Labor and Employment Alert: Employers Reminded That Non-Compete Agreements Must Be Reasonable To Be Enforceable

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Natalie M. McLaughlin

Michael C. Griffaton

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Restrictive employment agreements such as non-compete and non-solicitation agreements are generally disfavored. As recent developments in Nevada, Florida and North Carolina illustrate, employers must ensure that such agreements are reasonable in scope and supported by consideration in order to be enforceable.

Florida finds that certain referral sources are legitimate business interests.

By statute, Florida law generally prohibits non-compete and non-solicitation agreements unless they protect "legitimate business interests." These interests include, but are not limited to, trade secrets, valuable confidential business or professional information, substantial relationships with specific prospective or existing customers, patients, or clients, certain customer, patient, or client goodwill, and extraordinary or specialized training.

The home health services industry typically employs marketing representatives to cultivate relationships with physicians, hospitals and skilled nursing facilities in the hope of procuring future patient referrals. In *White v. Mederi Caretenders Visiting Services of Southeast Florida, t*he Florida Supreme Court recently held that such home health service referral sources may constitute a protectable legitimate business interest sufficient to support a non-compete agreement. Importantly, the court explained that Florida's non-compete statute is not an exhaustive list of protected interests, and there may be other interests employers can legitimately assert. The court cautioned, however, that whether a referral source so qualifies depends upon "the context and proof adduced" and this "is inherently a factual inquiry, which is heavily industry – and context – specific."

Nevada law permits reasonable non-compete agreements.

In June 2017, Nevada enacted a statute regulating non-compete agreements. The law specifies that a non-compete agreement is unenforceable unless it (1) is supported by valuable consideration; (2) does not impose restrains that are greater than required for the employer's protection; (3) does not impose an undue hardship on the employee; and (4) imposes restrictions that are appropriate in relation to the valuable consideration supporting the non-compete agreement. Additionally, a non-compete agreement may not restrict a former employee from providing service to a former customer or client if (1) the employee did not solicit the former customer or client; (2) the customer or client voluntarily chose to leave and seek services from the former employee; and (3) the former employee is otherwise complying with the temporal or geographic limitations in the non-compete agreement.

If an employee is terminated because of a reduction of force, reorganization, or similar restructuring, a non-compete agreement is only enforceable during the period in which the employer is paying the employee's salary, benefits or equivalent compensation such as severance pay.

Finally, if the court finds the non-compete agreement is supported by consideration but has unreasonable restrictions, the court must revise it to the extent necessary to make it reasonable and then enforce it as revised. Typically referred to as blue-penciling, this new requirement expressly overturns a Nevada Supreme Court decision that prohibited rewriting non-compete agreements to make them reasonable.

North Carolina reminds employers to support non-compete agreements with consideration.

In *American Air Filter Company v. Samuel C. Price, Jr. and Camfil USA*, the employee entered into an employment contract after his employment began which contained both an automatic renewal clause and a non-compete provision. The employee received additional compensation, in addition to his salary, for executing this agreement. Several years later, the employee resigned to work for a competitor. His former employer sued for breach of contract.

The court dismissed the suit. The court explained that the employee had received consideration to support his non-compete restriction when he first signed the employment contract. But each time the contract automatically renewed, the employer did not provide any additional consideration for the non-compete provision. As a result, the court held that "[a]ny failure to provide consideration for a given year's renewal would break the 'chain' and render the [original agreement] unenforceable as to subsequent years." While the Court applied Kentucky law, it is likely the court would have reached the same result under North Carolina law. So this case is important to employers in both states.

Conclusion

In of these developments, employers should review their non-compete agreements to ensure they comply with state law. For example, employers in North Carolina and Kentucky may want to review agreements that provide for automatic renewals to determine whether sufficient consideration is being paid each time to support a non-compete provision. Ultimately, whether a non-compete will be enforced depends on state law, court decisions, and the particular facts and circumstances. Contact your Vorys lawyer if you have questions about drafting, enforcing, and defending non-compete and non-solicitation agreements.