



LEGAL AND LEGISLATIVE UPDATE: NOVEMBER 2006

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DON'T FORGET NON-COMPETE AGREEMENTS

In recent years, it has become common practice for employers to require key employees to sign non-compete agreements, also known as restrictive covenants. These agreements protect the most valuable assets of a business, including such things as customer relationships, pricing information, and marketing strategies, by deterring an employee from engaging in competitive activity. However, when it comes to enforcement, Pennsylvania courts have been cautious in enforcing these agreements because of the inherent restraints on trade they create by sometimes preventing an employee from earning a living.

In Pennsylvania, for a restrictive covenant to be enforceable, the covenant must generally meet three requirements: (1) the covenant must relate to the contract for employment; (2) the contract must be supported by adequate consideration; and (3) the covenant must be reasonably limited in both duration and geographical scope.

When considering a non-compete agreement, an employer should examine the following factors:

- § The scope of the company's operations and the employees' duties.
- § The scope of the agreement's time and geographic limitations.
- § The employee's level of contact with customers, clients and business partners.
- § The employee's access to or possession of confidential information or trade secrets.
- § The employee's possession of knowledge and training gained as a result of the employer's efforts as opposed to general skills and techniques or skills the employee brought to the job when hired.
- § The relative benefit of the restriction to the employer and the hardship on the employee.
- § The employee's ability to earn a living if the agreement is enforced.

Pennsylvania law is clear that when a non-compete agreement is proposed at the start of employment, the adequate consideration has been found to exist in the job offer itself. However, when the employer seeks to have an employee sign a non-compete agreement after the start of employment, there must either a beneficial change in the job and/or other additional consideration offered for the non-compete agreement to be enforceable. Thus, Pennsylvania

employers should make sure there is sufficient consideration when using non-compete agreements, particularly when an employee has already started working.

NO RIGHT TO BE “LEFT ALONE” WHILE ON FMLA LEAVE

A recent Third Circuit Court of Appeals case made it clear that an employee does not have the right to be “left alone” while on FMLA medical leave. In Callison v. City of Philadelphia, the Court approved the City’s requirements for periodic calls and check-ins for employees using FMLA leave as being appropriate. Importantly, the Court concluded that “nothing in the FMLA prevents employers from ensuring that employees who are on leave from work do not abuse their leave.” Thus, in Pennsylvania, employers have a clear right to check on employees using FMLA to prevent fraudulent leave.

For more specific guidance on these issues, you may reach Mr. Gold at (717) 237-6702 or by email at kgold@rhoads-sinon.com.