What Does Obamacare Have to do with Non-Compete Agreements?

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What does Obamacare have to do with non-compete agreements? Well, technically speaking, nothing. But the Supreme Court recently focused on what it should do with the remainder of the healthcare law if it decided to strike the individual mandate. Justice Scalia asked, "Once you cut the guts out of it, who knows which parts were desired and which ones weren't?" The manner in which courts treat overly broad non-compete agreements is not terribly different. If a court finds part of a non-compete agreement unenforceable, what should it do with the rest of the agreement? The answer varies from state to state, and unlike Congress with the healthcare bill, employers should include language that clarifies their intent.

First, consider the approach employed by various courts. Generally speaking, there are three approaches. In some states (e.g., Vermont), if a covenant is overbroad by an inch, it might as well be overbroad by a mile because overly broad covenants will be invalidated in their entirety. In other states (e.g., Arizona), overly broad covenants will be blue-penciled – meaning that courts will strike through offending language but will stop short of rewriting the agreement. In still other states (e.g. Ohio), courts are free to reform restrictive covenants so that its restrictions are reasonable under the circumstances.

Recognizing the different approaches among states, employers should consider including severability clauses in their agreements. But caution is required concerning how such a clause should be worded. This is because the law from state to state with regard to modification and

enforcement of overly broad non-compete agreements varies, and an argument can be made that a severability clause gives an employer less protection than it otherwise would receive absent its inclusion. Stated differently, depending on the wording of a severability clause, an overly broad restriction might just get severed from the agreement (i.e. not modified) leaving an employer with little or no protection.

How can this happen? A typical severability clause in a non-compete agreement might provide that "the provisions of this agreement are severable. If any provision is deemed to be invalid, void or unenforceable, the remaining provisions shall not as a result be invalidated." Such a clause can be of great help in states like Louisiana or Wisconsin where overbreadth can be fatal. Upon finding a non-compete provision unenforceable, courts in these states are powerless to modify or blue-pencil the agreement. Under these circumstances, a severability clause may salvage a separate, independent non-solicitation or confidentiality provision contained in the same agreement.

So what's the problem? Unless your severability clause is carefully drafted, a compelling argument can be made that the parties' inclusion of a severability clause precludes modification of an overly broad non-compete in states like Ohio and Pennsylvania where courts are empowered to judicially modify overly broad covenants. After all, if an agreement provides that unenforceable provisions should be severed, judicial modification of overly broad provisions would ignore the parties' clear intent as set forth in a severability clause. The consequences can leave employers with little or no protection.

For example, consider an employment agreement that contains a fifty-mile non-compete clause, a customer non-solicitation clause, and a confidentiality clause. Imagine that an employee accepts employment with a competitor right across the street in violation of the non-compete, but complies with the non-solicitation and confidentiality clauses. What happens if the court finds the non-compete clause to be ten miles overbroad? If it chooses to strictly apply the severability clause as written and severs the overly broad non-compete provision instead of modifying it, the employer would be powerless to prevent the employee's employment with its competitor. In the absence of such a severability clause, a court might choose to modify the fifty-mile non-compete downward to a forty-mile radius. In the presence of a poorly worded severability clause, a court may simply sever the non-compete based on the parties' intent as reflected in the clause.

Such unintended results might be avoided by including a carefully drafted severability clause that takes into account the difference between jurisdictions that blue pencil, modify, or strike overly broad provisions. For example, consider the following clause:

"If any provision of this Agreement is held to be unenforceable, then this Agreement will be deemed amended to the extent necessary to render the otherwise unenforceable provision, and the rest of the Agreement, valid and enforceable. If a court declines to amend this Agreement as provided herein, the invalidity or unenforceability of any provision of this Agreement shall not affect the

validity or enforceability of the remaining provisions, which shall be enforced as if the offending provision had not been included in this Agreement."

This sample clause may enable an employer to reap the benefits of a court's common law discretion to modify overly broad provisions, while providing the same benefit needed in states where overly broad provisions must be struck. In other words, this clause may provide the best of both worlds. If a non-compete provision is overbroad, the clause provides that a court may modify and enforce it to the extent permitted by law. If the court chooses not to modify the restraint, the invalid provision may be severed, leaving in place the remaining, and hopefully enforceable, provisions.

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