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News & Types: Employment, Labor & Benefits Update

Non-Compete Found so Overbroad as to be Unenforceable and Unfixable

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Practices: Employment, Labor & Benefits

EXECUTIVE SUMMARY

Recently, a former employer sought injunctive relief against a former executive whom it claimed had violated his Employee Confidentiality/Non-Compete Agreement by accepting employment with a direct competitor and supposedly failing to return its confidential information. The Court denied the motion for temporary restraining order and refused to set a preliminary injunction hearing. The Court later granted the former employee's motion to dismiss for failure to state a claim, finding the non-compete to be unenforceable and not subject to "blue penciling." In short, the Court held that even a non-compete which is reasonable in time and geographic scope will be unenforceable if it prohibits work in any capacity for a company in the same business, and that Illinois courts may not rewrite a non-compete which is "patently unfair" in scope of activity. *Medix Staffing Solutions, Inc. v. Daniel Dumrauf*, No. 17-CV-6648, 2018 U.S. Dist. LEXIS 64813, 2018 WL 1859039 (N.D. Ill. Apr. 17, 2018).

After beginning his employment with Medix (a staffing and recruiting firm), Dumrauf signed a new non-compete which provided, among other things, that during and for 18 months after his employment, he would not, within a radius of 50 miles from any Medix office in which he worked:

> … directly or indirectly, own, manage, operate, control, be employed by, participate in or be connected in any manner with the ownership, management, operation, or control of, any business that either: (1) offers a product or services in actual competition with Medix; or (ii) [sic] which may be engaged directly or indirectly in the Business of Medix.

The agreement provided in boldface type in its "Severability" section:

> If any restriction or limitation in this Agreement is deemed to be unreasonable, onerous and unduly restrictive by a court of competent jurisdiction, it shall not be stricken, [sic] in its entirety and held totally void and unenforceable, but rather shall be deemed re-written and shall remain effective to the maximum extent permissible within reasonable bounds.

Unusually for these types of cases, after informing Medix he was leaving the company, Dumrauf told Medix management that he had accepted a new role with a new employer, identified the employer, and described his new job duties and territory before explaining he did not wish to "compete in any form" and had discussed with the new employer "the importance of [his] non-compete." (More frequently, the former employer only learns at

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a later date of the former employee's plans.) Medix responded four days later, told Dumrauf that Medix saw his new position as being in direct competition and a "direct violation of your non-compete agreement," and threatened to "exhaust all legal remedies we have at our disposal."

Five weeks after learning of Dumrauf's departure for an alleged competitor, Medix sued him on the following theories: (1) breach of contract; (2) the Illinois Trade Secrets Act; and (3) the federal Defend Trade Secrets Act. Dumrauf opposed the request for injunctive relief, arguing, among other things, that he had no confidential information and that the non-compete was "overbroad and unenforceable under Illinois law because it contains no activity restriction." Specifically, he claimed, the agreement would prohibit him from working in any capacity—including the roles of "a custodian, an accountant, a lawyer, or an IT professional"—for a Medix competitor in the 50-mile radius. In a Minute Order, Judge Sara L. Ellis denied the motion for temporary restraining order. She also declined to grant expedited discovery or to set a date for a preliminary injunction hearing.

Medix then amended its Complaint to drop the Illinois and federal trade secrets claims, relying solely on a breach of contract theory. Dumrauf moved to dismiss the Complaint for failure to state a claim. In her Order granting Dumrauf's motion, Judge Ellis reasoned, "Without some connection to the work he did at Medix, this restriction cannot possibly serve to protect a legitimate business interest of Medix and is in essence an impermissible restriction on competition *per se*. Thus, the Covenant is so broad that it is unreasonable on its face and unenforceable." The Court refused to blue pencil the agreement, recognizing that while Illinois law permits modifying an overly broad geographic scope to "accomplish the purpose of the covenant," it prohibits "rewriting the activity scope of a restrictive covenant to make it enforceable … when the scope is so broad as to be patently unfair." The Court dismissed the case with prejudice.

Takeaways: First, it is a risky strategy to use a non-compete agreement you know to be potentially overbroad and count on a court to rewrite it later. Second, "one size fits all" is not true in the world of non-compete agreements. To have a chance at enforceability, a non-compete should be tailored to the particular activity, geographic area and customers of the employee's position, so as to demonstrate a legitimate basis for the restriction. Third, it may have enhanced Dumrauf's position and credibility with the Court for him to be so transparent with Medix about his new employment. Fourth, as a company hiring an employee with a non-compete agreement, Dumrauf's new employer engaged in two "best practices" by tailoring his role to avoid the territory at issue in his non-compete and by requiring him to sign a "Reminder re Expectations." In that "Reminder," the company reiterated that it did not believe Medix's agreement to be enforceable and understood Dumrauf had none of Medix's confidential information, but stated it neither has nor wants any Medix confidential information, that Dumrauf should promptly ensure he has returned to Medix any such information in his possession, and should neither use nor disclose such information to his new employer. Although the new employer was not sued in this case, these "best practices" may help tip the balance of equities in favor of a former employee.

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