



Recent Decision Demonstrates Need for Careful Crafting of Restrictive Covenants

Client Advisories

06.06.2017

A recent appellate decision by the Superior Court of Pennsylvania underscores the need for employers to carefully review the language of restrictive covenants and illustrates how a lack of precision can result in uncertainty and costly litigation.

In Metalico Pittsburgh, Inc. v. Newman, 2017 PA Super 109 (2017), the employer ("Metalico") entered into identical employment agreements with two employees ("Newman and Medred") which provided for three-year terms with Metalico having an option to extend for additional three-year terms subject to the employee's agreement. The agreements also included restrictive covenants prohibiting each employee from soliciting Metalico's customers, suppliers and employees for a specified period beginning "on the last day of employment" and continuing for a defined time period varying based on the reason for the termination. The agreements included a provision stating that if the employee's "employment hereunder expires or is terminated this Agreement will continue in full force and effect as necessary or appropriate to enforce the covenants or agreements" of the employee, including the restrictive covenants.

Shortly before the original three-year term expired September 18, 2014, Newman and Medred inquired as to their future status, and Metalico confirmed that Newman and Medred would become at will employees and, while their salaries would not change, certain other benefits provided by the agreements, such as raises, bonuses and stock grants, would become discretionary.

On September 21, 2015, Newman's and Medred's employment with Metalico ended, and they went to work with a competitor and promptly began to solicit Metalico's employees and customers. Metalico sued Newman and Medred for breach of the restrictive covenant and (along with their new employer) for tortious interference with Metalico's business.

The trial court granted summary judgment for Newman, Medred and their new employer, finding that since the original employment agreements expired and Metalico was no longer bound to provide the same contractual benefits, the restrictive covenants failed for lack of consideration.

The Superior Court reversed this decision, holding that the contractual consideration required by the agreements was provided and citing a prior decision, Boyce v. Smith-Edwards-Dunlap Co., 580 A.2d 1382 (Pa. Super. 1990), appeal denied, 593 A.2d 413 (Pa. 1991), in which the Court held that a restrictive covenant survived the expiration of the stated term of employment where the covenant referred to employment “whether pursuant to [the employment agreement] or otherwise.” Despite the absence of such a provision in Newman’s and Medred’s agreements, the Superior Court found that the agreements clearly contemplated that the restrictive covenants would apply beyond the original term.

While the Superior Court ultimately found that the restrictive covenant survived Newman and Medred becoming at will employees, this decision demonstrates the critical importance of careful drafting of restrictive covenants, particularly in instances where an employee may “convert” to at will employment after the original term expires. Had more careful drafting occurred - including a provision similar to that found in the employment agreement in the Boyce decision, it may well be that Metalico could have avoided the consequences of breaches and the expense of litigation.

If you have any questions about restrictive covenants please contact **Patrick J. Doran**, **Jonathan P. Rardin**, or any member of the **Trade Secret and Non Compete Practice 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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Attachments

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