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# Court Rejects Employer's Novel Attempt to Create an Enforceable Non-Competition Agreement with an Existing Employee

By Jeffrey R. Gordon / Jun 05, 2014

A recent decision by the Pennsylvania Superior Court highlights employers' continued struggles in their attempts to craft legally enforceable non-competition agreements entered into with current employees. Pennsylvania courts have consistently held that contractual restrictions on an employee's ability to compete against an employer after leaving employment must be supported by "valuable consideration" to be enforceable. Initial employment constitutes such consideration, however, under Pennsylvania law continued employment itself has not been viewed as adequate consideration that would render a non-compete restriction enforceable. Within this context, Pennsylvania employers have long-grappled with the issue of what they need to do in order to enter into a binding, enforceable agreement with a current employee that prevents that employee from competing against them after they leave employment.

The Pennsylvania Superior Court just issued a ruling that helps clarify what employers must provide in the form of valuable consideration to make a non-compete covenant enforceable when entered into with a current employee. In *Socko v. Mid-Atlantic Systems of CPA, Inc.*, 2014 PA Super 103 (PA Super. Ct. 2014), the Court considered an employer's admittedly creative legal argument that Pennsylvania's Uniform Written Obligations Act ("UWOA") allowed it to avoid the obligation to provide a current employee additional valuable consideration to make a non-competition agreement enforceable.

Specifically, in *Socko*, the employer relied on Section 6 of the UWOA which provides that "[a] written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration if the writing also contains an additional express statement... that the signer intends to be legally bound." 33 P.S. §6. The employer argued that because the current employee signed a non-competition agreement which expressly contained the language "intending to be legally bound" that the fact that the agreement was otherwise not accompanied by the receipt of any valuable consideration should not prevent the non-compete restriction from being enforceable.

The Court rejected the employer's argument that the UWOA-compliant language "intending to be legally bound" nullified the requirement that additional valuable consideration must be provided to a current employee in order for the non-compete covenant to be enforceable. Citing consistent Pennsylvania Supreme Court precedent instructing employers that restrictive covenants in employment relationships are disfavored because they are a restraint of trade and because they cause considerable hardships on employees, the Court said current employees must receive actual valuable consideration in exchange for entering into an employment agreement that contains such restrictions.

The clear take-away from the Court's decision in *Socko* is that an employer must confer an actual concrete benefit on a current employee in order to create a non-compete restriction that can be enforced against an employee. The Court's rejection of this statutorily-based attempt under the UWOA to avoid providing valuable consideration follows other Pennsylvania court decisions rejecting attempts by employers to meet the requirement by providing an employee a nominal sum of money (Ex. \$1.00) or by merely changing a job title and calling it a "promotion".

There is no hard and fast rule in Pennsylvania concerning what an employer must specifically provide an employee to be considered "valuable consideration". There is no set dollar amount that meets the threshold. Further, consideration does not necessarily need to be in the form of a cash payment or bonus. Courts have found promotions and/or pay raises to be sufficient consideration under some circumstances.

When considering approaching a current employee with an employment agreement that will restrict his/her ability to compete against it after employment ends, employers should be cognizant of the fact that merely allowing that employee to continue working will not render the non-compete restriction enforceable. In addition to providing valuable consideration, the application of the restriction must be reasonably limited in both time and geographic scope to comply with current Pennsylvania law. Because this is an increasingly litigated area and the case law on the issue is continually evolving, employers are encouraged to engage their employment counsel when considering entering into non-competition agreements with employees.

If you have any questions about non-competition agreements or related issues, contact Jeffrey R. Gordon at (412) 394-2359, [jgordon@clarkhill.com](mailto:jgordon@clarkhill.com), or another member of Clark Hill's Labor and Employment Practice Group.