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Enforcing The Phantom Noncompete: Michigan Court Allows Employer To Pursue Noncompete Claim In The Absence Of A Written Document Signed By Employee

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It is commonly accepted that to enforce a noncompete agreement against an unfaithful employee, the employer first needs to have a signed, written agreement with that employee. However, a new decision from a federal court in the Western District of Michigan, *Stryker Corporation v. Ridgeway,* has splashed some cold water on that notion. The employer in *Stryker* sued a former employee for breach of his noncompete agreement. Unfortunately for the company, it had no signed version of the noncompete. Jumping on this opportunity, the employee moved for summary judgment, arguing that the company could not prove that he breached the agreement because it could not produce admissible evidence that he entered into the agreement. To support his position, the employee produced statements from his co-workers that he had no noncompete, and he also highlighted that there were no witnesses who saw him sign the document. Sounds pretty bad for the employer, right? Well, the company had a few cards of its own to play: the company used a standard noncompete that it required employees to sign as a condition of employment. In other words, the employee could not have worked for the company unless he had signed the noncompete. Also, while it did not have a signed copy of the noncompete, it was able to produce a fax cover sheet from the employee where he returned signed versions of not only his offer letter, but also the noncompete. In the end, the court determined that this evidence was sufficient to deny summary judgment. Helping out in this regard was a Michigan statute (Mich. Comp. Laws §§ 66.132(1)) which provides that a "party seeking to enforce an agreement need not produce a written copy of the agreement, as long as the party can produce some written evidence that establishes the agreement's essential terms." The fax cover sheet, the standard noncompete form and the testimony of company witnesses that it would not have hired the employee without signing the noncompete, presented enough evidence of the agreement and its essential terms to send the case to a jury. While the result ultimately was good for the company, careful employers who use noncompetes should consider a few things before trying to enforce a phantom noncompete. First and foremost, the company only got past summary judgment. It still needs to convince a jury that (a) there was a noncompete and (b) the employee breached it. Second, the best practice remains having a document fully executed by all parties that can be located when it matters. If the employer in this case had such a document and kept it in a safe place, it would not have had to (a) worry about summary judgment, (b) prove up the fact that it had a standard

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form agreement and (c) prove that it would not have hired the employee without signing the agreement. Instead, it would simply have pulled the signed agreement from the employee's file and attached it to the complaint. Every year, employers spend considerable sums of money paying attorneys to draft enforceable non-competes. It does no good to go to all of that effort only to lose the document when the time comes. With that in mind, employers should make sure that if they present a noncompete to an employee – particularly a new hire – that the person signs the document before starting work and that the document is properly filed. It would not hurt to make a copy of the signed agreement and give the copy to the employee (with the company keeping the original in its files). That way, there are two copies of the document in existence. Additionally, considering that unfaithful employees have been known to access their personnel files and remove things like their signed noncompete only to later pretend that they never had one, it might also not be a bad idea to have a separate file with another copy of the non-compete – either physical or electronic – that employees cannot access. Finally, what saved the employer in this case was application of the Michigan statute and the company's ability to convincingly rely upon its standard practices – specifically, the evidence that it (a) had a standard noncompete and (b) only hired the employee *because* he had signed the standard noncompete. Employers outside of Michigan may not have the benefit of pointing to standard practices to save a noncompete that is based on an unsigned form document. While using a standard form at least gives an employer something to point to if – as in this case – it cannot locate the actual signed document, this is no substitute for an actual signed agreement. Employers who have noncompetes should make certain that the documents are properly signed by both the employee and the company, and that the documents are kept a secure location so they can be located when needed.