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ALERTS

Labor & Employment Law Alert - Indiana Court Of Appeals Refuses To Enforce Terms Of Non-Compete Agreement

March 11, 2014 | Atlanta | Chicago | Columbus | Delaware | Elkhart | Fort Wayne | Grand Rapids | Indianapolis | Los Angeles | Minneapolis | South Bend

A recent decision of the Indiana Court of Appeals could drive a stake through the heart of many employer's non-compete agreements. The case, Clark's Sales and Service, Inc. v. Smith and Ferguson Enterprises, involved a long-time salesman for an appliance retailer. Mid-way through his 14-year employment tenure (and after a key colleague went to go work for one of the company's competitors), his employer required him to sign a non-compete agreement. The key provisions of the non-compete should be familiar to most Indiana employers:

- For two years after the employee's termination from employment, he was prohibited from, in any capacity:
    - soliciting or providing services competitive to those offered by his employer to any business account or customer who was a business account or customer at any point in time during his employment;
    - working in a competitive capacity with a named competitor of the employer in the state of Indiana, in any city or state in which the competitor conducts business, or to work for any business that provides services similar or competitive to those offered by the employer during the term of his employment, including but not limited to within the state of Indiana, Marion County, the counties surrounding Marion County, or within a 50 mile radius of his principal office with the employer.

After the employee resigned and went to go work for one of its competitors, the employer filed suit to enforce the non-compete and sought injunctive relief. The trial court, however, rejected the employer's claims and struck down the non-compete as overly broad and unreasonable. The decision was affirmed by the Indiana Court of Appeals.

The Court of Appeals took issue with several parts of the agreement. First, the Court felt that the restriction on soliciting or providing services to customers was overbroad because it prohibited the employee from servicing anyone who had been a customer at any point in time during his employment – including customers with whom he may not have had any contact.

Second, the Court viewed the scope of activities as too broad because it went beyond the sales job he had with his employer and prohibited him from engaging in any service that the company offered but which he

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personally never performed during his employment (i.e. performing maintenance or repair). The Court felt that restricting the employee from competing with portions of the business in which he never was associated was invalid.

Third, the Court viewed the geographic restriction as unreasonable. While the Court felt that a 50 mile radius might be reasonable given the nature of the sales services he provided, the problem was that the way the provision was worded, it is was in addition to and not a limitation of the much more expansive geographic restrictions (the entire state and counties within the state) that preceded it.

Perhaps more troubling for employers is that the Court refused to apply the "blue pencil doctrine." Where a covenant is clearly separated into parts, some of which are unreasonable and some which are not, the doctrine allows Indiana courts to strike out the offending provisions to salvage the agreement. Here, the Court felt that any such revisions would have to be extensive and elaborate – necessitating changes to the entire meaning of certain paragraphs. Since the Court could not easily redact the challenged language, the Court refused to enforce the non-compete agreement.

The case poses yet another stark reminder of the need for employers to carefully and narrowly craft the language of their restrictive covenants. We encourage all of our clients to review the terms of their existing agreements (and to prepare future agreements) to ensure that they are consistent with the terms of this decision.

To obtain more information about this decision, non-compete agreements or any other labor and employment issues; please contact the Barnes & Thornburg Labor and Employment attorney with whom you work, or a leader of the firm's Labor and Employment Law Department in the following offices:

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