Appellate Decision Renders Certain Restrictive Covenants Enforceable and Requiring Blue-Penciling

Soliciting a former employer's actual or prospective clients may be permissible under ADP, LLC v. Kusins.

Docket No. A-4664-16T1 (App. Div. July 26, 2019).

The Appellate Division recently considered the scope of broad non-compete and non-solicitation provisions (RCAs) that prohibited former employees from soliciting any of their former employer's actual or prospective clients, regardless of whether they had contact with the clients or were competing in the same geographic location. They concluded that the RCAs were enforceable but overly broad and blue-penciled their scope (when blue-penciling, the court draws the scope of the non-compete and/or non-solicitation provisions so that they are deemed to be reasonable). As blue-penciled, the former employees would not be allowed to solicit *former or prospective clients with whom they were directly involved with or knew as clients, or compete in the same geographic area for a reasonable time period.*

Significantly, this decision reinforced the enforceability of the RCAs, as three lower court decisions found them unenforceable and three found them enforceable but blue-penciled narrower restrictions.

In that case, the defendant, a direct competitor of the plaintiff, both human capital management companies, hired six of the plaintiff's top-performing sales executives. When the plaintiff filed six separate lawsuits against the former employees, the trial courts reached different decisions. Some decisions added geographic or market restrictions to certain RCAs. Others concluded the RCAs were unenforceable and held the former employees to other agreements.

The appellate decision held that:

Protecting client relationships is a legitimate employer interest. The Appellate Division recognized that most trial court decisions found the RCAs enforceable to protect legitimate employer interests, like client relationships. The top-performing sales representatives received specialized training and participated in development and skills programs. They accessed proprietary software, databases, and client information. As a result, they developed strong client relationships. They participated in a stock incentive program (and had to sign the RCAs) because they were top-performing sales representatives who had excelled by creating and continuing client relationships. The RCA reflected the company's concern that their departure and potential employment by a competitor posed a greater threat to its customer relationships than other representatives.

Former employees are only prohibited from soliciting existing clients with whom they were actively involved or whose names they learned, and prospective clients whom they gained knowledge of during employment. The non-solicitation provisions prohibiting former employees from soliciting all of the former employer's current or prospective clients are overly broad, unreasonable, and impose an undue burden on the former employee. The Appellate Division reversed the trial court decisions that blue-penciled a market restriction as there was no rational reason to add a market restriction. The employer sought to protect its client relationships, regardless of the number of the client's employees.

Employers who successfully prove violations are entitled to injunctive relief, attorneys' fees, and costs. Ultimately, the decision found that former employees who solicited clients that they had worked with at the former employer breached the non-solicitation provision, as revised. Former employees who competed in the same geographic region as the former employer's violated the non-compete, as well. The Appellate Division affirmed injunctive relief to stop the former employees from soliciting any actual or prospective client known to them while employed and to prohibit them from using or disclosing any confidential or proprietary information. It remanded for consideration of the former employer's applications for attorneys' fees and costs.

Any company seeking to enforce non-solicitation and non-compete provisions or considering hiring an employee bound by one of these agreements should carefully consider the scope of the RCA. Enforceability is a very fact-sensitive question and will depend on the role of the former employees at the company, their access to specialized training and confidential information, and whether they solicit clients they learned of *while working with their former employer.* A prohibition on soliciting all of the former employer's current or prospective clients is definitively too broad.

If you have any questions about the information contained in this Litigation Alert, please contact:

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