



Can Non-Compete Agreements Be Classified As Personal Services Contracts?

Insights

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In *Symphony Diagnostic Services No 1 Inc. d/b/a MobilexUSA v. Greenbaum*, the 8th Circuit Court of Appeals just addressed an issue that frequently arises in the non-compete context: what happens when a company buys the assets of another and then tries to enforce non-compete agreements?

The factual situation is as follows: Kimberly Greenbaum and Josephine Tabanag worked as mobile x-ray technicians for Ozark Mobile Imaging. Both signed non-compete agreements with Ozark, with the consideration being continued employment and the primary restriction being that they could not work in the mobile diagnostic business in a set geographic area for a two-year period after the end of their employment. Some years later, Ozark was bought by Mobilex in an asset purchase. Greenbaum and Tabanag declined offers to work for Mobilex, citing inferior terms of employment, and instead took positions with a competitor, Biotech X-ray. Mobilex filed suit against Greenbaum and Tabanag for breach of contract, but the district court granted summary judgment to Greenbaum and Tabanag, finding that because they had not consented to the assignment of their contracts at the time of the asset purchase.

The 8th Circuit reversed the trial court's ruling. It started by noting that Missouri courts had not provided a definitive answer on the question of whether non-compete agreements can be assigned as part of an asset sale, but then it rejected the district court's reliance on a decision that involved personal services contracts. The key piece of the holding in *Symphony Diagnostic Services* is that non-compete agreements are not personal services contracts because the latter require the affirmative performance of certain services, whereas non-compete restrictions prevent the performance of particular acts. In fact, the decision provides a rejoinder to one objection that lay people sometimes raise to non-compete provisions: "doesn't this violate the Thirteenth Amendment?"

The 8th Circuit went on to address the argument that "by eliminating other realistic opportunities for employment, it may effectively force the employee to continue working for the employer on the employer's terms." The rejoinder was that Ozark could have threatened the same change in working conditions that Mobilex did and it would have been within its rights to do so.

Finally, the 8th Circuit pointed out that it would make little sense to treat Mobilex differently because it purchased Ozark as part of an asset sale instead of a merger or stock sale. In the latter

situations, the successor entity would have no issue enforcing the non-compete restrictions, so why would the former be different?

Symphony Diagnostic Services is a good reminder to companies that restrictive covenant issues often arise when a sale of a business occurs. It is important to pay attention during the sale process to ensure that there will be no issues with the purchaser enforcing the seller's restrictive covenant rights with employees. This is especially critical because after a sale, employees often leave the company because changes in management, culture, and conditions often lead to a desire to change jobs. And on the front end, it's important for employers to make sure that they include in their restrictive covenant agreements language stating that the agreements are enforceable by successors in interest.

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