Lawyers and Lawmakers Grapple With Noncompete Pacts

Charles Toutant and David Gialanella, New Jersey Law Journal

Mitchell Schley of Law Offices of Mitchell Schley, LLC, East Brunswick, New Jersey
Carmen Natale

Litigation over noncompete clauses is highly active in New Jersey and some attorneys say employers are increasingly requiring such agreements for low- and mid-level workers. But there are signs that more lawmakers and regulators at both the state and federal level are looking to clamp down on the use of noncompetes in certain circumstances.

Efforts to regulate noncompete clauses have met with mixed results across the country, with Hawaii and Utah recently passing laws restricting the use of noncompetes and a measure in Massachusetts currently being debated by business leaders.

Proponents point to California, which banned noncompetes nearly a century and a half ago, as the prime example to assert that unfettered job-hopping has contributed to the success of Silicon Valley. And some lawmakers have argued that such pacts should be handled with more transparency and shouldn't apply to entry-level workers.

Attempts to regulate noncompetes in New Jersey and on the federal level have so far gone nowhere, but the agreements remain the subject of scrutiny.

Meanwhile, employers' use of noncompetes appears to be expanding, according to some attorneys.

Mitchell Schley, a labor and employment lawyer in East Brunswick, said the broader application of such pacts is cause for concern.

"At one point, noncompete clauses were used for high-level employees, executive level employees, or people with access to very proprietary types of company information," Schley said. "Then it seems lately companies are trying to use them more liberally for lower-level employees. And they're using them to inhibit them from going to competitors."

Courts typically won't enforce an overly restrictive agreement, but employers have nothing to lose by having workers sign one, and such agreements may keep the employee from changing jobs, Schley said.

"The problem is, even though it might not be enforceable because it's overreaching, the employee is stuck with the looming possibility that the employer will go to court and try and enforce it," he said.

The U.S. Department of the Treasury likewise raised concerns about the broader use of noncompete agreements in a report the agency issued March 31.

The report said "a growing body of evidence suggests that noncompete agreements, as currently experienced by workers and enforced by states, are often deployed in ways that lack transparency and fairness."

Workers are often not presented with a noncompete agreement until after they have accepted a job or started work, the Treasury report said. In addition, employees may not be well-informed about the laws, allowing employers to write broad contracts that may not be enforceable but "nonetheless have a chilling effect on workers' perceived mobility," the Treasury report said.

Such effects have a negative impact on the economy by making it harder for new firms to hire, the report said. It also called for increased transparency in noncompetes for workers, and for a dialogue on other potential reforms.

A bill that would nullify noncompete agreements for any worker who qualifies for unemployment compensation was pre-filed in the New Jersey Senate in the present legislative session after the same bill failed to advance in a previous session.

"There's been a lot of opposition to the bill, mostly from business groups," said the bill's sponsor, Sen. Peter Barnes, D-Middlesex, who heads an Iselin firm.

"I don't think we're going to get it moving. … I think there's just too much opposition," Barnes said, but added that he still plans to renew the push.

A bill introduced in the U.S. Senate in June 2015 would have banned such contracts for workers earning under $15 an hour or $31,200 a year, and would make employers notify prospective employees in advance that they might be asked to sign a noncompete contract. That bill is before the Senate Committee on Health, Education, Labor and Pensions.

The improving job market appears to have prompted an uptick in litigation against employees who leave to take a new job with a competitor. In New Jersey, the current crop of cases includes many involving sales representatives who market chemicals, or commercial insurance, or trade show displays and who were sued when they approached their longtime clients on behalf of a new employer.

Lawyers, both in New Jersey and outside the state, have varying views about how many lower- and middle-level employees are being asked to sign such agreements.

Kevin Chapman, associate general counsel for Dow Jones, based in the company's New Jersey office, said he's seen an increase in the use of—and early-stage enforcement efforts in connection with—noncompete agreements in the last three or four years.

