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New Arkansas Law Permits Blue-Penciling of Employment Non-Compete Agreements

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Arkansas has joined the list of states that allow "blue-penciling" of employment contracts by a court.

Governor Asa Hutchinson has signed legislation (S.B. 998 or Act 921) allowing a court to enforce the reasonable parts of a non-competition agreement, while deleting the overbroad, unenforceable provisions, rather than striking down the entire agreement. The new law, signed on April 1, 2015, is scheduled to take effect on August 6, 2015.

Under Act 921, a covenant not to compete will be enforced if the agreement is ancillary to an employment relationship or part of an otherwise enforceable employment agreement or contract to the extent that:

the employer has a protectable business interest (such as trade secrets, customer lists, confidential information, intellectual property, customer lists, goodwill with customers, knowledge of business practices, methods, profit margins, costs, and other confidential information that increases in value by not being known to a competitor, training, and "other valuable employer data that the employer has provided to an employee that an employer would reasonably seek to protect or safeguard from a competitor"); and

the non-compete agreement is limited with respect to time and scope in a manner that is not greater than necessary to defend the protectable business interest.

Further, Act 921 states that the absence of a specific or defined geographic descriptive restriction in a non-compete agreement does not make the agreement overly broad if the agreement is limited with respect to time and scope in a manner that is not greater than necessary to defend the protectable business interest of the employer.

Moreover, under the new law, courts are given the authority to determine the reasonableness of the agreement and "shall" reform overly broad covenants. Prior to enactment of this statute, Arkansas did not allow blue-penciling, and a non-compete agreement had to be valid as written — the court could not narrow the overbroad provision. Employers doing business in Arkansas now have some statutory guidance, whereas before, it was "your guess is as good as mine."

Now, by statute, continued employment is sufficient consideration for a covenant-not-to-compete. In addition, a post-termination restriction of two years is presumptively reasonable as to length of time, unless the facts and circumstances of a particular case clearly demonstrate that it is unreasonable compared to the employer's protectable business interest. Damages and injunctive relief also may be awarded, where appropriate.

The Act, however, does not apply to non-solicitation, recruitment or hiring of employees, confidentiality agreements, nondisclosure agreements, or to other terms and conditions of an employment agreement; the existing common law would still apply to those provisions. In addition, the law excludes from coverage employees who hold professional licenses in medical fields.

Implications

Under the new law, employers have more flexibility in drafting non-compete provisions with the understanding that, if necessary, a court can modify a provision rather than invalidate the entire contract. Common law principles will

still apply in terms of allowing measures to protect business interests.

Furthermore, an employer may find a broader scope allowed on geographical restrictions. With the rapid pace of technological advancements, courts have begun leaning that way, but not having been able to modify the terms of an agreement, have invalidated agreements in their entirety because their scope was not sufficiently defined.

Since the Act does not provide for retroactive application, employers wishing to present new or modified agreements to employees should do so after the Act becomes effective to benefit from the Act.

If you have any questions about the new law, please contact the Jackson Lewis attorney with whom you regularly work.

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practices

Non-Competes and Protection Against Unfair Competition

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contact

James H. Stock