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Employer's Waiver Of Non-Compete Period In Order To Avoid $1 Million Payment Held Ineffective

In *Reed v. Getco, LLC*, the Illinois Court of Appeals was recently faced with an interesting situation: under a contractual non-compete agreement, the employer was obligated to pay the employee $1 million during a six month, post-employment non-competition period. This was, in effect, a form of paid "garden leave" — where the employee was to be paid $1 million to sit out for six months – perhaps to finally correct his golf slice or even learn the fine art of surfing. It was a win-win situation that seemingly would be blessed by most courts; it was for a reasonable length of time, and the employee was set to be paid very handsomely for sitting out. Accordingly, it is doubtful that most judges would have had an issue with it.

Yet here, the employer apparently had second thoughts – and just over a week after the employee resigned, the employer notified the employee that it was waiving the six month non-compete, allowing him to work anywhere, and therefore not paying him any portion of the promised $1 million.

Some non-compete agreements have express clauses allowing an employer to do just this – to shorten the non-compete and thereby avoid contractual non-compete payments — but the Court's opinion makes mention of no such a clause here.

According to the Court, the employer attempted to justify the non-payment on several grounds.

First, the employer argued that because the non-compete itself was to the employer's benefit, it was free to waive the non-compete period and not make the accompanying $1 million payment. But the Court effectively said, "whoa, not so fast," noting that the non-compete agreement also had a clause stating that there could be no waiver of any contractual provision unless "signed by the party against whom the waiver or modification is enforced." Here, the waiver was being enforced *against* the employee, but the employee signed no such written waiver and therefore the purported waiver was ineffective. Moreover, the Court found that there was no language in the agreement indicating that actual enforcement of the non-compete provision was a condition precedent to the $1 million payment.

Second, the employer argued that because there was a provision in the non-compete agreement which allowed the employer to waive the restriction *if requested by the employee*, the employer had the discretion to modify *all* of the noncompete restrictions, including the $1 million payment obligation. Again, the Court found that this interpretation was not supported by the plain and unambiguous language of the provision, which only applied to a situation where the employee requested a waiver.

Finally, the employer argued that the employee had a duty to mitigate, and could not simply spend six months doing as he chose while collecting $1 million from his former employer. The Court held that when an employer breaches an employment contract, the employee generally has a duty to reasonably mitigate damages. However, here the promise was that the employee would not engage in competitive activities for six months and, in exchange, the employee would be paid the promised sum. The employee abided by his non-compete obligation and sat out for six months, so the Court held that the payment was due.

What should employers take from this decision? Because provisions obligating payment during non-compete periods can impose significant costs on the employer, employers must realistically assess what they are willing to pay. One option to control such costs is to make explicit in the agreement that the employer has the right to shorten any non-compete or garden leave period, and that the employer also has an accompanying right to proportionately reduce or eliminate any accompanying payment obligation. The absence of such an express contractual authorization was the death knell for Getco in this case.

Tags: garden leave, Getco LLC, Non-Compete Agreement, Peter A. Steinmeyer
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