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THE NATIONAL EMPLOYMENT & LABOR LAW FIRM®

# Across the Board: Changes Are In the Works for Noncompete Agreements

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Summary: From coast to coast, changes are in progress in state laws governing the enforcement of noncompete agreements and the provisions therein. Meanwhile, courts are not sitting idly by and employers would be wise to take heed of these changes, evaluate their current use of noncompete provisions.

From coast to coast, changes are in progress in state laws governing the enforcement of noncompete agreements and the provisions therein. From Oregon, where the circumstances under which courts will enforce noncompete agreements are becoming more narrow, to Connecticut, where certain professions are being largely excluded from the scope of allowable noncompete agreements, state legislatures are taking action to specify when and under what circumstances noncompete agreements will be enforced. Meanwhile, the courts are not sitting idly by. For instance, the Texas Supreme Court recently clarified its stance on the use of forum-selection clauses in noncompete agreements. Employers would be wise to take heed of these changes, evaluate their current use of noncompete provisions, and consult counsel appropriately.

## Forum Selection Clauses in Texas- *Location, Location, Location*

Texas has a strong public policy on noncompete contracts but after the Texas Supreme Court's decision in *AutoNation* on June 29th, Texas residents cannot depend on being able to keep a fight over a noncompete contract in a Texas courtroom. The Texas Supreme Court has made it clear that because of the important public policy concerns regarding noncompetition covenants, Texas law will apply to an employee who performs the majority of services in Texas, even when the parties stipulate the law of a different forum. *DeSantis v. Wackenhut*, 793 S.W.2d 670, 676-79 (Tex. 1990). Thus, even if a contract says that another state's law will control, the Texas public policy will overrule the contract language and result in Texas law applying.

What happens, however, with regard to the location of legal dispute? If the contract says the court of a different state (like Florida) is the exclusive forum for a legal battle over the noncompete contract, will that contract provision be honored? Or, will Texas public policy not only over-rule the choice of law clause but also over-rule the choice of forum clause as well? The answer may depend on who gets to the courthouse first, but more likely than not, the contract's choice of forum will be honored.

Despite the strong state public policy interest in covenants not to compete, Texas courts have repeatedly enforced forum selection clauses where the parties have agreed to litigate the question of a noncompetition provision in another state. Therefore, the initial decision of the Texas Court of Appeals in *AutoNation, Inc. v. Hatfield*, was somewhat surprising.

In *AutoNation*, the employee, Hatfield, who worked at a Mercedes-Benz dealership in Houston, Texas, owned by AutoNation, signed a noncompete agreement that contained a provision requiring any lawsuits to be filed in Florida. After the employee resigned and accepted employment with a competing Mercedes-Benz dealership, A-Rod OC, LP ("A-Rod") (a dealership owned by Alex Rodriguez who formerly played for the Texas Rangers), AutoNation filed suit in Florida for breach of the agreement. Before learning of the Florida suit, Hatfield and A-Rod filed a declaratory judgment action in Texas and sought injunctive relief. After learning of the Florida suit, Hatfield and A-Rod sought an injunction against AutoNation proceeding with the suit in Florida. The Texas trial court issued a temporary injunction restraining AutoNation from taking any further action in the Florida suit and from filing any future litigation in any non-Texas court

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seeking to enforce the restrictive covenants. AutoNation filed an accelerated appeal and the Texas court of appeals affirmed the issuance of the injunction. In so doing, the court of appeals recognized a general public policy against enjoining suits in other states, but citing *DeSantis*, it noted that the issue of whether noncompete agreements are reasonable restraints upon Texas employees is a matter of fundamental Texas public policy.

Not to be deterred, AutoNation then filed a writ of mandamus challenging the order granting a temporary injunction, which was denied by the Houston Court of Appeals. The ever-persistent employer then petitioned for a writ of mandamus from the Texas Supreme Court.

The Texas Supreme Court conditionally granted AutoNation a writ of mandamus and directed the trial court to dismiss Hatfield and A-Rod's suit in favor of the first-filed Florida litigation. *In re AutoNation, Inc.*, 2007 Tex. LEXIS 604, 50 Tex. Sup. J. 960 (Tex. June 29, 2007). The court recognized that in *DeSantis* it held that the enforcement of noncompete agreements was a matter of Texas public policy, but stated that it "decline[ed] Hatfield's invitation to superimpose the *DeSantis* choice-of-law analysis onto the law governing forum-selection clauses." Noting that DeSantis did not concern a mandatory forum-selection clause, the court stated that **"we have never declared that fundamental Texas policy requires that every employment dispute with a Texas resident be litigated in Texas."**

The court went on to note that giving deference to the first-filed Florida litigation, not only complied with the agreed-upon contract terms, but honored principles of interstate comity, whereby one state or jurisdiction will give effect to the laws and judicial decisions of another. When a matter is first filed in another state, Texas courts will generally stay the later-filed proceeding pending resolution of the first suit. "Accordingly, and without offending *DeSantis*, we will not presume to tell the forty-nine other states that they cannot hear a noncompete case involving a Texas resident-employee and decide what law applies, particularly where the parties voluntarily agree to litigate enforceability disputes there and not here."

