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FEATURE

Did Time Run Out on Employee's Noncompete?

A job change with an employer may require a new noncompete agreement

By Erik A. Christiansen

Employers, beware: A noncompete agreement with a furloughed employee may not be effective when the employee is rehired in a new position. In *Russomano v. Novo Nordisk Inc.*, an appellate court held that the clock on a noncompete agreement began to run when the employer temporarily terminated its employee. The court concluded that the one-year noncompete agreement had expired, and since the employee did not sign a new agreement upon being rehired, the employee was not restricted from working for a competitor. In the wake of this decision, ABA Litigation Section leaders recommend that employers redraft noncompetition agreements to account for potential changes of position in the future.

> The employee didn't resign his noncompete when offered a different position at the pharmaceutical company
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> *Photo Illustration by Elmarie Jara | Getty Images*

Employee Resigns After Being Thrice Hired and Twice Laid Off

Novo Nordisk, Inc., initially hired Russomano on January 25, 2016, as a Hemophilia Community Specialist for the New England region. As a condition of employment, Russomano signed a noncompete agreement on December 14, 2015. On October 24, 2016, Novo told Russomano that his position was being eliminated, and he was laid off on November 18, 2016. Later, on December 8, 2016, Russomano was rehired as a Hemophilia Therapy Manager for the Penn West region. As a condition of his rehiring, Russomano signed a second one-year noncompete agreement on December 7, 2016.

Approximately a year and a half later, on June 20, 2018, Novo sent Russomano a letter stating that his employment would "be eliminated and his employment [would] end effective August 3, 2018." Prior to his termination, Russomano applied for open positions in the company and was offered a different position as Senior Hemophilia Community Liaison in New York. Novo sent Russomano a letter "formally confirm[ing his] transfer to the new position." Russomano's start date was "[e]ffective August 6, 2018, a Monday three days after the Friday end date specified in the earlier letter." He did not sign a new noncompete agreement for his new position. Russomano later resigned from Novo on January 6, 2020, and on January 21, 2020, he accepted a position with BioMarin Pharmaceutical, Inc., a competitor.

Failure to Obtain New Noncompete Fatal to Employer's Request for Injunctive Relief

On that same day, Novo sought a temporary restraining order and preliminary injunction against Russomano and BioMarin, arguing that Russomano had simply been transferred, not laid off. The district court denied Novo's motions.

On appeal, the U.S. Court of Appeals for the First Circuit agreed that Novo was unlikely to succeed on the merits of its claim and that the one-year noncompete covenant started to run upon the employee's temporary termination two years prior to his 2020 resignation. It explained that "[t]he district court did not err in concluding that the letter laying Russomano off was unambiguous when it stated that his employment ended 'effective August 3, 2018.' The letter offering him a new position also was unambiguous: his new position was '[e]ffective August 6, 2018."

As a result, the First Circuit concluded that because the noncompete agreement expired on August 3, 2018, the trial court correctly decided not to restrain the employee from starting work with a competitor less than 30 days after his 2020 resignation from Novo. The appellate court also rejected Novo's argument that the termination of Russomano's employment was conditional on him not securing another role within the company.

"Both the trial court and the court of appeals got it right," affirms David Gevertz, Atlanta, GA, cochair of the Section of Litigation's Employment & Labor Relations Law Committee. "There is general hostility to noncompetition agreements, and that reluctance is especially true when a company seeks injunctive relief to stop a former employee from obtaining new employment. Courts look for any reasonable reason to deny these types of injunctions."

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Other Section leaders agree. “The court hung its hat on the word ‘effective’ and the facts at issue. Russomano’s new job involved a new territory and a new role in the company. Under those circumstances, particularly when a job does not involve client contact, courts often wind up denying injunctive relief,” explains Jeff Brodin, Phoenix, AZ, cochair of the Section’s Employment & Labor Relations Law Committee.

Best Practices for Employers

Section leaders believe that employers might attempt to draft around the decision, or else human resource professionals might have to monitor job changes and get new agreements with every change in status. “Maybe the best practice going forward is to modify the effective date of agreements to be one year from the employee’s ‘final departure date’ with the company, or draft an agreement that employment must cease for at least 60 or 90 days for there to be considered a cessation of employment for purposes of the restrictive covenant period,” Gevertz counsels. “Drafting around the case seems a lot easier than having human resource professionals try to keep up with the myriad of transfers and rehires within a very large company,” he adds.

“Noncompete agreements might be drafted to apply to all future changes in positions or duties, including any new positions, transfers, or new jobs at the company,” agrees Brodin. “Attacking the problem as a drafting exercise might be easier than having human resource professionals add employment changes to their employment checklists,” he notes.

“Employers, however, must exercise caution,” Brodin warns. “Noncompetition agreements should not only be narrowly drafted in terms of geographic scope and duration, they really should be drafted to conform to the employee’s duties and the nature of the business. If an employee

changes jobs at a company, and the sensitive nature of the position goes away, there may be less need for a noncompete agreement in the new position, and a court may be less inclined to enforce the covenant," he offers. "On the other hand, a high-level executive might always need an enforceable noncompetition agreement, regardless of a change in position, and the best practice might be to craft employment-level noncompetition agreements," Brodin suggests. In short, "noncompetition agreements should be position-specific, rather than employee-specific, and should be narrowly tailored to the individual employment position," advises Brodin.

Traps for the Unwary

The *Novo* case also highlights a number of other traps for unwary employers. "Many times, an employee will have a defined duration of employment in an employment agreement, the employment agreement then expires, and the employee stays on beyond the termination of the employment contract. Does the restrictive covenant continue to apply after the employment contract ends?" posits Gevertz. "Similarly, other employment agreements address a specific territory, and an employee is later transferred to a new territory without a new agreement. Does the restrictive covenant continue to apply with a change in territory or position?" he questions. "Again, the need to draft noncompetition agreements to address these types of situations is critical," Gevertz opines.

Ultimately, the best solution is "to not put in place blanket agreements, but instead to only adopt noncompetition agreements for those employees and positions that are truly critical to a company," Brodin concludes.

Hashtags: #Non-compete #Non-compete #Employment #Employee #Labor

Resource

- Josephine M. Bahn, "Reformation Agreements Cannot Save Noncompete Agreements," (July 13, 2020).
