Pennsylvania Supreme Court Invalidates "No-Hire" Agreement between Businesses as a Violation of Public Policy

Client Advisories

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Several months ago, we wrote about an appeal that had just been decided by the Pennsylvania Superior Court. We advised employers to consider moving away from no-hire agreements in favor of nonsolicitation and noncompete agreements. Now, for the first time, the Pennsylvania Supreme Court has addressed the issue of no-hire agreements, and it has confirmed our previous advice.

As we previously wrote, the case involved a dispute that arose when a third-party logistics provider hired four employees of a shipper with whom it had a services contract. The contract contained a no-hire provision, and after the four employees jumped ship, the plaintiff sued.

The Superior Court ruled for the defendant and held that the no-hire provision was unenforceable. The plaintiff then petitioned the Pennsylvania Supreme Court to take the case, and the high court agreed to hear it. Last month, the court issued its opinion agreeing with the Superior Court.

The Pennsylvania Supreme Court had not previously decided whether no-hire agreements are enforceable. However, several other jurisdictions had addressed the issue and come to different conclusions. Courts in Wisconsin, California and Texas have struck down such agreements, but courts in other states, such as Virginia and Illinois, have upheld them. Thus, while the high court in Pennsylvania had not previously addressed this issue, it was not writing on a blank slate, and it had the benefit of the reasoning of other courts to consider.

The court began by treating the no-hire provision the same way Pennsylvania courts treat any restrictive covenant. That is, the restrictive covenant must be ancillary, or supplementary, to the contract of which it is part. The court must then balance the reasonableness of the restriction in light of the interests the restriction protects and the harm to the contracting parties and to the public. In addition, Pennsylvania courts look the most stringently on restrictive covenants in the employment context, which was not the case here.

The court began its analysis by determining that the plaintiff's no-hire provision was ancillary to the contract between the parties, and then went on to hold that the provision in this case was not reasonable. Although the plaintiff had a legitimate business interest in preventing its employees from working for a competitor, the court determined that the restriction in this case went too far in protecting the plaintiff's interests and was harmful to the public, and thus refused to enforce the agreement.

First, the no-hire provision was too broad, as it prohibited the defendant from hiring any of the plaintiff's employees, regardless of whether those employees worked on the contract between the parties. Second, the no-hire provision harmed nonparties to the contract. Among those harmed are the plaintiff's employees, who were not parties to the contract, did not have knowledge of or consent to the contract, and were not provided with any consideration in exchange for a restriction on their job mobility. Third, the no-hire provision undermined competition in the marketplace, which could harm the general public.

The court left open the door to the enforcement of narrower no-hire provisions. However, if businesses are concerned that their employees will take an in-house position with a customer or another party with whom the business contracts, they should remember there is more than one way to skin a cat. There are other types of restrictive covenants, such as noncompete and nonsolicitation agreements, which businesses can have their employees sign. This would eliminate the concern that the employees are directly affected by an agreement to which they are not parties. These other restrictive covenants, of course, would have to satisfy the balancing test the court applied here.

If you have questions about restrictive covenants or the many legal issues that they create, or about any issue that could arise between former employers, employees, and new employers, feel free to contact Tom Muccifori, Chair of Archer's Trade Secret Protection and Non-Compete Group at 856-354-3056 or tmuccifori@archerlaw.com, or any member of the Group in: Haddonfield, NJ at 856-795-2121, Princeton, NJ at 609-580-3700, Hackensack, NJ at 201-342-6000, Philadelphia, PA at 215-963-3300, or Wilmington, DE at 302-777-4350.

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