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New York Court of Appeals Advises Employers to Take Time to Present Restrictive Covenants to New Employees

It is not uncommon for employers to present restrictive covenants, such as non-competition, non-solicitation, or confidentiality agreements, to new employees in a stack of orientation paperwork. A recent case from New York's highest court reminds employers not only that it is important to narrowly tailor restrictive covenants, but also that it is worthwhile to take the time to explain the meaning of those agreements to new employees, and even provide new employees with some time to review them.

In an earlier New York Labor and Employment Law Report blog article, we reported on a New York Appellate Division (Fourth Department) case regarding the partial enforcement of an overbroad non-solicitation provision in an employment agreement. In *Brown & Brown, Inc. v. Johnson*, the appellate court deemed the non-solicitation provision overbroad and unenforceable because it prohibited the former employee from soliciting any client of the firm, not just those with whom she developed a relationship while employed by the firm. The firm sought to have the non-solicitation agreement partially enforced. In other words, the firm asked the court to modify or "blue pencil" the covenant to make it enforceable.

Significantly, the appellate court refused to blue pencil the overbroad agreement, citing the unequal balance of power between the employee and employer at the time the agreement was signed. Thus, the entire non-solicitation provision was deemed unenforceable, allowing the former employee to solicit any former clients. Given this decision, we cautioned employers to be wary of overreaching in a restrictive covenant, as it could result in a court refusing to enforce even a pared down version of the agreement.

In June 2015, the Court of Appeals reversed the Appellate Division on the partial enforcement issue and sent the case back to the trial court to review the circumstances of the case. According to the Court, the lower court should have taken a closer look at the facts and circumstances surrounding the signing of the non-solicitation agreement before deciding whether to simply strike the overbroad agreement. The Court noted that the fact that the agreement was not presented to the employee, Johnson, until after she left her prior employment "could have caused her to feel pressure to sign the agreement, rather than risk being unemployed." Nevertheless, the mere fact that the agreement was a requirement of the job, and that the employee was not presented with the agreement until the first day of work was not enough alone to deny partial enforcement. The Court cited other factors that would be considered to determine the partial enforcement issue: whether the employee understood the agreement, whether it was discussed or explained to her, and whether she was coerced into signing it on the first day or could have sought advice from counsel or negotiated the terms.

The latest lesson on restrictive covenants from New York's highest court is clear: they must be presented to employees in a non-coercive fashion. If your restriction on an employee could be construed as overbroad, courts will consider the circumstances under which the agreement was provided to the employee when determining whether to modify or "blue pencil" it to make it enforceable. To convince a court to do so, there must be facts showing that the employer took steps to minimize the inherent inequality in bargaining power between the employer and the employee. While employers may be reluctant to negotiate the terms of these agreements, employers should consider sitting down to explain the meaning of a non-compete or non-solicitation agreement, leaving some time for the new employee to think over and review the agreement, and allowing the employee to seek counsel before signing it.

To learn more, contact Kristen E. Smith (315.218.8513; ksmith@bsk.com) or Christa Richer Cook (315.218.8321; ccook@bsk.com).

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