Can You Hear Me Now? – Pennsylvania Supreme Court Strikes Down Noncompete Because There Was No "Meeting of the Minds"

Client Advisories

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In January, we wrote about a case pending before the Pennsylvania Supreme Court, Rullex Company v. Tel-Stream "Consider Yourself Warned", January 2020. We warned that the case had the potential to change the state's long-standing rule that requires employers to offer "new and additional consideration" to employees who sign restrictive covenants after employment begins (if they sign before or at the commencement of employment, the job itself is the consideration). The court did not change that law. But, the Pennsylvania Supreme Court decision, which was issued on Tuesday, provides important guidance that employers should keep in mind.

To briefly refresh your memory, the facts in the case were as follows. Rullex, a telecommunications construction company, hired a subcontractor, Tel-Stream, to provide labor for the construction of cell phone towers. Rullex required Tel-Stream to sign a restrictive covenant, which contained trade-secrets, nonsolicitation, and noncompete agreements ("NCA"). Rullex claimed that it provided the contract before work began, but instructed Tel-Stream to review the contract and decide whether any of the clauses needed to be changed. However, the parties did not sign the agreements until at least two months after Tel-Stream began work.

After the project ended, but before the NCA expired, Tel-Stream began working for one of Rullex's competitors. Rullex then sued for a preliminary injunction. The trial court denied the request because it concluded that the NCA was unenforceable, as the contract was executed after work began, and therefore required that the NCA be accompanied with additional consideration. The Superior Court affirmed.

Employers have been holding their collective breath ever since the Pennsylvania Supreme Court agreed to hear the appeal, wondering whether the high court would change the state's long-standing requirement that new and additional consideration is required when an employee signs an NCA after work begins. That rule, which exists in a minority of jurisdictions in the country, has been a technical thorn in the side of employers for many years.

In the real world, sometimes "business moves faster than paper," and oftentimes employers are unable to get paperwork complete before work must begin.

The Pennsylvania Supreme Court in Rullex did not abrogate the new-consideration requirement and agreed with the lower courts that the NCA was unenforceable. In doing so, the high court clarified that courts ought not to look solely at whether the NCA was signed before or after commencement of employment. Instead, courts should focus on whether the parties contemplated and intended to be bound by the NCA at the onset of the employment relationship. In other words, there must be the proverbial "meeting of the minds" regarding the NCA, even if the actual document is not signed until shortly after work begins.

In this case, Rullex failed to establish that there was a "meeting of the minds." Rullex admitted that when it provided the NCA, it advised Tel-Stream to review the document and, if desired, obtain counsel's advice. If Tel-Stream thought that any provision needed to be changed, Rullex said it would be accommodating. Thus, at the outset of the employment relationship, when the NCA was provided, there was no meeting of the minds. The fact that Tel-Stream signed the agreement two months later does not change this fact. Because Rullex did not provide additional consideration, the NCA was unenforceable.
This case provides a couple of important takeaways for employers. First, if you are about the hire someone and want to implement an NCA, make sure the employee is clear about the terms of the NCA before employment begins. The safe bet is to ensure that the employee signs the agreement before beginning work. But if that is not possible, make sure that the employee understands that acceptance of the terms is a condition of employment, and have the employee sign the agreement as soon as possible. Second, if you are unsure whether too much time has passed for the NCA to be enforceable, consider offering additional consideration. This may be a small price to pay for an enforceable NCA.

If you have questions, please contact Thomas A. Muccifori, Chair of Archer's Trade Secret Protection and Noncompete Group, at 856-354-3056 or tmuccifori@archerlaw.com, or Daniel DeFiglio at 856-616-2611 or ddefiglio@archerlaw.com, or Anthony M. Fassano at 856-816-2618 or afassano@archerlaw.com.

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