Pa. No-Hire Pact Ruling Holds Hidden Noncompete Lesson

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Gluttony is one of the seven deadly sins for a reason. When more is taken than what is needed, the excess is wasted and often causes harm. This is the real lesson of Pittsburgh Logistics Systems Inc. v. Beemac Trucking LLC.

Pittsburgh Logistics called upon the Pennsylvania Supreme Court to determine whether no-hire clauses are enforceable in commercial contracts between business partners. The court's answer — maybe, if the clause passes a balancing test — is one that has garnered a lot of attention.

Given the holding and the fact that the no-hire clause in the case failed the test, much of the analysis about the Pennsylvania Supreme Court's April decision in Pittsburgh Logistics has centered around whether such clauses remain viable in Pennsylvania.

A no-hire clause is what it sounds like: It is a provision that prohibits one business partner from hiring the employees of the other. Such clauses are routinely used in commercial transactions, and until Pittsburgh Logistics, they were likely as enforceable in Pennsylvania as any other restrictive covenant that could withstand the analysis to which such covenants are subjected.

In Pittsburgh Logistics, the Pennsylvania Supreme Court took a new tack. Instead of applying traditional restrictive covenant tests — which would have asked whether the no-hire covenant was ancillary to an otherwise enforceable agreement, was supported by consideration, and was no more restrictive in time, geographic reach and substantive scope than necessary to protect a legitimate interest — the Pennsylvania Supreme Court came up with a different test that is confusing to apply at best and will create much uncertainty going forward.

Under the new test, a court faced with a challenge to the enforceability of a no-hire clause between business partners must weigh the interests the clause seeks to protect against the harm to the other party bound by it and to the public. A no-hire promise will be enforceable in Pennsylvania only when the need for it outweighs the harm to the business partner who gave the promise or the harm to nonparties who are affected by it — such as the employees who cannot go work for the business partner who wants to hire them.

The new Pittsburgh Logistics test for evaluating no-hire clauses, to paraphrase the late U.S. Supreme Court Justice Antonin Scalia, is like asking courts to determine whether a particular line is

longer than a particular rock is heavy. One business partner who wants to stop another from taking its employees will nearly always be able to articulate a legitimate interest protected by the promise.

Likewise, the offending partner will always be harmed by enforcement because it will be forbidden to hire people it wants and who want to work for it, and those people — i.e., the public — will be similarly harmed by losing a job opportunity. The Pennsylvania Supreme Court in Pittsburgh Logistics gave no guidance on how to weigh these competing interests.

The opinion itself is likely bad news for the future of no-hire clauses because of the uncertainty created by the balancing test used to judge them. In the Pittsburgh Logistics case, the party seeking enforcement advanced a perfectly logical interest that was protected by the clause, namely, preventing a business partner from poaching its employees who had developed specialized knowledge and expertise at the enforcing party's expense.

However, the Supreme Court concluded that this reasonable interest was outweighed by the other side of the balancing test. The other business partner was going to be harmed by keeping its promise and not hiring qualified employment candidates. Furthermore, the public was harmed because the affected employees were not informed about the promise when it was given, had not consented to the promise, and had not been given consideration for it.

The Supreme Court even found a likelihood of harm to the general public due to the impact on the labor market by a promise between two private companies operating in the enormous shipping and logistics industry.

The circumstances present in the Pittsburgh Logistics case are likely to be found in most no-hire clause cases. There will usually be analogous competing interests, and somehow, courts will have to find a way to justify their decisions by explaining why any interest protected by the clause is or is not outweighed by the impact of enforcing contractual commitments on both those who make the promises and those who are affected by them. Uncertainty lies ahead.

Which brings us to why Pittsburgh Logistics is actually a lesson in gluttony.

The ultimate result in Pittsburgh Logistics is probably best understood by the context in which the dispute between the business partners arose. When Beemac Trucking tried to hire the employees of Pittsburgh Logistics, the latter first sought to protect its interests by suing the employees involved in the Court of Common Pleas for Beaver County, Pennsylvania.

Pittsburgh Logistics had employment agreements with the affected individuals that included noncompetition covenants, which prohibited the employees from working for competitors anywhere in the world. Pittsburgh Logistics attempted to stop the employees from going to work for Beemac Trucking by seeking to enforce these noncompetes. It lost.

When the Court of Common Pleas reviewed the noncompetition covenants, it concluded that they were unduly oppressive and not subject to equitable modification. The trial court thought that Pittsburgh Logistics' interests could be adequately protected by a nonsolicitation-of-customers covenant, a less restrictive alternative that would have allowed the affected employees to work for Beemac Trucking, but that would have kept them from using their knowledge and goodwill by prohibiting them from doing business with Pittsburgh Logistics' customers.

Thus, the trial court held that the noncompetition covenants were too restrictive to be enforced.

The result in the employee case almost certainly influenced the outcome of the lawsuit between Pittsburgh Logistics and Beemac Trucking over the no-hire clause. It probably seemed anomalous to say that the same employees who had succeeded in striking the noncompetes to which they were parties would nevertheless lose the job opportunities they coveted because of a no-hire promise made between their former and future employers.

That conundrum likely explains the invention of a new rule, which was then used to strike down the no-hire clause.

If the employees' restrictive covenants had been properly drafted in the first place, there would not have been any need to look to other agreements for relief. This problem — overly zealous drafting — is often disregarded by clients and practitioners alike.

After all, Pennsylvania law — unlike the law in some other states — permits courts to reform overly restrictive covenants within reason. For example, a restricted period that runs too long can be shortened, and a covenant that reaches too far geographically can be circumscribed.

Thus, clients somehow feel safer when they ask for too much in their restrictive covenant agreements, and lawyers feel as if they can avoid being second-guessed if they create draconian restraints designed to capture every possible eventuality. They both anticipate that the courts will save them if they ask for too much, but that the courts will never intervene when they seek too little.

Such thinking is wrongheaded. It may seem counterintuitive, but the best restrictive covenant is the narrowest one that can be drafted to protect the interest at stake. Clients should want narrow covenants because overbroad ones invite noncompliance and litigation, often with bad results that ripple through other agreements and relationships.

When a company subjects a sales representative to whom it has assigned one account in a tiny municipality from working for a competitor in any capacity anywhere in the U.S., that company is being careless, not tough. The obvious overbreadth will not stop a departing sales representative from accepting a job with a competitor, who will immediately recognize the unenforceability of the covenant and be prepared to defeat its enforcement through litigation.

Any part of the clause that is not enforced or that is modified can affect the employer's rights with every other employee who signed the same agreement. And sometimes that overzealous clause has other deleterious effects, too, such as calling into question the enforceability of entirely separate agreements, like the no-hire agreement between business partners in Pittsburgh Logistics.

There will be much ink spilled in the coming months and years by practitioners and courts alike writing about whether and to what extent no-hire clauses remain viable in Pennsylvania. However, the most important lesson to be learned from Pittsburgh Logistics has nothing to do with no-hire clauses.

Rather, the most important lesson is that the best way for employers to protect their legitimate interests in their workforce is to draft sound, reasonable and narrow restrictive covenants. Those will work every time.

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