The end result is that the party that won the race to the courthouse is the one who got to control the venue of the litigation. Employers should note that this is a different result from what we saw (and reported on) out of other state courts in the recent past.

In re *AutoNation is an Important Case to Employers Because it*:

- Made clear that despite Texas' public policy interest in noncompetition agreements, Texas courts will honor forum-selection provisions.
- Means employers who use noncompete contracts should have their contracts reviewed to ascertain whether they currently contain forum-selection clauses. If not, employers should evaluate whether to implement such provisions. And, if the contracts already contain forum-selection clauses, employers should ascertain whether having disputes litigated in the designated-forum state is a good decision. With the Texas Supreme Court's recent pronouncement in *Sheshunoff Management Services, L.P. v. Johnson*, noncompete agreements are easier to enforce under Texas law (and, likewise, in Texas courts). Depending on the circumstances, employers may be well-served, post-*Sheshunoff*, to include forum-selection clauses choosing Texas as the forum state. (For additional information about the *Sheshunoff* decision, see Littler's ASAP – *Texas Supreme Court Provides New Focus for Noncompete Contract Enforcement*.)

## Security Guards and Broadcast Employees Enjoy (Relative) Freedom from Noncompetes in Connecticut

In July 2007, Governor M. Jodi Rell of Connecticut signed An Act Concerning Noncompete Agreements, Connecticut substitute House Bill 6989. The Act applies to broadcast employers and, in certain situations, to security guards.

The legislation, as it was first proposed, followed a dispute between two security guard companies in Bristol, Connecticut. The controversy was prompted by ESPN, who had used security guards provided by Guardsmark security company, out of New York, but then decided to switch to Securitas Security Services, of New Jersey. As a result, Guardsmark laid off nearly 40 security personnel, but would not permit them to work for Securitas, due to a contract provision that forbade the guards from working for a successor security firm.

Thus the impetus for the bill, originally dubbed the "Guardsmark Bill." The bill was later expanded to include broadcast industry employers.

The Act, as applied to security guards, applies to someone who "guards, patrols or monitors premises to prevent theft, violence or infractions of rules." The Act prohibits employers from requiring security guards to enter into agreements prohibiting them from engaging in the same or similar job, at the same location at which the employer employs such person, for another employer or as a self-employed person, unless the employer proves that such person has obtained trade secrets. This aspect of the Act goes into effect October 1, 2007, and applies to contracts entered into, renewed or extended on or after that date.

As to broadcast employers, the Act applies to owners or operators of television or radio stations and also applies to related compa-

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nies that are contract providers of weather, sports, traffic or other reports for broadcast. Cable stations and cable networks are excluded from the law. Also excluded from the law are employees whose primary functions are sales or management. The Act prohibits the inclusion of noncompete provisions in broadcast employees' employment agreements. The Act also prohibits the use of provisions that require a broadcast employee to disclose, after the termination of employment, the terms of any offer of employment from any other broadcast industry prospective employer. Similarly, the Act precludes the use of contract provisions whereby an employment contract is automatically renewed on the same terms and conditions offered by a prospective employer. The part of the Act pertaining to broadcast employers applies to employment contracts entered into, renewed, or extended on or after July 1, 2007.

*This Act is Important for Connecticut Employers to Note Because:*

- In a civil action by an aggrieved security guard, the guard can recover damages and such injunctive and equitable relief as the court deems appropriate.
- In a civil action by an aggrieved broadcast employee, the broadcast employee can recover damages, together with court costs and attorneys' fees.

