A Timely Analysis of Legal Developments

ASAP®

April 15, 2015

New Arkansas Law Boldly Embraces Noncompetition Provisions

By Jacqueline Johnson

On April 2, 2015, Arkansas enacted a new law (the Act)[1] that greatly expands the enforceability of noncompete agreements in the state. The Act makes striking changes to Arkansas non-compete law.

Under the new law:

- A noncompete provision is enforceable if it is ancillary to an employment relationship or an otherwise enforceable employment contract to the extent that the employer has a protectable business interest (which may include, by statute: trade secrets, intellectual property, customer lists, goodwill with customers, knowledge of business practices, methods, profit margins, costs, and other confidential information that increases in value by not being known to a competitor, training, and "other valuable employer data that the employer has provided to an employee that an employer would reasonably seek to protect or safeguard from a competitor").
- A noncompete agreement is not rendered unenforceable by a lack of geographic limitation if it is limited by time and scope in a manner that is not greater than necessary to protect the employer's legitimate interests.
- A two year restriction is presumptively reasonable unless the facts and circumstances of a particular case "clearly demonstrate" that two years is unreasonable compared to the employer's business interests.
- Irreparable harm for breach of a noncompete is presumed.
- Courts "shall" reform overly broad covenants.
- Continued employment is sufficient consideration.

The foregoing provisions reflect changes in the law in several respects. Perhaps the biggest change is that under prior Arkansas law, Arkansas courts did not have the power to judicially reform overly broad restrictions. To the contrary, the non-compete covenant had to be valid precisely as drafted. By granting Arkansas courts the power to rewrite overly broad restrictions, the Act complete reverses the law.

---

1 An Act to Provide for the Enforceability of a Covenant Not To Compete Agreement; and for other Purposes (SB 998).

Similarly, numerous Arkansas cases previously found geographically-unlimited noncompete provisions to be unreasonable and unenforceable. Thus, allowing for the possibility of a noncompete without a geographic limitation represents a significant divergence from prior case law. This provision also acknowledges that modern business interests often transcend geography.

The Act does not apply to noncompetes outside the employment context (Arkansas common law applies to other types of noncompetes), nor does the Act apply to employee non-solicits/no-hires, confidentiality agreements, non-disclosure agreements, or to other terms and conditions of an employment agreement (existing common law applies). Consequently, it appears that if a noncompete is contained in an employment agreement containing other types of restrictions, the noncompete provision itself can be reformed under the Act, but any other overly broad terms cannot. Notably, the statute does not apply to noncompetes with licensed medical professionals under Arkansas law.

It is unclear whether the Act will apply retroactively. Because the Act is not specific on this point, it will be up to Arkansas courts to decide whether it can apply retroactively.

Recommendations for Employers

Arkansas employers with noncompete covenants should revisit their agreements to ensure that they are maximizing the protections afforded them under the new law. Employers should, for example, examine whether a geographic limitation is necessary to render the restriction reasonable given their business interests and the applicable temporal and scope limitations. Similarly, companies should look at whether they can avail themselves of the rebuttable presumption that two-year restrictions are reasonable. Obviously, these inquiries require consideration of the business at hand and the employee's position and responsibilities. It is advisable for employers to consult with their employment counsel before revising their agreements.

Jacqueline Johnson is a Shareholder in Littler's Dallas office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Ms. Johnson at jjohnson@littler.com.