Employee Mobility Alert: Decision by the United States Court of Appeals for the Second Circuit Allows High-Level Executive To Compete with Former Employer

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By Jennifer B. Rubin and Jennifer F. DiMarco

The United States Court of Appeals for the Second Circuit has affirmed a lower court decision declining to enjoin a former IBM executive from working for Dell, based upon the executive's failure to properly execute a non-compete agreement.

IBM sought an injunction from the district court barring David L. Johnson, its former Vice President of Corporate Development, from working for Dell as its Senior Vice President of Strategy, based upon a non-compete agreement it claimed Johnson had signed in 2005. However, when Johnson was initially presented with the non-compete agreement, he claimed he was unsure as to whether he wanted to commit to a non-compete agreement with IBM. In an effort to delay his decision, Johnson purposely signed the non-compete agreement in the signature block designated for IBM. IBM then asked Johnson several times to properly execute a new contract so that it could be "booked" and relied upon by IBM. Johnson never signed the agreement as IBM requested and, in late 2008, he joined Dell as its Senior Vice President of Strategy.

Judge Stephen C. Robinson of the United States District Court for the Southern District of New York denied IBM's motion for a preliminary injunction, holding that IBM was not likely to succeed on the underlying merits of its case. Judge Robinson held that the non-compete agreement was not a binding contract because it was improperly signed and, given IBM's multiple requests that Johnson properly sign the compete agreement, not acknowledged by IBM as a binding contract.

In a decision handed down by the Second Circuit on October 22, 2009, the appellate court agreed with the lower court, finding that IBM failed to show that it had a likelihood of success on the merits and that such a decision was well-supported by the lower court's determination that IBM's witnesses were much less credible than Johnson and, accordingly, found IBM's arguments lacking in merit.

This recent Second Circuit decision is significant to employers who toil over the drafting, execution, and maintenance of non-compete agreements in an effort to protect confidential information, business strategies, and trade secrets. Here, an employee's admitted connivance served to protect him from any limitation contained in the non-compete agreement he signed because he intentionally signed it in the wrong place. Employers should be sure to take all necessary housekeeping steps when employees commence employment to ensure that restrictive covenants are properly executed, to avoid any surprises at the time the employer may need its protection most.

If you have any questions regarding
the subject covered in this Alert, or any related issue, please feel free to contact an attorney listed below or any of Mintz Levin's Employment, Labor and Benefits practice attorneys.

MEMBERS

David Barmak
(202) 585-3507
DBarmak@mintz.com

Micha "Mitch" Danzig
(858) 314-1502
MDanzig@mintz.com

Jennifer B. Rubin
(212) 692-6766
JBRubin@mintz.com

Donald W. Schroeder
(617) 348-3077
DSchroeder@mintz.com

ASSOCIATES

Michael S. Arnold
(212) 692-6866
MArnold@mintz.com

Katharine O. Beattie
(617) 348-1887
KOBeattie@mintz.com

Jennifer F. DiMarco
(212) 692-6260
JFDiMarco@mintz.com

Nathan R. Hamler
(858) 314-1510
NRHamler@mintz.com

Brandon T. Willenberg
(858) 314-1522
BTWillenberg@mintz.com