Fairfax Circuit Court Strikes Down Noncompete as Overbroad, Offering Yet Another Lesson for Employers

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BKK Employment Law Newsletter
April 2014

On March 6, 2014, a Fairfax Circuit judge denied a preliminary injunction in a suit brought by Wings LLC to enforce a noncompete against two defector employees. In a letter opinion, Judge Bruce D. White said the noncompete was unenforceable because the geographical limits were overbroad. The ruling is not particularly unprecedented but offers another look into why noncompetes continue to get struck down and how to avoid it by examining the real business needs of an employer rather than imagined possibilities.

The Case

Founded in 1996 by John Kia, Wings LLC provides commercial and residential vinyl, fabric and leather repair services. Kia remains its sole owner. Technicians Jeffrey Manalansan and Cameron Fridey signed noncompetes when Kia hired them to work for Wings. The noncompete provided that the technicians could not, for 24 months after employment with Wings, directly solicit any customer that Wings serviced in the past 12 months prior to their departure. The noncompete also prohibited the technicians from accepting employment "in a position that is the same, or substantially the same" as their job with Wings with any business that had, within the past 12 months, provided "material, labor, or services" that competed with Wings. The restriction applied to "any U.S. state or foreign country in which the employer had conducted business during the 12 months prior to the employee's departure."

In late 2013, Manalansan and Fridey resigned from their positions at Wings. Kia then learned that Manalansan resigned from Wings to work for Kia's son, who owned a competing company, and that Fridey was thinking of doing the same. Seeking an injunction against the former employees, Wings asserted that both Manalansan and Fridey violated their noncompete agreements. Wings asserted Manalansan was working as a technician for Capitol Leather, LLC, the competing business owned by Kia's son, and Fridey was observed working at dealerships that were Wings customers.

Applying the usual four-factor test for injunctive relief, Judge White found the likelihood of winning on the merits was low because the agreements were unenforceable as geographically overbroad. White noted that, in the past 18 months, Wings served customers mainly in Northern Virginia, southern Maryland, and West Virginia. But the geographical scope of the noncompete was worldwide and Wings had no business interest beyond the local metropolitan area.

Fairfax Circuit Court Strikes Down Noncompete as Overbroad, Offering Yet Another Lesson for Employers (Cont.)

Even in the local area, Judge White found the restriction too broad. Although Wings' customer market was limited to certain regions, the technicians nevertheless "would be prohibited from working as technicians for two years throughout the entire states of Virginia, Maryland and West Virginia and possibly in Washington D.C." While a two year restriction might have been reasonable on its own, White added that, combined with such a broad geographical range, the noncompete simply became untenable. "As with geographic restriction, Plaintiff put forward no evidence as to why a restriction that lasts for two years was narrowly tailored to meet a legitimate business interest."

The Takeaway – Tailor Restrictive Covenants to Meet Actual Needs, Not Potential Future Goals

Judge White's decision underscores the importance of good drafting. But it also raises another point about when to use a noncompete and when other tools such as a non-solicitation and confidentiality agreement would better serve an employer's business goals. Wings' noncompete clearly suffered from overbreadth. Its geographical scope was worldwide but Wings did not conduct business beyond the Washington D.C. metropolitan area and part of West Virginia. Worse, it only conducted business in certain regions of Virginia, Maryland and West Virginia. This might not have doomed Wings' noncompete if the duration was 6 months or possibly a year, and it would have taken on new life if the noncompete period was paid. But the restriction spanned the United States and any foreign country for a full two years without qualification. Regardless of time limits, the idea that Manalansan or Fridey could not accept a technician's job in, say, Great Britain was indefensible. Judge White had no choice but to strike it down.

Such an outcome was not unexpected. A worldwide geographical range is not *per se* unenforceable, but it must be based on legitimate business interests and, traditionally, the remaining restrictions (duration, function) must be very narrowly tailored. Wings' noncompete was missing all of these components, so it was destined to fail.

