Non-Compete Agreement Offered a Day Late is Not Valid

by Jeffrey J. Maleska - Tuesday, November 14, 2017

While we all know that a non-compete agreement offered at the beginning of the employment relationship does not require independent consideration, do we really know when the employment relationship actually begins? One Minnesota employer learned the hard way.

Let's Start at the Beginning

Joan Stier applied on May 19, 2003, for a part-time therapist position at Safety Center, Inc. (Safety Center), a treatment facility for special-needs sex offenders. The following day, Safety Center mailed Stier a letter "to confirm Stier's acceptance of the position [Safety Center] offered her." The May 20 letter specified Stier must attend training, and also laid out the terms of her employment, including her hourly wage and at-will employee status. The letter identified Stier's first day of work as May 27, 2003. Notably, the May 20 letter did not mention anything regarding a non-compete obligation.

On May 27, when Stier arrived to work, she was given a non-compete agreement, which she signed. Stier continued to work for Appellant until early 2015, when she resigned to work at another treatment program for special-needs sex offenders that she herself had established in 2014. As a result, Safety Center sued Stier claiming that she violated the non-compete agreement. The district court refused to enforce Stier's non-compete agreement because it was "not ancillary to the initial employment agreement," nor supported by any independent consideration. Safety Center appealed this decision to the Minnesota Court of Appeals.

A Day Late is Many Dollars Short

The Appeals Court reiterated the general rule that a non-compete agreement does not need to

be supported by independent consideration if it is entered into at the inception of the employment relationship. However, if the non-compete is entered into after the start of the employment relationship, independent consideration is required to make such an agreement valid and enforceable – a mere promise to continue employment is not sufficient.

Here, the Court concluded that Stier's non-compete agreement was not "ancillary to the employment agreement" – and therefore unenforceable – because the employer's May 20 letter was sent to *confirm* Stier's acceptance of the position with Safety Center. A confirming letter can only be sent after an event has already occurred, so the letter obviously verified that Stier had actually accepted the job before the letter was sent. Therefore, the non-compete was not offered at the inception of the relationship and even though only one day had passed, additional consideration was required for the obligation to be valid.

However, Safety Center argued that Stier herself testified that she first learned of her job offer with Safety Center when she received the May 20 letter – and not sometime prior to that date. The Court rejected this argument and explained that Stier's testimony as to her recollection of events more than 13 years before the lawsuit merited less weight than the plain language of the May 20 letter. Therefore, because the non-compete was not supported by independent consideration, the Court upheld the district court's refusal to enforce Stier's non-compete.

Bottom Line

This case reinforces the need for employers to use clear language when sending written offers of employment to a potential new hire. If an employer requires a new hire to sign a non-compete as a condition of employment, the employer must clearly communicate this requirement when sending a written offer of employment.

This decision further clarifies the need for employers to distinguish between letters used to "confirm" employment, and letters that operated as an "offer" of employment. Failing to recognize this distinction can result in unintended consequences.

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