

RECENT DEVELOPMENTS CONCERNING ENFORCEMENT OF RESTRICTIVE COVENANTS IN EMPLOYMENT AGREEMENTS

In the modern employment world, a developing trend over the past twenty years has involved restrictive covenants that employers increasingly are requiring employees to sign. Very often, the employees involved agree in advance that, in the event of any termination of employment, their activities will be restricted. Limitations can be imposed on a number of actions, including contact with clients, solicitation of clients, and even solicitation of other employees.

Not surprisingly, these issues also often become the subject of contentious litigation. A great deal can be at stake both for the employers and the employees involved, and it is very often left to the courts to decide whether and to what extent a particular restrictive covenant might be enforceable. These issues are of great importance and experienced counsel should be involved at each stage of the process, from the very beginning of the employment relationship involved. Experience has shown that courts will enforce agreements that are properly drafted and executed. Given the importance of the interests involved, at every phase of the negotiation, drafting, and enforcement process, it is therefore necessary to have counsel involved who are experienced in dealing with these matters.

Restrictive covenants are construed on a case by case basis, and the law of all three jurisdictions in this area can differ greatly. Several recent decisions issued out of the Virginia Courts illustrate some of the pits and falls of dealing with restrictive covenant issues.

For example, on April 19, 2002, the Supreme Court of Virginia issued its opinion in the case of Modern Environments, Inc. v. Stinnett. In that case, Justice Elizabeth B. Lacy wrote for a unanimous Court, affirming the judgment of the Circuit Court of the City of Virginia Beach that a particular restrictive covenant was overly broad and therefore unenforceable. (The general rule in Virginia, unlike in many other jurisdictions, is that an overly broad restrictive covenant will probably not be enforced at all, as the Virginia Courts are reluctant to “blue pencil” such agreements.)

The Modern Environments case involved a salesperson who had worked for a firm selling and installing office furniture for about five years. The employee had signed an employment agreement in April 2000, in which was contained a fairly standard one-year “non-compete” clause. After leaving her employment, the employee went to work for a competitor.

The language in the restrictive covenant provision was similar to others that have been upheld by the Virginia Courts. The key to this case, however, was the absence of specific evidence concerning precisely what the employee was doing with her new employer, in addition to a lack of evidence concerning the “legitimate business interests” that the prior employer was seeking to protect by enforcing the agreement. Apparently, in trying to enforce the restrictive covenant, the prior employer relied on the fact that the language was similar to language in other agreements that had been upheld as enforceable, and neglected to put on further evidence that might have led to a different result.

In another recent case, District Judge Claude M. Hilton of the United States District Court for the Eastern District of Virginia, Alexandria Division, held that, under certain circumstances, continued employment at the same job does not furnish adequate consideration for a restrictive covenant. In the case of Mona Electric Group, Inc. v. Truland Service Corporation, Judge Hilton evaluated a situation in which an employee had worked for several stints at the same company over 30 years. The employee rejoined the company in 1991 and stayed until February 2001. In April 2000, after the employee had been working there for many years, a supervisor asked the employee to sign a “Non Competition Agreement.” The agreement stated that it barred the employee from soliciting customers for one year after leaving his job. When the employee left his job, the former employer sued to enforce the agreement.

Judge Hilton found that the agreement was unenforceable, because there was insufficient consideration for the restrictive covenant that the employee was asked to sign in April 2000. The terms of employment had already been defined and agreed upon when the employer asked that the restrictive covenant be signed. In construing an issue that has not been reviewed or passed upon by the Supreme Court of Virginia, Judge Hilton predicted that the Supreme Court of Virginia would follow a minority rule that states that continued employment does not furnish sufficient consideration for a restrictive covenant. Again, experienced counsel might have been able to get around this problem during the negotiation process.

The right time to involve counsel in these matters is sooner, rather than later. Experience shows that courts will enforce restrictive covenants, assuming that the applicable legal standards and requirements are met. The key is making sure at the outset that the provisions are likely to be enforced. When legal action is necessary, all appropriate evidence must then be provided to convince the courts to take the right action under the circumstances.