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Coast-to-Coast Noncompete Dispute Highlights 3 Key Enforcement Strategies

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We have written here before about the importance of differences in state laws in the enforcement of noncompete agreements . A Miami court's decision last week in a dispute between language education companies Rosetta Stone and Open English highlights this difference, as well as strategic points all companies should consider in their noncompete programs.

Nicole Wilson was employed by Open English in Florida. She signed an agreement including an agreement not to compete for 6 months after her employment with Open English and not to disclose Open English's confidential information. The agreement specified that any disputes over the agreement be litigated in Florida. After Wilson went to work for Rosetta Stone in California, in February 2013 Open English filed a lawsuit against Wilson and Rosetta Stone in Miami, asking the court to stop Wilson from competing and from disclosing Open English's confidential information. The defendants subsequently filed their own lawsuit in California against Open English, asking the California court to declare that the agreement was not enforceable under California law. The Florida court has now declined to dismiss the first case on the grounds that it should be litigated in California because of the almost certain unenforceability of the noncompete provisions in California.

While there may well be more chapters to be written in this particular dispute, the Florida court's decision not to dismiss the case highlights three important principles of noncompete enforcement of which all companies seeking to protect their business assets should take note. First, a strong choice of forum clause is critical. The Florida court's decision gives great weight to the parties' prior agreement to litigating disputes in Florida, citing Florida case law dictating that it do so. Such deference to choice of a forum is common, and deference to those provisions is generally greater than it is to choice of law (i.e. which state's law applies, regardless of where the matter is litigated) clauses.

Second, in concluding that there was no compelling reason the dispute should be heard in California, the court wrote, "In any event, agreements not to use or disclose a company's trade secrets while employed and after employment, which is at the crux of this case, are enforceable in both Florida and California." It is true that trade secret misappropriation is, with some state-by-state variation of course, almost universally prohibited across the states – almost the exact opposite of noncompete law. Strong trade secret language in Wilson's agreement and in the complaint filed with the court allowed the Florida court to make this seemingly pivotal statement in its

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conclusion, rather than focusing solely on the almost certain different treatment the two states' courts would give the plaintiff's attempt in the complaint to stop Wilson from competing.

Finally, the decision underscores the fact that there is usually a benefit to getting to the courthouse first in multi-state noncompete disputes. The Florida court noted that the California case, on which the defendants relied in part as a reason the Florida case should defer, was filed after the Florida case. There are too many moving parts (as in any dispute like this) to say that the fact that Open English won the "race to the courthouse" was determinative, experience tells us that it is often critical. Whether the fact that the system encourages this is good public policy is debatable, but it is clearly the case and companies need to consider this in their decision-making.

We will keep an eye on this dispute to see if there are further decisions – from either coast – with takeaways for employers generally.