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New Connecticut Law Restricts the Use of Non-Compete Agreements in Acquisitions and Mergers

By Patricia Reilly, Matthew Curtin, and Stephen Rosenberg

On the final day of the most recent Connecticut legislative session, the General Assembly passed a bill titled "An Act Concerning Employer Use of Noncompete Agreements" (the Act). Despite the broadly worded title, the ostensibly narrow focus of the Act is to restrict the use of non-compete agreements in the context of mergers and acquisitions. The Act awaits Governor Dannel P. Malloy's signature. The new law, Public Act No. 13-309, would take effect on October 1, 2013.

New Restrictions on the Use of Non-Compete Agreements

The focus of the Act is to restrict the use of non-compete agreements when an employer is acquired by or merged with another employer. Under the Act, when an employee is presented with a non-compete agreement as a condition of continued employment following a merger or acquisition, the non-compete is void unless the employer provides the employee with both a written copy of the agreement and a reasonable period of time to consider the agreement. The Act defines a "reasonable period of time" as not less than seven calendar days.

The new restriction, however, allows an employee to waive the right to this period to consider the non-compete. To be effective, the waiver must 1) be in a writing that is separate from the proposed non-compete agreement, 2) explicitly specify the right being waived, and 3) be signed by the employee prior to execution of the proposed non-compete agreement.

While the Act is supposedly limited to the narrow context of mergers and acquisitions, it is the first broadly applicable statute regulating the use of non-compete agreements under Connecticut law and applies to all employers regardless of size or industry. Until now, Connecticut statutes regulating non-compete agreements were limited to security guards and broadcast employees.[1]

Unintended Consequences?

Despite the seemingly limited focus of the Act, unintended consequences are possible. It is, for example, unclear what effect the Act will have on existing non-compete agreements when an employer is merged with or acquired by another employer. A facial reading of the Act seems to imply that the new constraints only apply to non-competes "entered into, renewed or extended" post-merger or acquisition. However, the interplay of the different provisions of the Act is confusing

1 *See* Conn. Gen. Stat. §§ 31-50a & b.

and could be construed to mean that any non-compete entered into, renewed or extended after October 1, 2013, is void unless the employer affords the requisite waiting period and supplies a written copy of the agreement, as long as the employer was acquired by or merged with another employer at any time in the past.

The Act may also create confusion as it does not set forth a time frame in which its restrictions apply following an acquisition or merger. Absent a time restriction, entering into a renewal of an existing employment agreement containing a non-compete agreement that expires after a merger or acquisition is completed could be subject to the Act's requirements no matter how far removed from the merger or acquisition.

So, even though the applicable merger or acquisition triggering the Act's restrictions may occur years prior to the expiration of the employment agreement, the merged or acquired employer will need to abide by the Act's various restrictions when renewing such an employment agreement. Conversely, an employer that has not previously been involved in a merger or acquisition will be subject to the waiting period or notice restrictions. Such results may seem arbitrary and absurd, but without any guidance to the contrary, employers will be wise to tread carefully when negotiating non-compete provisions post-merger or acquisition.

Prior Versions of the Act

The Act is a significantly watered down version of the original proposal. The initial proposal would have made several significant changes to the five prong reasonableness standard currently used to assess the enforceability of non-compete agreements under Connecticut common law. Under existing Connecticut common law, courts consider the following when evaluating whether a particular non-compete agreement is reasonable:

1. the length of the non-compete agreement;
2. the geographical area covered;
3. the fairness of the protection afforded to the employer;
4. the extent of the restraint on the employee's opportunity to pursue his or her occupation; and,
5. the extent of interference with the public's interest.[2]

The initial proposal, which purported merely to codify Connecticut common law, instead changed the common law standard so that in assessing the reasonableness of a non-compete, a court would consider only the duration, geographical scope, and type of employment or line of business it prohibits.

Additionally, instead of seven calendar days, the initial version of the Act required that an employer provide an employee at least 10 business days, and more, if reasonable, to seek legal advice relating to the agreement's terms.

The final version of the Act also omitted a particularly troubling proposal to create a new cause of action that would allow any person denied a period of not less than 10 business days to consider a non-compete agreement to bring a civil action in Superior Court to recover damages, costs and attorneys' fees.

Fortunately, the General Assembly discarded the wholesale revision of the common law reasonableness standard, the new cause of action, and the difficult to assess "reasonable" consideration period. While the final version of the Act has its flaws and pitfalls, the initial version of the bill would have caused more significant problems for employers, made enforcement of non-competes in Connecticut more difficult, and, most egregiously, created an unnecessary cause of action to combat enforcement of non-compete agreements.

Looking Forward

Connecticut employers will now need to be aware of this statutory restriction on the use of non-competes when discussing or implementing a merger or acquisition. Given the lack of clarity in the Act, employers should ensure that both non-competes in effect at the time of a merger

2 *See Robert S. Weiss & Assoc., Inc. v. Wiederlight*, 208 Conn. 525, 529 n.2 (1988).

or acquisition and those contemplated subsequent to a merger or acquisition are valid in light of the Act's explicit restrictions and hidden pitfalls. Employers will certainly want to consult with legal counsel to determine the effect, if any, this Act may have on existing employment agreements containing non-competes and what should be done when presenting new non-competes to employees following a merger or acquisition.

Patricia Reilly is a Shareholder, and Matthew Curtin and Stephen Rosenberg are Associates, in Littler Mendelson's New Haven office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Ms. Reilly at preilly@littler.com, Mr. Curtin at mcurtin@littler.com, or Mr. Rosenberg at sprosenberg@littler.com.