The secretary of the Association of Corporate Counsel's labor & employment committee, Chapman, who's been in the Dow Jones legal department for 20 years, said that even for lower-level employees, "I'm seeing more noncompete clauses" in employee contracts and standalone noncompetes for employees who aren't on contract.

"Our HR directors want noncompetes, especially for salespeople," Chapman said.

Jennifer Harper, principal counsel for employment law and litigation at D.C. Water in Washington, D.C., likewise said she believes employers have attempted to make wider use of noncompetes over the past five years or so—often, she said, because they're attempting to address an issue for which a noncompete is unnecessary.

"Employers very often misuse noncompetes, and what they really want to do is curtail an employee's opportunity to misappropriate information"—an objective that's often best served by a confidentiality agreement or nonsolicitation agreement, Harper said.

Some employers have "conflated all of these concepts into one, and they think a noncompete covers it all," she said. "Frankly, they're confusing the concepts, which is too bad because there is a legitimate purpose for a noncompete."

Employment lawyers, when asked by a client to draft a noncompete, should steer the inquiry toward what interest needs protection, said Harper, who spent much of her career at Jackson Lewis, where she devoted a significant amount of her practice to noncompete issues. She's also the communications subcommittee co-chair of the ACC Employment & Labor Committee.

Using a noncompete in an inappropriate context decreases the chances of enforcement, Harper said.

However, other lawyers said they don't see a trend toward noncompetes for lower-level workers.

Clifford Atlas, co-leader of the noncompetes and protection against unfair competition practice group at Jackson Lewis in New York, said there's "a misperception out there that employers are increasingly seeking to apply these to lower-level employees."

He said that enforcement efforts and litigation over noncompetes have increased, but added that he doesn't believe generally that employers are seeking to make more widespread use of them.

"There is this misconception that employers are suddenly trying to push the envelope," he said.

The two main economic reasons for the uptick in suits, according to Atlas, are a little more monetary leeway to litigate and increased employee mobility caused by an improved job market.

Noncompetes are more difficult to enforce against an employee who "left cleanly" as opposed to one who might have improperly copied sales contact lists—"all of which is pretty traceable these days with computer forensics," Atlas said.

"The agreement is going to be as enforceable as the breach is bad," Atlas said, noting courts are more willing to enforce agreements that restrict a sales employee by barring contact of a certain list of customers rather than an agreement that bars contact in an entire region.

Christine Amalfe, chair of labor and employment law at Gibbons in Newark, said legislative regulation of noncompete agreements is "not a priority" in New Jersey because of limits the state's courts have imposed on what type of agreement is enforceable. Going back to 1970, the state Supreme Court ruled in *Solari Industries Inc. v. Malady* that such restrictions will be valid as long as they protect a legitimate business interest of the employer; impose no undue hardship on the employee; and are not injurious to the public interest.

"Creating legislation that is one size fits all is difficult in this area because the unique facts presented always drive the reasonableness of the restraint," Amalfe said in an email.

Demonstrating that a noncompete clause would protect a legitimate business interest and impose no undue hardship on the employee would be hard to do with a low-level employee, Amalfe said.

Like D.C. Water's Harper, Jed Marcus, co-chair of the labor and employment law practice group at Bressler, Amery & Ross in Florham Park, said nonsolicitation and confidentiality agreements can better accomplish much of what employers seek to achieve through noncompetes.

"I can't think of a court that's going to enforce a noncompete against a secretary or an administrative assistant," Marcus added.

As for how employers tend to view noncompetes, Marcus said there are "two universes" when it comes to enforcement.

"Smaller employers might do more cost-benefit analysis: The cost of going to court versus how much damage the employee could do," he said.

"I'm involved in several of these now," he noted. "They're very expensive."

But some large corporations in competitive industries lodge noncompete actions more aggressively, "just to make [competitors] expend attorney fees and costs, and as a message to other employees," Marcus said.

Contact the reporters at ctoutant@alm.com and dgialanella@alm.com.

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