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On Second Thought … State Supreme Court Questions Key Noncompete Drafting Strategy

December 18, 2017 | | Non-competes And Trade Secrets, Currents - Employment Law

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As I have written here many times, a key dynamic in the drafting and enforcement of noncompete agreements are the distinctions between different states' laws. Therefore, it is a big deal when a state Supreme Court rules on one of the key issues in the area of noncompete law, as typically happens two to three times per year. The North Dakota Supreme Court recently issued a decision calling into question choice of forum (or venue) clauses as a tool to maximize the enforceability of noncompete agreements. North Dakota is one of a small handful of states – most notably including California – that by statute largely simply prohibits noncompetes. Often a company may be able to avail itself of more enforcement-friendly state laws by specifying not only that such a state's laws govern the agreement, but that disputes must be litigated in a particular state. Courts will commonly disregard choice of law clauses if the chosen law conflicts with the law of the forum state, but choice of forum clauses are usually observed by the courts. In other words, Ohio is an enforcement-friendly state. Therefore, I often advise clients to specify choice of Ohio law *and* that all disputes must be litigated in Ohio. That is the best way to ensure the noncompetes are interpreted as favorably as possible. However, the North Dakota Supreme Court recently rejected this approach. In *Osborne v. Brown & Saenger, Inc.*, 2017 N.D. 288, Osborne had worked for Brown & Saenger in its Fargo, North Dakota, office as a sales representative under a contract that specified the application of South Dakota law and provided that any dispute should be litigated. Following her termination, Osborne sued Brown & Saenger for a declaratory judgment that a 100-mile, two-year noncompete was null and void under North Dakota law. The Court spoke to North Dakota's "strong public policy against non-compete agreements" and said that public policy would be undercut if an employer could avoid it simply by choosing another forum state. The Court concluded that the choice of law and forum selection clauses in Osborne's employment agreement were void as a matter of public policy as they related to the noncompete agreement. A couple of takeaways:

- States that don't like noncompetes *really* don't like them. Courts generally observe choice of *forum* clauses, but even choice of forum clauses may not help an enforcing employer get protection in a noncompete-unfriendly state. As our partner Hans Murphy wrote here, California now has a statute greatly restricting the ability to use choice of forum clauses to avoid California's prohibition on noncompetes. If you have employees in such a state, they likely need separate

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agreements specifically tailored to those states' laws.

- It is noteworthy here that the restricted employee sued first in North Dakota, the forum of her choosing, in a declaratory judgment action, in which a party to a contract asks the court to interpret a contract. It seems likely the result would have been different had the enforcing employer gotten to court first in South Dakota, where noncompetes are allowed. This article is not new, but reviews this and other considerations when deciding what is the right first step for an employer seeking to enforce a noncompete.
- Most courts can still be expected to observe choice of forum clauses, so they are still important drafting measures. In drafting noncompetes, though, employers should strategize about the possibility that the clause would not be enforced and draft with that possible scenario in mind.