In Key Ruling, Pa. Court Confirms Non-Compete Agreement for Existing Employee Is Unenforceable in Absence of Some Benefit in Return

Client Advisories

05.21.2014

On May 13, 2014, in *Socko v. Mid-Atlantic Systems of CPA, Inc.*, the Superior Court of Pennsylvania issued an important decision that, for the first time, held that a non-compete agreement stating only that the parties "intend to be legally bound, " but providing no new benefit of value or change in job status, is unenforceable against an existing employee for lack of consideration. The Superior Court refused to follow the contrary 2007 Western District of Pennsylvania opinion in *Latuszewski v. Valic Financial Advisors, Inc.*. Instead, the Superior Court determined that Pennsylvania's Uniform Written Obligations Act ("UWOA"), 6 P.S. § 33, which generally states that the parties' stated intent to be bound constitutes sufficient consideration, is inapplicable to restrictive covenants because, unlike other contracts, the value of the consideration is a factor in determining the enforceability of restrictive covenants. Previously, the Pennsylvania Supreme Court determined that non-compete agreements are unenforceable where the consideration is merely continued employment, an employment agreement executed under seal, or recitation that nominal consideration ($1.00) was paid.

David Socko was a salesman for Mid-Atlantic Systems of CPA Inc. ("Mid-Atlantic"), a basement waterproofing business in York, Pennsylvania. More than a year after he began his employment at Mid-Atlantic, the company made Socko sign a new employment agreement superseding all previous agreements and containing a new, two-year covenant not to compete. Socko received no additional benefits or employment status change. In January 2012, Socko left Mid-Atlantic and less than one month later began working for a competitor. Mid-Atlantic sent Socko's new employer a letter threatening litigation under the non-competition agreement. Ten days later, Socko was fired from his new job.

Socko brought suit in the Court of Common Pleas of York County, seeking to have the non-compete agreement declared unenforceable. He subsequently filed a motion for summary judgment, arguing that the non-compete was unenforceable for lack of consideration. Mid-Atlantic, citing the 2007 federal case, countered that, under

the UWOA, the use of language "intending to be legally bound" provides the required consideration. The trial court rejected the federal court's reasoning and held that the UWOA does not permit enforcement of a non-compete agreement without a corresponding change in the employee's benefits or job status. Mid-Atlantic appealed.

In its *Socko* ruling, the Superior Court acknowledged that, while Pennsylvania does not typically look at the adequacy of consideration to determine the enforceability of a contract, a non-compete in an employment agreement historically has been treated differently and requires actual and valuable consideration. Contractual language and formalities, such as the seal or $1.00, do not qualify, according to the Court, which did not elaborate on what would be considered sufficient.

The decision is important for Pennsylvania employers who have entered, or plan to enter, into non-compete agreements and restrictions with employees or former employees. If not part of the employment agreement at the time of hire, restrictive covenants imposed later will not be enforceable in the absence of valuable increased benefits or a change in employment status. The difference is that, for agreements entered into at the outset of employment, an employer's offer of employment is deemed sufficient consideration.

If you have questions about the *Socko* case and its potential impact, or would like to discuss any labor- or employment-related legal matter, contact a member of Archer's Trade Secret Protection and Non-Compete Group or Labor & Employment Law Department in Haddonfield, N.J., at (856) 795-2121, in Philadelphia, Pa., at (215) 963-3300, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, or in Wilmington, Del., at (302) 777-4350.

DISCLAIMER: This client advisory is for general information purposes only. It does not constitute legal or tax advice, and may not be used and relied upon as a substitute for legal or tax advice regarding a specific issue or problem. Advice should be obtained from a qualified attorney or tax practitioner licensed to practice in the jurisdiction where that advice is sought.