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Commentary

Maw Uncertainty

Ruling on noncompete pacts introduces more confusion into an area that has had its fill

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Drafting, negotiating and litigating noncompete agreements is fraught with uncertainty for clients and their counsel. In many respects, crafting such agreements is far more art than science.

The applicable rules of law are necessarily indefinite, each case is fact-specific, relevant considerations can vary significantly from employee to employee, courts are permitted to rewrite agreements to enforce only those restrictions found "reasonable" under the circumstances, and outcomes are difficult to predict, dependent as they are on the subjective balancing of many factors.

It is therefore difficult to understand how the majority opinion in the recent Appellate Division decision in *Maw v. Advanced Clinical Communications Inc.* (April 16, 2003) discerned a "clear mandate of public policy" in the law relating to noncompete agreements.

Even if read narrowly, the opinion imposes new and sweeping potential consequences on employers who seek to protect their legitimate business interests by requiring existing employees to sign noncompete agreements, and injects even greater uncertainty into this area of the law.

While the breadth of the holding is unclear, at a minimum, the court held that an employee fired for refusing to sign an agreement has a cause of action under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1, if he or she reasonably believed the agreement was directed at lessening competition and therefore "contrary to a clear mandate of public policy."

The employee also would have an alternative cause of action for wrongful discharge "contrary to a clear mandate of public policy" under *Pierce v. Ortho Pharm. Corp.,* 84 *N.J.* 58, 72 (1980), if the agreement was directed at lessening competition.

This holding appears to be an unwarranted extension of the concept of a "clear mandate of public policy" for the reasons discussed in Judge Mary Catherine Cuff's dissent. Its practical day-to-day effect on the workplace, however, should be minimal *if* it is limited to circumstances where an agreement does not protect the employer's legitimate business interests *at all*, or where "an employer, through superior bargaining power, extracts a deliberately unreasonable and oppressive noncompetitive covenant" that would be unenforceable under *Solari Indus., Inc. v. Malady,* 55 N.J. 571 (1970).

There are aspects of *Maw*, though, that suggest its holding may be broader, and intended to allow a CEPA or *Pierce* claim even if the agreement is not void on its face, but its terms grant the employer more protection than is "reasonable" under the circumstances. If that is the case, an employee terminated for refusing to sign such an agreement will essentially have a CEPA claim if he or she reasonably believed the agreement was overbroad, even though it would later be subject to judicial modification, opening the proverbial Pandora's box.

The theoretical basis of such a holding is extremely questionable. An agreement that is not overbroad on its face cannot be incompatible with a *clear* mandate of public policy when the tests of its enforceability are indefinite, among them "whether the agreement *reasonably* protects a legitimate business interest." An *employee* cannot possibly form an informed reasonable belief about whether such an agreement is contrary to a clear mandate of public policy when the application of the relevant legal concepts to a given case is the subject of daily debate by counsel and the courts in vigorously contested noncompete cases.

Additionally, one cannot tell whether an agreement will be enforceable as written at the time it is presented to an employee, because

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many of the relevant considerations are based on events (for example, circumstances surrounding the termination and the employee's prospects for a new job) that cannot occur until the employee departs and engages in conduct that violates the agreement.

To avoid potential CEPA liability, employers will be required to consider proposing agreements that "underprotect" their legitimate interests — unless *Maw*'s scope and validity are clarified, thus bringing a welcome measure of certainty to the field. ■