Attorney Advertising

PORZIO
BROMBERG&NEWMAN P.C.

Employment Law Monthly

March 2015

SURVIVAL OF THE NONCOMPETE: PROTECT TRUE "LEGITIMATE BUSINESS INTERESTS"

By Deborah H. Share, Esq.

From New York to Nebraska, courts are tasked with determining whether employers' restrictive covenants are reasonable and thus enforceable. Recent decisions remind that employers may only seek to protect "legitimate business interests."

Does the Position Warrant Noncompete? *Fewer v. GFI Group Inc.*, 124 A.D.3d 457 (N.Y. 1st Dept. 2015)

The New York Appellate Division recently invalidated a noncompete where the suing employee's job role had changed drastically since signing the noncompete. Former employee Donald Fewer began his tenure with Jersey Partners Inc. (later GFI Group Inc.) ("GFI") as the head of its North American credit derivatives desk. Four years later, Fewer was promoted and became responsible for a much larger piece of GFI's brokerage business, with direct line reporting to the company's CEO and president. Seven years after the promotion, however, Fewer was removed from this role, replaced by another individual, and placed in the position of reporting directly to his replacement. Fewer thus faced a dramatic reduction in responsibility and stature.

When Fewer left the company and found employment elsewhere, GFI brought suit and tried to enforce the restrictions. Among other contractual issues, the court analyzed whether Fewer's noncompete was viable. The crucial factor for the court was the significant change in Fewer's job position. While he was in his original roles, GFI indeed had a legitimate business interest in protecting itself from Fewer leaving and working for a competitor. At that time, Fewer held a unique position, which was what made GFI's business interest in his future employment legitimate.

EDITOR-IN-CHIEF

Vito A. Gagliardi, Jr.
973.889.4151
vagagliardi@pbnlaw.com

EMPLOYMENT LAW ATTORNEYS

Phillip C. Bauknight
Frank A. Custode
Marie-Laurence Fabian
Gary M. Fellner
Vito A. Gagliardi, Jr.
Thomas O. Johnston
Okechi C. Ogbuokiri
Michael L. Rich
Eliyahu S. Scheiman
Deborah H. Share
Kerri A. Wright

James H. Coleman, Jr.
Retired Justice, New Jersey Supreme Court

Maurice J. Gallipoli
Retired Judge, Superior Court of New Jersey

Alvin Weiss
Retired Judge, Superior Court of New Jersey

STAY CONNECTED

More on Us

Join Our Mailing List!

However, the court held that once he was demoted, and his position became less unique, in effect, GFI's business interest was no longer legitimate as it pertained to Fewer's future employment endeavors. The noncompete covenant was thus unenforceable.

The court was less persuaded about the non-solicitation clause of the contract. Fewer had solicited colleagues while he was still employed with GFI. These colleagues subsequently followed Fewer to his next firm, which was a competitor of GFI. The court refused to grant Fewer summary judgment on this issue, determining it needed to be resolved by the ultimate factfinder.

How Far to Prevent Competition? *Gaver v. Schneider's O.K. Tire Co.*, 289 Neb. 491 (2014)

Jason Gaver, a former employee of Schneider's O.K. Tire Co. ("Schneider"), sought a declaratory judgment from a Nebraska court that the noncompete agreement he had signed upon hiring by Schneider was unenforceable. The district court found the noncompete invalid, and Schneider appealed.

Participation in Schneider's profit-sharing plan was contingent on an employee's signing a noncompete upon commencement of employment. Schneider explicitly stated in the noncompete itself, as well as in its briefs to the court, that the purpose of the noncompete was to ensure that former employees did not use the money they earned from Schneider's profit-sharing plan to compete with and thus harm Schneider. Schneider's noncompete was anomalous for a variety of reasons, namely that it was a freestanding agreement, it made reference to the profit-sharing plan, and it did not restrict the employee's right to work for a competitor, but rather his right to start up his own competing business.

The Nebraska Supreme Court noted that typically it considers the following to be legitimate business interests of employers in the restrictive covenant context: trade secrets, confidential information, an employee's special influence over customers, and business goodwill. Here, however, the Court found no evidence that any of these interests were at work. Although Gaver had gained the knowledge and skills expected for those employed in the automotive sales and repairs field while working at Schneider, the Court did not find that Gaver had special access to any trade secrets, confidential information, or contact with Schneider's customers.

The Court refused to view Schneider's interest in "preventing its earnings from directly funding a competitor" as a legitimate business interest. First, the noncompete restricted Gaver's freedom to use his own money as he wished. Second, the Court viewed the noncompete as an attempt to prevent ordinary competition, which is not a legitimate business interest recognized by the Court. The manner in which Schneider tried to protect its interests went too far to prevent ordinary competition, and thus the Court found the noncompete invalid.

Conclusion

Only the legitimate business interests of employers may be protected through the use of restrictive covenants. Although the courts of various jurisdictions will differ slightly as to

their exact list of what qualifies as legitimate, generally courts will not validate an employer's interest in protecting itself from ordinary competition.

What this means for employers is that, in addition to maintaining reasonable boundaries both in geographic and time duration limits in noncompetes, employers must also consider what the court will allow as legitimate and protectable business interests. Employers should ensure that noncompetes contain language that emphasizes the specific business interests that are being protected. These interests should be tailored to those permissible in the jurisdiction. Language that provides a rationale that may be construed as preventing ordinary competition should be avoided. Noncompetes are meant to avoid competition by unfair or improper means only.

The Porzio Employment Law Monthly is a summary of recent developments in employment law. It provides employers with an overview of the various legal issues confronting them as well as practical tips for ensuring compliance with the law and sound business practices. This newsletter, however, should not be relied upon for legal advice in any particular matter.

© Copyright 2015 Porzio, Bromberg Newman P.C. All Rights Reserved | 973-538-4006