Painful Reminder That "One-Size Fits All" Restrictive Covenants May Not Be Enforced

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Employers frequently use template employment agreements containing "one-size fits all" non-compete and non-solicitation provisions. Typically, these provisions are used out of convenience and are intentionally broad so that they apply to large groups of employees working in different capacities throughout the company. Employers who use "one-size fits all" provisions, however, do so at their own peril. Indeed, a recent decision from the Appellate Court of Illinois in *Mazzetta Company, LLC v. Felsenthal, et al,* Case No. 18-CH-0087 (June 17, 2019) serves as a reminder that "one-size fits all" non-compete and non-solicitation provisions may be unenforceable if they are too broad.

What was the *Mazzetta* case about? The Mazzetta Company, a wholesale seafood company, hired Stephen Felsenthal in 2013 as a sales associate. When Felsenthal accepted his employment, he executed a "Noncompetition, Confidentiality and Proprietary Right Agreement," which included non-compete and non-solicitation provisions. Felsenthal resigned from his sales position with Mazzetta four years later and accepted a business development position with Mazzetta's direct competitor, Fortune International, LLC. Mazzetta sued Felsenthal for breach of contract and Fortune for tortious interference with a contract. Mazzetta also sought an injunction to prohibit Felsenthal from working for Fortune. The trial court denied the injunction and dismissed Mazzetta's claims on the basis that the non-compete and non-solicitation provisions were overbroad, and thus, unenforceable. Mazzetta appealed, but the Appellate Court of Illinois affirmed the trial court's decision.

Why did the court determine that the restrictive covenants were unenforceable? The Court held that the non-compete provision was overbroad because it attempted to restrict Felsenthal from working in any capacity – "whether that be in

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Phillip C. Korovesis
Of Counsel

Ivonne M. Soler
Senior Attorney

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marketing, research, IT, or any non-sales capacity" – for any company involved in the frozen seafood importing business. Moreover, the non-compete attempted to restrict Felsenthal from working anywhere in North America. The court determined that the breadth of the non-compete provision was "draconian," overbroad and unenforceable as a matter of law. The court also held that the non-solicitation provision was overbroad because it barred him from contacting the potential customers with which he had contact while working at Mazzetta, regardless of whether Mazzetta actually earned any business from the potential customer.

What were the specific non-compete and non-solicitation provisions in *Mazzetta*? Here are the actual provisions which the court found to be unenforceable:

> Non-Compete:
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> Employee agrees that so long as he . . . is an employee of the Company, and for a period of eighteen (18) months following the effective date of termination of Employee's employment with the Company . . . he . . . will not, directly or indirectly, engage in (whether as an employee, consultant, proprietor, partner, director or otherwise), or have any ownership interest in, or participate in the financing, operation, management or control of any Competing Organization which does business anywhere within the Restricted Territory.
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> The non-compete provision defined "Competing Organization" as any company which provides "services and products related to the frozen seafood importing business." "Restricted Territory" was defined as "any market area or any county, parish, territory, or similar division of any state in the United States or province in North America, where [Mazzetta] does business during the Employee's employment with the company, at the time of Employee's termination, and any area in which the Company has plans to enter at the time of the Employee's termination."
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> Non-Solicitation:
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> Employee shall not, on behalf of any Competing Organization, either as a proprietor, partner, shareholder, officer, director, employee, manager, agent or consultant, or in any other capacity, directly or indirectly: (i) . . . during the eighteen (18) month period following the effective date of termination of Employee's employment . . . solicit or call (or attempt to solicit or call), or perform services for, any supplier or customer (or employee of a supplier or customer) of the Company . . . (a) with whom the Employee serviced, sold to or solicited on the Company's behalf during his/her employment at the Company; or (b) with whom the Employee had contact on the Company's behalf during his/her employment at the Company . . . .

What should you do in light of the *Mazzetta* decision? There are several key takeaways from the *Mazzetta* case.

1. The most important takeaway is that, if you're using "one-size fits all" non-compete or non-solicitation provisions, you should have those provisions reviewed by legal counsel to evaluate whether the provisions will be enforceable. You shouldn't wait until a key employee leaves to learn that your non-compete and non-solicitation provisions are unenforceable.

2. Non-compete and non-solicitation provisions should be tailored for the jurisdiction in which they are used. The laws governing non-compete and non-solicitation agreements are highly state specific. Some states (such as Michigan) permit courts to revise overbroad non-compete and non-solicitation provisions to make them reasonable, while other states do not. You shouldn't count on a court revising your restrictive covenants to make them enforceable.
3. The state laws governing non-compete and non-solicitation agreements are rapidly evolving. We recommend auditing your non-compete and non-solicitation provisions on a regular basis to ensure they are compliant with any changes in the applicable laws.

If your company uses "one-size fits all" non-compete or non-solicitation provisions, or if you have questions about the enforceability of non-compete or non-solicitation provisions, please contact the author of this advisory or any of Butzel Long's Non-Compete and Trade Secret attorneys.

Brett Rendeiro
248.258.1312
rendeiro@butzel.com