

SO, YOU'RE SAYING THERE'S A CHANCE...5 EMPLOYER TAKEAWAYS TO ENFORCE NO-HIRE AGREEMENTS

Publication
Sep 7, 2021

In a recent decision, the Supreme Court of Pennsylvania examined whether no-hire agreements (which, as their name suggests, prohibit one business from hiring employees from another business), are enforceable under Pennsylvania law. After walking through the varying analyses performed by jurisdictions across the country, the court ... didn't say no. But it didn't say yes either. In fact, it never directly answered the question. Instead, in a ruling that was disappointing for many who had hoped for much-needed clarity, the court came to a narrow holding that the specific no-hire clause at issue in the case before it was unenforceable.

While the court's own analysis was brief compared to its lengthy dissection of cases throughout the country, it provides valuable guidance – and perhaps a little optimism – for employers looking to draft and enforce no-hire agreements in Pennsylvania and beyond. Here are five takeaways you can learn from an analysis of this case.

The Basic Facts

The relevant facts of the case are simple. Pittsburgh Logistics (PLS) is a logistics company that organizes shipping services for clients using outside trucking companies, including Beemac Trucking. PLS and Beemac entered into a service contract that contained a provision prohibiting Beemac from hiring or soliciting PLS employees for the duration of the contract, and then for a period of two years after its termination. While the contract was still in

Related People



Edward G. Winsman

Of Counsel

610.230.2142

Service Focus

Employee Defection and Trade
Secrets

Litigation and Trials

Related Offices

Pittsburgh

Philadelphia

effect, Beeman hired four PLS employees. This litigation ensued.

The Ruling

The court employed a balancing test, weighing PLS's interests against the overbreadth of the no-hire provision and the likelihood of harm to the public, and found the no-hire provision to be unreasonable and unenforceable. While the court neither issued a sweeping ruling nor provided any insight into how it weighed each of these facts, its analysis still provides some hope and guidance for Pennsylvania employers seeking to enforce no-hire provisions.

1. Is the no-hire provision ancillary to the main purpose of the underlying contract?

This is the critical first question, and by far the easiest part of the analysis. The court clarified that no-hire agreements, like all other restrictive covenants, are void unless ancillary to an otherwise valid contract. Courts will not enforce a straightforward no-hire agreement between two competitors simply looking to stifle competition. These are the types of agreements that the U.S. Department of Justice has targeted aggressively in recent years, and there is little room for them in Pennsylvania or anywhere else within the U.S.

Takeaway: You should only enter into no-hire provisions that are part of some larger agreement, such as a vendor or services contract. Courts will rarely enforce naked no-hire agreements.

2. Does the enforcing company have a legitimate interest that the no-hire clause is protecting?

The court found that PLS had a legitimate interest in "preventing its business partners from poaching its employees, who had developed specialized knowledge and expertise in the logistics industry during their training at PLS." As in other restrictive covenant cases, the court recognized that employers have an interest in preventing employees from utilizing the specialized skills and knowledge that they develop on the job to compete directly with the employer.

Takeaway: Your no-hire provision should focus on employees who develop specialized skills or access

confidential information during their employment with you.

3. Is the no-hire agreement greater than needed to protect that interest?

The court took PLS to task for drafting an overbroad no-hire provision. The agreement prohibited Beemac from hiring *any* PLS employee during the term of the contract and for two years afterwards. It was not limited to PLS employees who worked with Beemac. It was not even limited to employees who worked at PLS while the contract was in force. Taken to an extreme, any employee hired by PLS one year after the contract with Beemac terminated could not be hired by Beemac for at least another year. The California Court of Appeal struck down a no-hire provision for similar reasons in [*VL Systems, Inc. v. Unisen, Inc.*](#), noting that the provision applied to all of the plaintiff's employees, regardless of whether they had ever done any work with the subcontractor defendant or were even employed when the underlying contract was in effect.

Takeaway: Draft the no-hire provision you need, not the no-hire provision you want. While some states follow the "blue pencil" rule where courts can modify overbroad restrictive covenants, do not assume that they will do so. You should limit no-hire provisions to the specific employees who jeopardize the interest you are looking to protect.

4. Does the no-hire agreement create a probability of harm to the public?

The *Beemac* court found the no-hire agreement at issue there did create such a probability. First, the court stated that the no-hire provision limited the employment opportunities of PLS employees without their knowledge or consent. The Wisconsin Supreme Court struck down a no-hire provision for similar reasons in [*Heyde Companies, Inc. v. Dove Healthcare LLC*](#), holding that the provision was harsh and oppressive to employees as well as contrary to public policy because the employees were unaware of it.

Takeaway: You should consider updating employment agreements for new employees to include a non-compete provision applicable to vendors, customers,

and any other category of entities with which your company anticipates entering into no-hire agreements. While you cannot predict the future, you can put employees on notice that they will be impacted by no-hire agreements that exist or that you will enter into. When you are in court seeking to enforce that no-hire provision, the fact that your employees were aware that they would be subject to such provisions and received adequate consideration (in the form of new employment) can help tip the scales in your favor.

Second, the court noted that “the no-hire provision undermines free competition in the labor market in the shipping and logistics industry, which creates a likelihood of harm to the general public.” In doing so, the court cited to a law review article which refers to studies suggesting that wages are higher in states that do not recognize or enforce restrictive covenants against employees.

At first blush, this fact may sound insurmountable. Every no-hire provision impacts the labor market in some way. But employers should not feel completely discouraged. The studies referenced in the law review article cited by the court discuss the economic impact of restrictive covenant in general, including covenants not to compete entered into with individual employees, and courts in Pennsylvania and across the country routinely enforce those.

Takeaway: Consider whether there are any unique factors in your industry or geographic region that minimize the impact your no-hire provision has on the labor market, and be prepared to highlight those.

Conclusion

The court had a clear opportunity to declare no-hire provisions unenforceable in Pennsylvania. It chose not to do so. Other courts around the country that have struck down no-hire agreements ancillary to the purpose of the underlying contract similarly have done so based on a more nuanced analysis rather than declaring such provisions *per se* unenforceable.

While the no-hire provision prepared by PLS did not pass muster, employers in Pennsylvania and around the country should use the court’s analysis for what it is – a broad guide on how to approach no-hire provisions:

- Only enter into a no-hire provision ancillary to an otherwise enforceable contract – do not enter into a stand-alone no-hire agreement.
- Make sure you can articulate the specialized knowledge or training that you are looking to protect.
- Limit the no-hire provision only to those specific employees necessary to protect that interest.
- Make new employees aware that you may enter into no-hire agreements that could impact them.
- If possible, be prepared to highlight the many other opportunities available to employees outside of the other party to the no-hire agreement.

As in other states, the court laid out a balancing test for the enforceability of no-hire provisions in Pennsylvania. You do not need to win on every factor. But you can use the court's analysis to draft no-hire provisions that tip the scales in your favor if you ever find yourself in the same position as PLS.

We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our [Employee Defection and Trade Secrets Practice Group](#).