

High Price for Non-Compliance: Non-Compete/Non-Solicitation Agreements in Pennsylvania

Article By:

Labor and Employment Law Practice Group

Non-compete and non-solicitation agreements have become common today for numerous positions at various levels throughout all industries. This is true even though courts look with disfavor on such agreements and seek reasons not to enforce them; viewing such agreements as one-sided, prepared by and favoring employers, and restricting the individual's ability to work and earn a living. In fact, for such reasons, these agreements are generally unenforceable in California. Thus, when asked to enforce non-compete/non-solicitation agreements, courts examine them to see if the employer has a protectable interest in the matters being restricted and whether the restrictions are narrowly-tailored in terms of both their length and geographic scope.^{more}

The cost to employers attempting to enforce such agreements, in terms of legal fees and management time, can be significant. Litigation (discovery, depositions, motions, and hearings), which in a typical civil action is usually spread out over a couple years or more, is compressed into a matter of a few months because, to maintain the employer's position that the enforcement of the agreement is needed to protect its legitimate business interests, the employer must move the case towards conclusion as quickly as possible. Suing to enforce a non-compete/non-solicitation agreement, furthermore, may result in the employee bringing counterclaims against the employer for unpaid wages/overtime/discrimination/etc., and seeking discovery of the employer's financial status when the employer claims economic damages resulting from the employee's breach of the agreement. Thus, there are multiple reasons employers need to think twice before seeking to enforce non-compete/non-solicitation agreements as, if viewed objectively, most employees do not have the "formula for Coca-Cola."

Despite these legal, practical, and financial obstacles for employers, disregarding a non-compete/non-solicitation commitment can prove very costly for the employee and the new employer. For example, the Superior Court of Pennsylvania recently affirmed an award of \$6,891,569.00 (\$2,391,569.00 in compensatory and \$4,500,000.00 in punitive damages) against five defecting employees and their subsequent employer.

In *Balmer & Co., Inc. v. Frank Crystal & Co., Inc., et al.*, five former employees, who had signed non-solicitation agreements at the commencement of their employment with an insurance broker, approached a competitor to establish a local office for the competitor, arranged details of their new employment with the competitor on work time by means of their former employer's facilities (phone,

fax, computers), and resigned en masse. They also took to the competitor trade secret information, customer and prospect lists, policy information, etc., and used this information to induce and attempt to induce such clients to place their insurance with the new employer. The new employer, moreover, had agreed to indemnify the defecting employees from all claims by their prior employer and controlled the defense of the litigation. These actions gave rise to claims for breach of employment agreements, breach of fiduciary duty, tortious interference with contractual relations, unfair competition, misappropriation of proprietary information and trade secrets, and unjust enrichment.

The former employees' conduct was found to justify an award of punitive damages designed to punish the conduct as it showed an evil motive or reckless indifference to the injury caused by commission of unreasonable acts in disregard of known or obvious resulting possible harm. Similarly, it was found to be outrageous for a subsequent employer to knowingly benefit from its new employees' breach of their restrictive covenants with their prior employer.

In Pennsylvania, at least, employers hiring employees who have signed non-compete/non-solicitation agreements must look before they leap into an employment relationship, as failure to do so may result in significant liability for both the new employee and the new employer. Competent legal counsel can help employers work through these issues.

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