Failure to Update Non-compete Agreements after Purchase of Company Foils Enforcement

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The federal appeals court in Boston has underscored the importance of carefully examining and understanding restrictive covenants, such as non-competes and non-solicitation agreements, that may be acquired in a business purchase. The Court found a one-year non-compete clause in a restrictive covenant agreement expired and unenforceable against former employees when it was sought to be invoked more than one year following the sale of the company that had entered into the agreements with them. *OfficeMax, Inc. v. Levesque*, 2011 U.S. App. LEXIS 18816 (1st Cir. Sept. 12, 2011). Accordingly, the Court refused to enforce the District Court's preliminary injunction restricting the former employees from competing with OfficeMax, an office supplies company that bought the assets of Boise Cascade Office Products Corp. (BCOP), another office supply company.

Background

In 1996, David Levesque and Dana Rattray ("Appellants"), while employed by Loring, Short, and Harmon ("LS&H"), an office supply company, accepted $2,500 each to sign agreements containing restrictive covenants ("1996 Non-compete Agreements"). The agreements provided that "[f]or a period of 12 months after termination of [] employment with LS&H" the Appellants would refrain from the "sale or distribution of office supplies, office furniture, or related office products or services."

In February 1996, BCOP purchased LS&H and the Appellants joined BCOP's sales team. BCOP offered them separate non-compete agreements, but they refused to sign.

In December 2006, BCOP merged with OfficeMax and the Appellants became employees of OfficeMax. In 2009, OfficeMax terminated Levesque's employment and Levesque began working for County Quick Print, a competitor of OfficeMax. In 2010, Rattray resigned and she, too, began working for County Quick Print.

The Suit

Based on the 1996 Non-compete Agreements, OfficeMax sued the Appellants and County Quick Print in federal District Court to prevent them from making sales of office products. It sought a preliminary injunction, arguing that the terms of the 1996 Non-compete Agreements prohibited the Appellants from engaging in the sale of office supplies for a period of 12 months following the end of their employment with OfficeMax.

For a preliminary injunction, courts in the First Circuit require the moving party to show a likelihood of success on the merits, immediate irreparable harm in the absence of injunctive relief, and that the balance of equities supports issuing the injunction.

Here, the District Court agreed with OfficeMax that the "agreements were validly assigned by LS&H to BCOP, and that OfficeMax had acquired the agreements as successor by merger to BCOP." The District Court also found that OfficeMax demonstrated it would suffer irreparable harm if the Appellants were not restricted from competing and that the balance of equities supported issuing the preliminary injunction.

Agreements Not Enforceable

On appeal, however, the First Circuit disagreed. It vacated the District Court's ruling, holding that the "triggering date for the noncompetition clause [was] the termination of employment from LS&H" following the sale to BCOP in 1996, and not the Appellants' departures from OfficeMax in 2009 and 2010.

The Court continued, "With all parties understanding that LS&H's contractual rights were going to be assigned to BCOP during the share sale, it was not absurd to have approved contractual language setting the triggering date of the noncompetition clause as the termination from LS&H." The Court also found significant that the rationale for the agreements was to prevent competition, to help BCOP establish its sales force and protect its customer goodwill for one year after the purchase of LS&H. Furthermore, BCOP was assigned the rights to enforce the agreement, and only BCOP was intended to have the right to enforce the obligations.

Thus, OfficeMax failed to establish a likelihood of success on the merits because the 1996 Non-compete Agreements did not explicitly extend the obligations not to compete beyond one year after the sale of LS&H to BCOP.

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OfficeMax, Inc. provides important guidance for employers seeking to ensure that restrictive covenants are effective following the purchase of a company that entered into the restrictive covenants with employees. Employers contemplating a corporate sale should carefully scrutinize any executed restrictive covenants to ensure that the obligations continue regardless of whether the former employee transfers to or is hired by the purchaser. Purchasing entities, consistent with applicable state law, can require all employees to sign new non-compete agreements as a condition of their new employment. Jackson Lewis attorneys specialize in restrictive covenant and trade secret matters and are available to assist with these issues.

practices

Trade Secrets, Non-Competes and Workplace Technology

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