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Ohio Supreme Court Holds That A Merger Triggers The Running Of A Noncompete Clock

The Ohio Supreme Court recently held that when a company that was the original party to a noncompete agreement merges in to another company, unless the noncompete agreement contained a "successors and assigns" clause, the merger is a termination of employment which triggers the running of the restrictive period in the noncompete.

In this decision, Acordia of Ohio, L.L.C. v. Fishel et al., employees of companies that later merged into another company signed two-year, post-employment noncompete agreements. These noncompetes did not contain language commonly found in noncompetes providing that the agreements could be assigned and/or would be carried over to a corporate successor. Rather, by their terms, the agreements were "between only the employees and the companies that hired them." As such, the agreements "appl[ied] only to 'the Company' with which the employees agreed to avoid competing, not the company's successors."

Because the companies that originally hired the employees no longer existed after the mergers, the mergers constituted a termination of employment which triggered the two-year, post-employment noncompete provision. As a result, the claims in this lawsuit were found to be untimely because the noncompete periods had already run.

In so ruling, the Court noted that the surviving corporation "could have protected its goodwill and proprietary information by requiring that the employees sign a new noncompete as a condition of their continued at-will employment." The Court's ruling also implied that if the agreements had included the type of "successors and assigns" language commonly found in noncompetes, the outcome may have been different.

One dissenting justice noted that "other courts construing similar statutes have rejected the conclusion reached by the lead opinion."

Another dissenting justice wrote that even though in his opinion, the noncompetes transferred by operation of law to the surviving corporation, they may still be unenforceable in light of all of the changes in corporate structure and size since the agreements were first signed.

This case illustrates the importance of including "successors and assigns" verbiage in a noncompete. It also illustrates the attention which should be placed on the enforceability of a noncompete following a corporate transaction, and whether it may be prudent for an acquiring corporation to have employees sign fresh noncompete agreements.

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