Also, Wings did not draft the noncompete to correspond to its actual needs. Wings needed to protect its customer base from being pilfered by Kia's son's business. A realistic examination of the actual span of Wings' customer base would have led to a more narrow geographic range. Instead, like many employers, Wings imagined potential future competition in places the company had not yet conducted business. This view is simply too speculative for a noncompete to be enforceable. For example, Wings had no existing business in foreign countries and there was no indication it was forthcoming. To include foreign countries in the range of competition is merely prospective. Noncompetes aren't intended to foretell the future of the competitive market—they can only protect against unfair competition in the present. Thus, noncompetes are most effective when the restrictions are limited to locations where business is currently being conducted and existing customers are located. Employers should approach the element of geographical range with the present in mind.

The Role of Noncompetes – Protecting the Investment

A closer look at this case also reveals a common misunderstanding about the purpose of noncompetes. Put simply, a noncompete is designed to protect a business from losing its investment. This can be seen most clearly in the context of a business sale. When one person buys a Pizza Hut franchise from its owner, the person also "purchases" the customer market that comes with it. If the former owner then opens a Little Caesar's across the street, the purchaser's investment is severely compromised in the form of lost customers and lost profits. A noncompete prohibiting the former owner from engaging in the same or similar business within the customer market for a sufficient period of time will help protect the purchaser from being undermined by immediate competition. And it prevents the seller from double-crossing the purchaser by profiting twice—once from the sale of the Pizza Hut and again from the profits made from Little Caesar's.

Similarly, when an employer invests in an employee for purposes of maintaining its competitive edge, it does not want to lose that edge to a competitor after the employee leaves. Here, the noncompete is designed to prevent the former employee from using the employer's investment for personal profit, either individually or on behalf of a competing business (for which the former employee likely will be handsomely rewarded). With a noncompete, the employer's investment is protected from being leveraged by a competitor. The employee is permitted to take another job, but not for purposes of using the employer's investment against it.

When Is a Non-Solicitation and Confidentiality Agreement a Better Option?

When the issue is mainly preserving an employer's customer base, a noncompete is not always the best vehicle. This is because of the legal restrictions placed on noncompetes such as the requirement of a reasonable geographic range. Customers can be located all over the world but that is not always equivalent to the principle of protecting a business's legitimate interest in its investment. For example, an employer with a customer base in Maryland and Virginia has no real interest in Ohio. If its employees move to Ohio and perform similar jobs, there should be no legal penalty against the employees. Thus, a noncompete prohibiting an employee from taking the same or similar job in Ohio almost certainly will be held unenforceable. Likewise, if an employer has customers in Ohio, but only occasionally conducts business with those customers, or the breadth of the customer base is very narrow, its interest in Ohio is too small to have a noncompete covering the entire state.

The better option in both cases is to execute a non-solicitation and confidentiality agreement. A non-solicitation and confidentiality agreement bridges the "investment" gap by preserving the employer's customer market without succumbing to the legal limitations of a noncompete. Wings had a non-solicitation agreement but also relied on its noncompete agreement. The noncompete was overbroad, but stronger non-solicitation and confidentiality agreements would protect a company from losing its customers to a competitor, which was the real loss Wings seemed to have suffered. It would also protect against the improper use of Wings' confidential business information that gave it a competitive edge in the market, preventing Capitol Leather LLC from using Wings' former employees to undermine Wings' business. A separate non-solicitation and confidentiality agreement would ensure that, even if a noncompete fails, the restrictions on pilfering customers and using an employer's strategic information against it would remain intact. When drafted well, these agreements preserve fair competition even if former employees move to a competitor.

Using Restrictive Covenants Smartly

Although disfavored, noncompetes in Virginia are still enforceable. The key is to use restrictive covenants smartly. Employers should consider using noncompetes for protecting their business investments against unlawful competition, but consider relying more on non-solicitation and confidentiality agreements to protect their actual competitive *position*. Understanding when and how to use both can mean the difference between a triumphant victory in court over a costly loss.