

With Pennsylvania Non-Competes, As in Life, Timing is Everything

Article By:

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In Pennsylvania, it has long been known that waiting until after the start of employment to have an employee sign a non-competition agreement comes with the real risk that the agreement will be unenforceable for lack of consideration. Last week, the Pennsylvania Supreme Court provided definitive guidance on the issue in *Rullex Co., LLC v. Tel-Stream, Inc., et al.*, holding that a non-competition agreement entered into after an employee commences employment fails for lack of consideration unless the essential provisions of those restrictions were agreed to before the employee started work.

In *Rullex*, *Rullex* sought to enforce a non-competition agreement against Yuri Karnei, who through his company *Tel-Stream* had been a contactor to *Rullex*, performing cell tower work for *Rullex*'s wireless communication clients. At some point, Mr. Karnei decided to stop working for *Rullex* and to provide the same services to one of *Rullex*'s competitors in violation of his non-competition agreement. *Rullex* then sued him and *Tel-Stream*, claiming that they breached their non-competition obligations to *Rullex*.

Mr. Karnei defended the lawsuit by claiming that the non-compete restriction was invalid because he did not sign his *Rullex* agreement until some months after he started working for *Rullex*. *Rullex*, for its part, didn't deny that Mr. Karnei signed the agreement until after starting the engagement (although the parties disputed just how long after), but countered that Mr. Karnei agreed to such a restriction, at least in concept, prior to starting work, cleverly noting that "events often move faster than paper." The Supreme Court agreed in some respects, rejecting the notion that a restrictive covenant agreement needs to be signed by the time work begins. The Court held, however, that the parties need to have done more than just discussed the fact that a non-compete was a condition of employment. Rather, "for a restrictive covenant executed after the first day of employment to be enforceable absent new consideration, the parties must have agreed to its essential provisions as of the beginning of the employment relationship." Given that no such agreement had been reached before Mr. Karnei started work for *Rullex*, the Supreme Court found in his favor.

The moral of the story, of course, is obvious. That is, Pennsylvania employers need to take care to ensure that non-competition, and all other forms of employee restrictive covenant agreements (e.g., customer non-solicitation restrictions), are signed, sealed and delivered by the time the employee or contractor starts working. Or, at the very least, the parties must have agreed to the essential terms,

with only the agreement's execution to follow. Employers that are not able to meet that deadline (or later decide that a restrictive covenant agreement is advisable) and still want to sign up an employee or contractor to a non-compete or other restrictive covenant should make sure that they offer consideration beyond continued at-will employment, such as a raise, bonus payment, equity, promotion or other material benefit.

Lastly, it is worth noting that courts and state legislatures are increasingly focusing on non-compete timing issues, with several states requiring even earlier action. For example, in Massachusetts, employers who require employees to sign a non-compete at the beginning of employment must provide a copy of the agreement to the employee either before making a formal offer or 10 days before the employee starts work, whichever comes first. In Washington State, employers must disclose in writing the terms of the non-compete restriction no later than when the employee accepts his or her job offer. Thus, as with non-competition-related issues generally, employers need to pay particular attention to state law before deciding how and when they are going to make a restrictive covenant agreement a condition of employment.

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