. Robert Garcia was terminated from his outside sales position with USA Industries (USAI) in April 2020 due to the company's economic hardship that resulted from the pandemic. Garcia had worked for USAI for 12 years selling oil field equipment and had previously entered into an

employment agreement which contained a noncompete provision. Upon his termination, Garcia signed a severance agreement that contained additional noncompete restrictions.

After he left USAI, Garcia secured employment with another company in the industry that sold some competing product lines. According to Garcia, however, he was terminated from his new position when USAI's counsel sent a cease-and-desist letter to Garcia and separate correspondence to his new employer "reminding them of Garcia's contractual obligations." Because subsequent employers can be liable for interfering with a contract if they knowingly hire an employee who is under a noncompete, Garcia alleged that his new employer likely terminated his employment to avoid liability for tortious interference with contract.

Shortly thereafter, Garcia filed suit asking the court to declare the noncompetition provisions unenforceable for lack of consideration. Garcia also sought injunctive relief prohibiting USAI from enforcing the noncompetition provisions, including by contacting any of his new employers.

The court granted Garcia's request for a temporary restraining order, specifically finding that the noncompetition provisions in the severance agreement lacked the requisite exchange of consideration necessary to be enforceable. Not surprisingly, the court also found that the restrictions USAI sought to impose were unreasonable and greater than necessary to protect USAI's legitimate goodwill expectations. Even before the pandemic, in fact, many courts across the country have refused to enforce non-competition agreements against employees like Garcia who work in pure sales functions. Finally, the court noted that unless USAI was restrained from contacting Garcia's future employers, Garcia would likely be unable to find work in his area of expertise.

What's Next – And What Should You Do?

The court has scheduled a hearing to further address the merits of Garcia's claims. At this early stage in the proceedings, it is difficult to predict what the final outcome may be. But given the trend toward heightened scrutiny of noncompete agreements, it seems quite possible that the court will not allow an employer like USAI to interfere with its employee's ability to obtain a new job under the current circumstances and given the specific allegations contained in his matter.

As things start to get back to normal in the coming months, it will be interesting to see if the trend towards heightened scrutiny of noncompetes continues. You should use this opportunity to work with your legal counsel to reexamine all of your restrictive covenants – both existing agreements and those you will require future employees to sign – to determine if they will survive the current level of review or whether they should be revised accordingly.

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' Insight System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any attorney in our Employee Defection and Trade Secrets Practice Group.

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