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Recent Developments on Enforceability of Non-Competes in Virginia

by Arianna S. Gleckel, Esquire

Many of my clients have inquired about any recent developments in Virginia that would impact the enforceability of their existing non-compete provisions. The Virginia Supreme Court has addressed this issue twice during its 2011 term in the cases of: Home Paramount Pest Controls Cos. v. Shaffer, Record No. 101837, and BB&T Ins. Servs. v. Thos. Rutherfoord Inc., Record No. 101483.

In Virginia, covenants not to compete are generally disfavored restraints on trade. However, Virginia courts will enforce non-competes if the employer can show that the restraint is reasonable and not greater than necessary to protect the employer's legitimate business interest.

An employer can prohibit an employee from leaving the company to work for another company that competes directly with the former employer if the new employer is a direct competitor. Factors an employer should consider when implementing a non-compete provision are the geographic scope of the restriction and the activity that is being prohibited.

When determining whether a non-compete is enforceable, the courts consider whether the restrictions are: (1) narrowly drafted so as only to protect the employer's legitimate business interest; (2) not unduly burdensome on the employee's ability to earn a living; and (3) not against public policy. BB&T Ins. Servs., 80 Va. Cir. Ct. 174, 177 (City of Richmond 2010).

In BB&T Ins. Servs., a former employer filed suit against two former employees who voluntarily terminated their employment and accepted employment with a competitor. The Circuit Court of the City of Richmond held that the employer's noncompetition provision in the employment agreement, which both employees had signed, was ambiguous and overbroad because it was not limited to direct competition with the employer and was not narrowly drawn to protect the employer's legitimate business interest.

The non-compete provisions stated that for a period of two years after the employee's employment was terminated with BB&T Insurance, the employee could not:

> Solicit, encourage or support any employee of BB&T Insurance to leave;
>
> Solicit, encourage or support any supplier of goods or services to BB&T Insurance to discontinue doing or reduce the amount of business for BB&T Insurance;
>
> Engage in any "competitive activity" with any BB&T Insurance customer;
>
> Engage in any "competitive activity" within the restricted territory of the City of Petersburg, VA, any county contiguous to the City of Petersburg or the independent city or county to which the employee was primarily assigned by BB&T Insurance within the last two preceding years before the end of the employee's employment.

The employer defined "competitive activity" as the sale, trade or service or attempted sale, trade or service of insurance products.

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The former employer appealed the case and the Virginia Supreme Court granted the appeal and found in favor of the employer. The Supreme Court held that the Circuit Court erred in holding that the post-employment restrictive covenants contained in the employment agreement were invalid as a matter of law.

Employers should consider whether their non-compete provisions are narrowly tailored enough to protect the employer's business without unreasonably burdening the employee's ability to earn a living.

Arianna S. Gleckel is an Associate with Bean, Kinney & Korman, P.C. in Arlington, Virginia and a regular contributor to the firm's employment blog. For more information on drafting or revising your non-compete provision or other employment issues, please contact Arianna at (703) 525-4000 or agleckel@beankinney.com.

New Development in Labor Law: New Notice Requirements under the NLRA

by Lauren K. Keenan, Esquire

Effective January 31, 2012, all employers subject to the National Labor Relations Act ("NLRA") will be required to post 11-by-17-inch notices in the workplace informing employees of their rights under the NLRA, including their right to form unions and engage in collective bargaining. The new rule, enacted by the National Labor Relations Board ("NLRB"), was published in the Federal Register on August 30, 2011. Most private-sector employers are subject to the NLRA, with the exception of agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, public-sector employers and most supervisors.

This new rule was passed in response to NLRB's concern that employees were not aware of their rights under the NLRA. The notice is intended to help educate employees about their rights under the Act. Under the new rule, all employers subject to the NLRA must display a poster-sized notice in the workplace to inform employees about their rights under the Act. Posters can be obtained free of charge from NLRB. Employers who often communicate with their employees by electronic communication may also choose to use an electronic version of the poster, in addition to posting it in a communal area within the workplace. If more than 20 percent of an employer's employees are not proficient in English, the poster should also be displayed in other languages to accommodate non-English speaking employees. The requirement to post is not affected by whether or not the employer's employees are already represented by a union.

The notice, which must be displayed in a conspicuous place within the workplace, includes the following information:

> The right to organize a union and negotiate with their employer concerning wages, hours and other terms and conditions of employment;
>
> The right to join or assist a union;
>
> The right to bargain collectively through representatives of the employees' choosing for a contract, setting wages, benefits, hours and other working conditions;
>
> The right to discuss wages and benefits and others terms and conditions of employment or union organizing with co-workers;
>
> The right to strike and picket, depending on the purpose or means of the strike or the picketing; and
>
> The right to choose not to do any of these activities, including joining or remaining a member of a union.

Several national trade associations have challenged the new rule and questioned NLRB's authority to make such a rule; however, as it stands today, without judicial intervention, the new rule is slated to take effect in 2012. Failure to comply with the posting requirement on or before January 31, 2012, may result in an unfair labor practices claim being filed against the employer. In addition, the NLRB may also choose to extend the 6 month statute of limitations for filing an unfair labor practices claim against any employer who fails to comply with the new rule.

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Meet Our Attorneys

Alan C. Bowden

Alan Bowden is a shareholder of the firm and has been practicing law since 1998. Mr. Bowden's practice is concentrated in the areas of general corporate representation, as well as business litigation. Mr. Bowden has a diverse background and years of experience in corporate law. He counsels business clients on a variety of corporate issues including formation, structure, capital raising, securities regulations, owner and shareholder agreements and all types of business contract issues.

Mr. Bowden also has extensive experience
representing financial institutions, corporations, partnerships and limited liability companies in all aspects of litigation and mediation. Mr. Bowden has been involved in a variety of complex commercial litigation litigation cases in both state and federal courts involving business tort actions and various contract disputes.

Mr. Bowden is admitted to the Bars and practices in the state courts of Virginia, Washington D.C. and Maryland as well as the United States District Court for the Eastern District of Virginia and the United States District Court for the District of Maryland. He is also a member of the Virginia Bar Association, the Arlington County Bar Association and the Loudoun County Bar Association.

Mr. Bowden is active in both Bar and community related activities. He currently serves as co-chairman of the Northern Virginia Advisory Board for First Book where he raises funds for books and directs the distribution of those books to underprivileged children in Northern Virginia.

Mr. Bowden received his undergraduate degree from Virginia Tech (B.S. Finance) in 1991, and his law degree from DePaul University College of Law in 1998. He also earned his LL.M. degree from Georgetown University in Securities and Financial Regulation in 2002.

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Check Out Bean, Kinney & Korman's Employment Law Blog

Follow Tony and Arianna as they examine different aspects of employment law and the constantly evolving issues that confront employees on a daily basis, including compliance with the Fair Labor Standards Act, overtime, HR policies, discrimination and wrongful discharge claims, non-compete and other employment agreements, along with the impact of social media in the workplace.

Check it out online at www.virginiaemploymentlawjournal.com.

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