Consider Yourself Warned: Pennsylvania Supreme Court Set to Consider Long-Standing Consideration Requirement for Pennsylvania Noncompetes

Client Advisories

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In Pennsylvania, an employer who wants current employees to sign a restrictive covenant must provide the employee with new consideration, as employment itself is only sufficient consideration to start the employment relationship. Pulse Technologies, Inc. v. Notaro, 620 Pa. 322, 327 (2013). What constitutes "new consideration?" And how much of this "new consideration" is enough to satisfy the courts when the employer attempts to enforce the restrictive covenant? These questions have led to an extensive amount of case law in the last several years. Now, the Pennsylvania Supreme Court has the ability to simplify the law and, in so doing, put Pennsylvania in line with the majority of jurisdictions in the nation.

Last fall, the Pennsylvania Supreme Court agreed to consider Rullex Company v. Tel-Stream, an appeal from a January 2019 decision by the Superior Court. The case involves an attempt by Rullex, a telecommunications construction company, to enforce a restrictive covenant against Tel-Stream, subcontractor who provided Rullex with a labor crew for the construction of cell phone towers.

The restrictive covenant at issue contained trade-secrets, nonsolicitation, and noncompete clauses, which are all fairly standard in situations like these. However, there was one problem: Tel-Stream began work before the parties signed the agreements containing the restrictive covenant. By Rullex's own admission, the agreements were signed "a couple of months" after Tel-Stream began work on the project.

After the project ended, Tel-Stream began working for one of Rullex's competitors and Rullex sued for a temporary preliminary injunction. The trial court denied the request, finding that Rullex (1) failed to establish that the restrictive covenant was enforceable, and (2) failed to show that Tel-Stream threatened any of Rullex's protected interests.

On appeal, Rullex argued that the restrictive covenant was enforceable because it was contemplated before Tel-Stream began work, even if it wasn't signed until after work began. To support this claim, Rullex pointed to an email (with the agreements attached), which Rullex sent before work began. In rejecting this argument, the Superior Court noted that unsigned draft agreements are not binding on the parties and, in any event, the agreements that the parties actually did sign contained an integration clause, which rendered any prior agreements between the parties superseded. In addition, the Superior Court determined that Rullex did not have a protected interest in its customer list because Rullex's sole witness disclosed its customers without objection at the hearing.

As explained above, Pennsylvania's long-standing rule requiring additional consideration for restrictive covenants entered into after the start of employment places it in the minority of jurisdictions in the country. However, that rule was created by the Pennsylvania Supreme Court, and the Court has the ability to change it. Whether it will choose to do so remains to be seen. Rest assured, given the implications of this case to Pennsylvania employers who seek to enforce restrictive covenants, we will closely monitor this case for our clients and provide an update once the Court issues its opinion. In the meantime, Archer's Trade Secret Protection and Noncompete Group boasts a team of attorneys with a wealth of experience in drafting and reviewing restrictive covenants. And, if the need arises, we can also enforce restrictive covenants through litigation. If you have questions, please contact Thomas A. Muccifori, Chair of Archer's Trade Secret Protection and Noncompete Group, at (856) 354-3056, or any member in Haddonfield, N.J., at (856) 795-2121, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, or in Wilmington, Del., at (302) 777-4350.

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