

1st Circ. Holds Non-Compete Agreement Unenforceable Against Fired and Rehired Employee

Article By:

James R. Hays

In light of the COVID-19 pandemic, many employers have been forced to conduct staff layoffs as businesses were closed in compliance with shelter-in-place orders and subsequently rehire employees as lockdown restrictions have been lifted. One concern employers should bear in mind is how the layoffs and later rehiring of employees impact the enforceability of any previously agreed upon restrictive covenant agreements.

On June 2, 2020, the US Circuit Court of Appeals for the First Circuit (the “First Circuit”) provided some guidance and a cautionary tale for the unsuspecting employer. In [*Russomano v. Novo Nordisk*](#), the First Circuit affirmed a district court judgment that prevented pharmaceutical company Novo Nordisk Inc. from enforcing a confidentiality and non-compete agreement that it had entered into with employee Thomas Russomano, who was briefly laid off and rehired before leaving the company for a competing company. Novo Nordisk sought to enforce the agreement signed with Russomano prior to his brief hiatus from the company in an effort to prohibit him from working for a competitor and sharing certain confidential information.

Russomano first joined Novo Nordisk in January 2016, and as a condition of his employment, signed a confidentiality and non-compete agreement. In November of that year, Russomano was laid off, but was rehired in December 2016 and signed a new confidentiality and non-compete agreement. Then, in June 2018 a similar series of events unfolded. Russomano was told his employment “will end effective August 3, 2018” but three days later he was then rehired into a new position with a start date of August 6, 2018, but was not made to sign a new confidentiality and non-compete agreement.

Russomano resigned from Novo Nordisk in January 2020. As Russomano was preparing to start his new position, he brought suit seeking a declaratory judgment against Novo Nordisk after they refused to promise not to enforce the non-compete agreement. Novo Nordisk removed the case to Federal Court and filed breach of contract, unfair competition and misappropriation of trade secrets counterclaims in addition to seeking a restraining order and injunction. Novo Nordisk argued that the confidentiality and non-compete agreement Russomano signed when he was rehired in 2016 still applied because he had been continuously employed at the company until he resigned in January 2020. The district court denied the motion, finding that Novo Nordisk was unlikely to succeed on the merits.

On appeal, the First Circuit affirmed the district court's judgment, holding that the district court did not err in concluding that Novo Nordisk's June 2018 termination letter was unambiguous and that Russomano's employment ended on August 3, 2018. While Novo Nordisk argued that it did not lay off Russomano, but rather transferred him to a different position in the company, the court held that the language in the June 2018 layoff letter and subsequent rehire letter were plain and unambiguous.

While the facts of each case will determine the enforceability of post-employment restrictive covenants, the lesson of *Russomano v. Novo Nordisk* is instructive for all employers. Employers should not assume that a rehired or recalled employee will be bound by the post-employment restrictive covenants signed prior to the lay-off or termination. Rather, as COVID-19 restrictions are lifted and businesses continue to reopen, employers are advised to assess each rehired or recalled employee's post-employment restrictive covenants and when appropriate have them sign a new post-employment restrictive covenant agreement following such breaks in service. Employers with questions about the use of post-employment restrictive covenants should consult with experienced employment counsel.

As you are aware, things are changing quickly and there is a lack of clear-cut authority or bright line rules on implementation. This article is not intended to be an unequivocal, one-size fits all guidance, but instead represents our interpretation of where things currently and generally stand. This article does not address the potential impacts of the numerous other local, state and federal orders that have been issued in response to the COVID-19 pandemic, including, without limitation, potential liability should an employee become ill, requirements regarding family leave, sick pay and other issues.

This article features contributions from Jamie Moelis.

Copyright © 2025, Sheppard Mullin Richter & Hampton LLP.

National Law Review, Volume X, Number 210

Source URL: <https://natlawreview.com/article/1st-circ-holds-non-compete-agreement-unenforceable-against-fired-and-rehired>