Ohio Business Litigation Blog

A blog about Ohio business litigation and beyond.

Sunday, December 5, 2010

Enforceability of Non-Competition Agreements Under Ohio Law

In my post last week about the risks and liabilities of undertaking fundamental changes to a business without proper legal advice, I glazed over an important issue covered in the Americare Healthcare Servs. v. Akabuaku, 2010 Ohio 5631, No. 10AP-777 (10th Dist. November 18, 2010) case regarding the enforceability of non-competition clauses in employment contracts. Non-competition agreements (also called "non-competes" and "covenants not to compete") are contractual agreements that require employees to agree not to engage in competitive activities after termination of an employment agreement. In this post, I cover the validity of non-competes and some of the requirements and limitations that exist regarding these provisions under Ohio law.

(1) Covenants Not to Compete Must Be "Reasonable"

Although non-competition agreements are restraints on trade and restraints on trade are usually frowned upon, non-competes are enforceable if they are "reasonable." In Raimonde v. Van Vlerah, 42 Ohio St. 2d 21, 325 N.E.2d 544 (1975), the Ohio Supreme Court held that non-competition agreements will only be found reasonable when an employer can demonstrate that the restriction placed on a terminated employee: (1) is no greater than what is required for the protection of the employer's legitimate business interests, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.

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Under this three part test, Ohio courts consider several factors when determining whether a non-compete agreement is reasonable, including: (i) how long the restriction lasts and the geographic area that the restriction covers, (ii) whether the employee was the sole contact with customers, (iii) whether the employee possesses confidential information or trade secrets, (iv) whether the covenant operates to bar the employee's sole means of support, (v) whether the covenant seeks to stifle the inherent skill and experience of the employee, (vi) the likelihood that the employee can find other employment if the restriction is enforced and (vii) whether the benefit to the employer is disproportional to the detriment of the employee. Id. at 25; Westco Group, Inc. v. City Mattress, No. 12619, 1991 Ohio App. LEXIS 3878 (2nd Dist., Aug. 15, 1991); Columbus Medical Equipment Co. v. Watters, 13 Ohio App. 3d 149, 468 N.E.2d 343 (10th Dist. Franklin Co., 1983).

The determination of what is "reasonable" will depend on the factual circumstances presented in each case. A non-compete found reasonable in one context may not be reasonable in another. *Compare* Proter & Gamble Co. v. Stoneham, 140 Ohio App. 3d 260, 747 N.E.2d 268 (1st Dist. Hamilton Co., 2000) (non-compete protecting employer's interests in customer relationships, good will, and trade secrets found reasonable) *to* Brentlinger Enterprises v. Curran, 141 Ohio App.3d 640, 752 N.E.2d 994 (10th Dist. Franklin Co., 2001) (similar agreement found unreasonable and unenforceable).

However, even when a non-compete is found unreasonable, this doesn't necessarily mean that its void as a matter of law. Courts have the power to modify and amend unreasonable agreements so as to enforce them as to the extent necessary to protect an employer's legitimate interests. Raimonde, 42 Ohio St. 2d at 25-26.

(2) Non-Competes are Enforceable Against Independent Contractors

As found in the Americare Healthcare Servs. case that I discussed last week, Ohio courts, including the Supreme Court of Ohio, find non-compete agreements made between employers and independent contractors to be enforceable. For example, in Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos., 86 Ohio St.3d 270, 1999-Ohio-162 (1999), the Ohio Supreme Court held that a non-compete clause in an agency agreement between Nationwide and its independent-contractor-agent was valid and enforceable. Similarly, in Albert v. Shiells, 10th Dist. No. 02AP-354, 2002-Ohio-7021, the appellate court affirmed a grant injunctive relief based on a non-compete clause between a beauty salon and its former independent contract.

Therefore, the enforceability of a non-compete does not depend on a person's status as an employee or independent contractor. See, also, Carl Ralston Ins. Agency, Inc. v. Nationwide Mut. Ins. Co., 9th Dist. No. 23336, 2007-Ohio-507; SJA & Assoc., Inc. v. Glider, 8th Dist. No. 80181, 2002-Ohio-3545; Burton Minnick Realty, Inc. v. Leffel, (Sept. 28, 1990), 2nd Dist. No 2680 (holding that a non-compete clause between a real estate broker and an independent contract salesperson would be enforceable if the clause was determined to be reasonable on remand).

(3) Promises of Continued Employment Are Sufficient to Support Non-Competition Agreements

The Americare Healthcare Servs. case also addressed the issue of whether an employer's promise to continue to employ an employee (or independent contractor) is sufficient consideration to support a non-competition

agreement. It is a fundamental principal of contract law that "mutual consideration" (or a bargained for mutual exchange of duties) must exist between parties of a contract in order for a contract to be valid.

In Americare, the defendants argued that non-competition agreements were unenforceable because the employer offered nothing in exchange to support the non-compete agreement. However, this argument failed. The Americare court found that the employee independent contractors "were required to sign non-compete agreements and were informed that the execution of a non-compete agreement was a condition of their continued employment or contracting relationship with Americare."

The court noted that both the Ohio Supreme Court and the 1st Appellate District Court in Hamilton County have held that "consideration exists to support a non-competition agreement when, in exchange for the assent of an at-will employee to a proffered non-competition agreement, the employer continues an at-will employment relationship that could legally be terminated without cause." Americare, *supra*, citing Lake Land Emp. Group of Akron, LLC v. Columber, 101 Ohio St.3d 242, 2004-Ohio-786 (2004); see Financial Dimensions, Inc. v. Zifer, 1999 Ohio App. LEXIS 5379 (1st Dist., Dec. 10, 1990) (the distinction of whether a person is an "employee" or "independent contractor" is "not relevant to the issue").

Therefore, an employer's promise of continued employment of an at-will employee is sufficient to support a non-competition agreement.

(4) Covenants Not to Compete are More Difficult to Enforce Against Physicians

Although a properly drafted non-competition provision/agreement can be found enforceable against anyone, it is particularly difficult to enforce non-competes against physicians. This is because it is more difficult to show that non-competes are reasonable under the three prong test mentioned above. Specifically, it is often difficult for employers to show that they have a legitimate business interest to protect in enforcing a non-compete against a doctor. Additionally, keeping doctors from working is viewed as being against the public interest. See Ohio Urology, Inc. v. Poll, 72 Ohio App. 3d 446, 594 N.E.2d 1027 (1991); Frederick D. Harris, M.D. v. Thomas L. Craig, III, M.D., 2002 Ohio 5063 (8th Dist. 2002).

Conclusion

Issues underlying what is "fair" competition and what is not is a central issue that courts decide in business litigation cases. Whether a non-competition agreement made between an employer and former employee is fair and reasonable under the circumstances and supported by "mutuality of obligation" is something that all employers and employees should consider before they sign employment or affiliation agreements. The above post is a short list of some of the specific legal considerations that should be taken into account before a covenant not to compete is signed.

Posted by Aaron Minc at 11:06 AM

Labels: Americare, Business Litigation Attorney, consideration, mutuality of obligation, non competition agreement, Ohio Business Litigation, physicians, reasonable

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