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Client Advisory

That's Amore: Tax Benefits Hit a Pennsylvania Court's Eye Like a Big Pizza Pie - The Newest Menu Item of Consideration in Pennsylvania Non-Competes

The English playwright Douglas Adams was once quoted as having said, "I'm spending a year dead for tax reasons." Well, if you are subject to a Pennsylvania non-compete clause, those same tax reasons might make you spend two.

In the newest installment in Pennsylvania's ever-changing landscape of non-compete cases, the Pennsylvania Superior Court ruled last week that converting an employee from a 1099 contractor to a W-2 employee was sufficient consideration to support a two-year, twenty mile non-compete agreement.

As you may recall from our [previous alerts](#), Pennsylvania is one of a few states which require an employer to offer new or additional legal "consideration" - most commonly thought of as compensation - in order to enforce a non-compete agreement signed *after* employment begins. Thus, under Pennsylvania law (as opposed to New Jersey), the mere offer of continued employment - even if just days after employment begins - is *not sufficient* to support a non-compete agreement. Instead, employers must offer something more. What constitutes sufficient consideration? "Something more" is always subject to debate.

Enter the most recent example of that something "extra", Fancy Fox, LLC v. Hanchey. The controversy here is simple and involved the enforcement of a non-compete agreement signed by one of Fancy Fox LLC's ("Fancy Fox") employees (Hanchey) in 2015. Briefly, in 2015 Fancy Fox made a "major investment" for new office materials linked to its local pizza business and made Hanchey the "main guy". And, as part of this "new" venture, Fancy Fox asked Hanchey to sign a non-compete agreement.

As it turns out, Fancy Fox terminated Hanchey two years later. Then, when Hanchey proceeded to solicit Fancy Fox's customers, Fancy Fox sought to enjoin Hanchey by way of the non-compete agreement signed in 2015.

In determining that Hanchey's non-compete agreement was enforceable, the Pennsylvania Superior Court reasoned that Hanchey's conversion from a 1099 contractor to a W-2 employee, among other things, constituted sufficient "consideration" to support his two-year, twenty-mile non-compete agreement. This was because, according to the Court, when Fancy Fox converted Hanchey to W-2 status, Hanchey's tax burden was decreased by almost \$8,000 or 22%.

What does this mean for businesses in the Delaware Valley moving forward? Plenty. First, this case is a reminder that, although sometimes disfavored, courts *can* and *will* enforce

reasonably tailored Pennsylvania non-compete agreements when supported by adequate consideration. Second, this case helps elucidate how employers can creatively take advantage of non-compete agreements without having to shell out additional out of pocket compensation.

Third, this case is a helpful reminder of the potential pitfalls employers face when enforcing non-compete agreements in Pennsylvania and elsewhere and how many of these snags can be avoided by careful negotiating and drafting of agreements. Point in case, if the agreement here had included a choice-of-law provision providing for New Jersey law, Fancy Fox could have more likely avoided the legal fight over "consideration." This is because New Jersey law, in contrast to Pennsylvania law, does not currently require any new or additional consideration to enforce a non-compete after an employment relationship has commenced (so long as continued employment is not illusory).

All that said, if you have independent contractors, such as a sales force, that you wish to now engage with a non-compete, converting those individuals to W-2 employees may be an option. Of course, this option needs to be weighed against the other consequences of such a conversion. And do not think that, because you are an employer in New Jersey or some other state, you are safe. In today's global economy, employees often commute from one state to another, meaning that, if you do not have the correct agreements in place, you could be caught off guard by quirks under Pennsylvania law or elsewhere. Careful planning, drafting and choice of law provisions are essential.

To help evaluate your options for drafting and/or enforcing non-compete agreements for current or new employees or for any other labor or employment related legal matter, contact [Jonathan Rardin](#) at (215) 963-3300, [Dan DeFiglio](#) at (856) 795-2121 or any member of Archer's [Trade Secret Protection Group](#) in Haddonfield, N.J., at (856) 795-2121, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, in Philadelphia, Pa., at (215) 963-3300, or in Wilmington, Del., at (302) 777-4350.

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