



Did Your Non-Compete Agreement Just Get Laid Off?

Insights

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Imagine this scenario: Like most businesses, you have undergone the effort and expense of recruiting quality talent to join your workforce. After employment offers are extended and accepted, you provide valuable training to your newest employees. To protect your investment, you have obtained a strongly worded and enforceable non-compete agreement. Time passes by and one of your key employees is let go due to a layoff or economic downturn. You find out that this employee has secured a job at your main competitor. Upon learning this, you start the process of enforcing the non-compete agreement against that employee. If you are in a state such as Arkansas, Iowa, Kentucky, Maine, Mississippi, New York, Pennsylvania, South Dakota, or Tennessee, or in the District of Columbia, you discover, to your surprise, that the non-compete is unenforceable.

Courts in these 10 jurisdictions have refused to enforce restrictive covenants against employees whose employment is terminated for reasons other than their performance or conduct, *i.e.*, as the result of a layoff, reduction in force, or elimination of position unrelated to the employee's performance or conduct. Thus, whether a termination was "for cause" or not "for cause" can render the restrictive covenant ineffective.

For example, a court in New York refused to enforce a non-compete agreement against employees who had their employment relationship involuntarily terminated as part of a plant closure (*SIFCO Indus., Inc. v. Advanced Plating Techs., Inc.* 867 F.Supp. 155 [S.D.N.Y. 1994].) As another New York court recently explained, the reason for finding non-compete agreements to be unenforceable when an employee is laid off or let go as part of a reduction in force, as an example, is because of a lack of fundamental fairness in enforcing a non-compete agreement against an individual who did nothing wrong to bring about their termination. (*Design Partners, Inc. v. Five Star Elec. Corp.*, 2017 WL 818364, *13 [E.D.N.Y. 2017].) In other words, because the employer is no longer willing to employ the individual, it would be unfair for the employer to terminate them and also enforce the non-compete against them. Additionally, courts point to the lack of mutuality of obligation in such scenarios, as mutuality is necessary to support enforcement of the agreement.

What does this mean for employers? Whether an employee is subject to a non-compete agreement is something you should consider when making the decision to terminate employment. In making this determination, you should weigh the likelihood that the employee will compete with your business. If this likelihood is high, then terminating the employee as part of a reduction in force may not be the best course of action. As noted above, the restrictive covenant may be found unenforceable by a court in the aforementioned jurisdictions.

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Non-compete agreements can have the effect of chilling certain behavior by current and former employees, but when it is possible to take steps to ensure enforceability, you should give those steps careful consideration.