Employees: Don't Play Cute With Non-Solicitation Obligations!!

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Many employers are applauding a recent decision issued by the U.S. Court of Appeals for the 1st Circuit, which rejected an employee's argument that as a matter of law he could not have solicited clients who called him first. The Court explained that employers have a right to enforce valid non-solicitation agreements, and "[t]hat right cannot be thwarted by easy evasions, such as piquing customers' curiosity and inciting them to make the initial contact with the employee's new firm." (For a copy of the decision, click here.)

In Corporate Technologies, Inc. v. Brian Harnett and OnX USA, LLC, Harnett was a former account executive/salesman at Corporate Technologies, Inc. (CTI). He signed a non-solicitation and non-disclosure agreement when he came on board. After he left to join OnX, CTI successfully obtained a preliminary injunction prohibiting Harnett from engaging in any marketing or sales efforts for a period of twelve months with respect to several CTI customers whom he formerly had serviced. The injunction also compelled the defendants to withdraw any bids that Harnett had helped to develop for those same customers.

The defendants argued that because the customers in question initiated contact with Harnett, he was thereafter free to deal with them without being guilty of solicitation. CTI countered by noting that the customers only contacted Harnett following their receipt of a blast email announcing his hiring by OnX. Regardless, the Court explained that there was evidence of numerous interactions between Harnett and the customers after the initial contact — and CTI argued that these interactions were compelling evidence that Harnett engaged in solicitation.

The defendants argued in favor of a bright line rule insisting that, "once a customer initiates contact with an employee who has switched jobs, all bets are off and subsequent business activity cannot as a matter of law constitute solicitation." The Court, however, concluded that "a per se rule vis-à-vis initial contact has no place in this equation." According to the Court, because "initial contact can easily be manipulated — say, by a targeted announcement that piques customers' curiosity — a per se rule would deprive the employer of its bargained-for protection."

So how are we to know when an employee has crossed the line an engaged in prohibited solicitation? The 1st Circuit observed that "[t]he line between solicitation and acceptance of business is a hazy one" that is most appropriately drawn by the district court.

This, of course, is not news. Courts asked to grant injunctions are of course sitting in equity, and restrictive covenant cases are fact intensive. They are decided on a case-by-case basis. Who called whom first is just one of many factors courts need to consider when deciding whether an employee violated a non-solicitation agreement. As the 1st Circuit explained, there are many reasons a customer might make an initial contact. They could be calling to say farewell. They could be calling to hear whether the employee left voluntarily or was fired. Depending upon the type of industry and the type of goods sold, the initial contact could result in a sale, or multiple contacts may be required. Whatever the situation, the 1st Circuit decided that the employer is entitled to its "bargained-for protection," and courts must reject the facile temptation to end their analysis after answering the question "who called whom first?"

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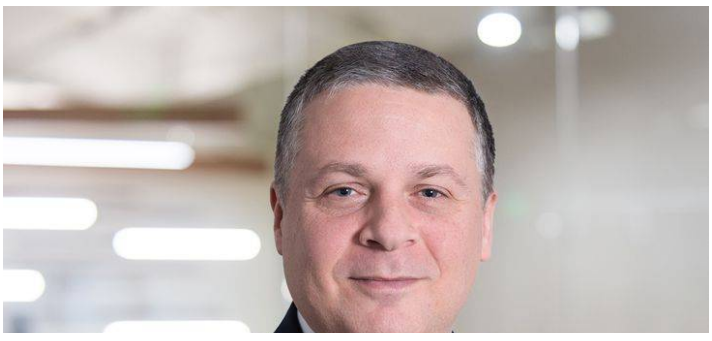

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