## Oregon Takes a Hard (and More Complex) Stance on Noncompetes

Currently awaiting signature by Oregon's Governor is Senate Bill 248, which has been passed by both the Oregon Senate and House of Representatives. The bill, which amends Oregon Revised Statute 653.295 (and 36.620, pertaining to arbitration agreements) proposes sweeping changes to Oregon's law on noncompete agreements. Under the new law, a noncompete in the employment context is voidable and may not be enforced by an Oregon court unless:

1. The employer informs the employee at least two weeks before the first day of the employee's employment that a noncompetition provision is required as a condition of employment or the noncompete agreement is entered into upon a bona fide advancement of the employee by the employer;
2. The employee is engaged in administrative, executive or professional work and performs predominantly intellectual, managerial, or creative tasks, exercises discretion and independent judgment, and earns a salary or is otherwise exempt from Oregon's minimum wage and overtime laws;
3. The employer has a "protectable interest" (meaning, the employee has access to trade secrets or competitively sensitive confidential business or professional information or is an on-air talent);
4. The total amount of the employee's annual gross salary and commission, calculated on an annual basis, at the time of the employee's termination, exceeds the median family income for a family of four, as determined by the United States Census Bureau (this provision is not applicable to on-air talent); and
5. The term of the noncompete does not exceed two years from the date of the employee's termination. Any portion of a noncompetition term in excess of two years is voidable and will not be enforced.

The Act contains a savings provision that allows employers to keep a noncompete agreement in place for employees who are nonexempt or paid so low that they would fail requirements 2 and/or 4 above by paying the employee during the period of time the employee is restrained from competing. Under this savings clause provision, if the employer provides the employee, for the time the employee is restricted from working, the greater of: (a) compensation equal to 50% of the employee's salary and commissions; or (b) 50% of the median income for a family of four (as determined by the United States Census), then failure to meet requirements 2 and/or 4 will not cause the noncompete agreement to become unenforceable.

The Act's requirements do not apply to bonus restriction agreements. Bonus restriction agreements are defined by the Act as agreements between employers and employees whereby competition of the employee is limited post-employment and the penalty imposed on the employee for competition against the employer is forfeiture of profit sharing or other bonus compensation that has not yet been paid to the employee.

The Act also does not apply to customer or employee nonsolicitation provisions.

*This Act is Important for Oregon Employers Because:*

- It is very important that the requirement of a noncompete be included in the original written offer of employment and that the written offer be given to the employee at least two weeks before the employee starts work. If not, then the employer will need to wait until the employee receives a bona fide advancement for the possibility of obtaining an enforceable noncompete agreement.
- Employers need to audit their practices as to the employees from whom they require noncompetition agreements and ensure that such employees meet all the above requirements.
- Because the Act's requirements for enforceability apply only to noncompete agreements, employers should consider the implementation of customer and employee nonsolicitation provisions, in conjunction with or in replace of, traditional noncompete agreements.

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## Tennessee Passes Legislation Expanding the Scope of Enforceable Noncompetes with Health Care Providers.

In June 2007, the Tennessee Legislature passed legislation, House Bill No. 240, to be codified at Tennessee Code section 63-1-148, setting forth the parameters for enforceable noncompetition agreements between health care providers and the entities employing or contracting with them. The Legislature's action follows the Tennessee Supreme Court's 2005 decision in *Murfreesboro Medical Clinic, P.A. v. Udom*, in which the court declined to enforce a noncompete provision in an employment agreement between a physician and a private physician-owned medical clinic. The Act applies to podiatrists, chiropractors, dentists, physicians, optometrists, and psychologists. The Act does not affect existing section 63-6-2004, which provides for the enforceability of noncompete restrictions with physicians when the employer is a hospital, hospital affiliate, or a faculty practice plan. The Act also does not apply to physicians who specialize in emergency medicine or radiology.

Under the Act, which goes into effect January 1, 2008, a noncompetition agreement "shall" be deemed reasonable if:

1. It is in writing;
2. The agreement is for two years or less; and
3. The maximum geographic term is the greater of: (a) a ten mile radius from the primary practice site of the health care provider; or (b) the county in which the primary practice of the health care provider is located. Alternatively, if the agreement does not contain a geographic restriction, it shall still be deemed reasonable if it restricts the health care provider from practicing his or her profession at any facility at which the employing or contracting entity provided services while the health care professional was employed or under contract. However, under this provision, a restriction will not be enforceable if the health care professional has been employed or under contract for six years or more.

Notwithstanding the foregoing, noncompetition agreements entered into in connection with the sale of a health care provider's practice may restrict such health care provider's right to practice, provided the geographic and temporal limitations are "reasonable." The Act creates a rebuttable presumption that the geographic and temporal terms agreed upon by the parties in such an agreement are reasonable.

*This Act is Important for All Tennessee Employers Because:*

- The Act helps provide more predictability for noncompete agreements with health care providers. This is because the Act *requires* a court to deem a compliant noncompete agreement to be reasonable ("*shall* be deemed").
- Tennessee does not have a statute of general applicability governing the enforcement of noncompete agreements. Therefore, non-healthcare employers who implement noncompete agreements within the parameters of the Act may be able to argue by analogy that similar noncompete provisions are reasonable.

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