Don't Chase Your Tail in Pursuit of the "Perfect Non-Compete"

Insights
7.21.13

I recently read an article in which some talented lawyers did a nice job summarizing a few recent conflicting cases in Massachusetts. In Interpros, Inc. v. Athy, a Massachusetts court held that a new restrictive covenant must be signed every time an employee has a significant change in responsibilities. The court reasoned this is necessary because "each time an employee's relationship with the employer changes materially such that they have entered into a new relationship, a new non-competition agreement must be signed."

The article went on to address another case, ARS Services, Inc. v. Morse, in which a different court enforced a restrictive covenant despite a change in an employee's title and compensation. The contract in the second case, however, contained a clause stating that it would continue "notwithstanding any change in duties, responsibilities, position, or title." The authors of the article suggested that by "including a clause providing that such agreements will remain in force despite changes in the employment relationship, employers may be able to create more durable non-compete agreements and avoid the re-execution of agreements seemingly demanded by Interpros."

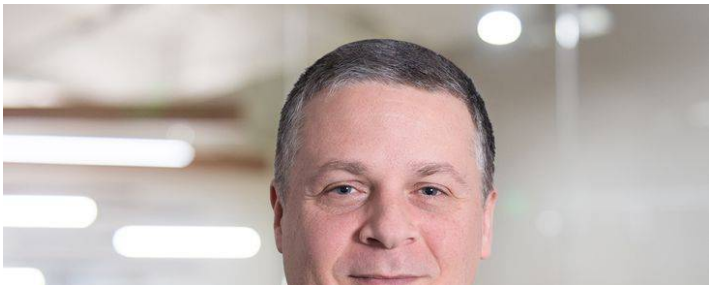
While there is some logic to the advice offered, and perhaps there may be a storm brewing in Massachusetts that requires such language, I have to wonder sometimes if we lawyers sometimes give to much credence to the opinions issued by trial courts.

Judges make up reasons all the time to reach the result they want to reach. They have equitable discretion because they are sitting in equity, and it is difficult to get them reversed. And they know it. Some judges are never going to enforce a non-compete no matter what. They are going to find a reason to find it unenforceable, even if it means they have to write (in my opinion) illogical opinions like the Interpros case described above. How is an employer supposed to know when the employee's responsibilities have changed enough to warrant a new restrictive covenant? Suppose the change in responsibilities is temporary? Is an employer supposed to have an employee keep signing new agreements over and over, month after month? Suppose the scope of the restraints in old covenant apply equally to the responsibilities for both the old and new jobs? Is a new contract still necessary? In my opinion, even if an employer included a clause like the one found in ARS, I strongly suspect the Interpros judge would have found another reason to invalidate the covenant. Some judges are just going to do that.

Consequently, I can understand the urge to react to Interpros and issue newsletters informing clients and prospects across the country that they would be well served to include clauses like the one set forth in ARS case. But after further reflection, my instinct is that employers should not chase their tails in pursuit of the perfect non-compete. That's not to say they shouldn't examine their legitimate interests and draft restraints that are appropriate tailored to protect those interests; but I've had so many clients over the years tell me that they want me to draft an "iron clad non-compete." I've told them all the same thing: "There is no such thing." The enforceability of any restrictive covenant is always going to depend first upon how well it is drafted, secon upon the facts and circumstances of the case, and third upon the judge you draw. When asked to draft an "iron clad non-compete" my stock response is that I will write a contract that maximizes the prospect of enforceability, but there is no such thing as iron clad agreement. Employers in search of one will find it next to the fountain of youth.

Michael R. Greco is a partner in the Employee Defection & Trade Secrets Practice Group at Fisher Phillips. To receive notice of future blog posts either follow Michael R. Greco on Twitter or on LinkedIn or subscribe to this blog's RSS feed.

Related People



Michael R. Greco
Regional Managing Partner
303.218.3655
Email