Non-Compete Agreements Must Be Narrowly Drafted

by Diana Tate Vermeire

Erin K. Dailey and Diana Tate Vermeire recently moved for and won dismissal in a case seeking to enforce an overbroad non-compete agreement that constituted an illegal restraint on trade. As the case illustrates, non-compete agreements must be narrowly drafted in order to be upheld and employers seeking to bind employees with such agreements must be careful in drafting them.

Our client, a former independent contractor providing services as a Certified Registered Nurse Anesthetist ("CRNA"), was recently sued by an entity for which she had worked as an independent contractor seeking to enforce its standard non-compete agreement. The client had left her position as an independent contractor and accepted full-time employment as a CRNA with a new organization. The plaintiff sought to enforce the un-negotiated non-compete agreement and prevent the client from continuing her employment while requesting nearly $500,000 in damages.

The non-compete agreement at issue in the case far exceeded the scope of what is permissible under Oklahoma law. As drafted, the agreement purported to preclude the client from practicing as a CRNA for two (2) years immediately following her separation from the former employer and within a three hundred (300) mile radius of the former employer's headquarters and within one hundred (100) miles of any facility where the former employer provided professional services, effectively covering the entire State of Oklahoma, as well as portions of Arkansas, Kansas and Texas. The agreement constituted an illegal restraint on trade not only because of its overbroad geographic scope provision, but also because of its lengthy list of prohibited activities, including (1) serving as a partner, consult, manager, or associate for, (2) directly or indirectly owning or purchasing, or (3) building, designing, managing, consulting, or affiliating with, any business providing similar professional services as the former employer. Finally, and most strikingly, the Agreement and the suit brought to enforce it sought to preclude the client from maintaining her *full-time employment* in a position providing anesthesia services that the client had formerly provided on an independent contractor basis.

Pursuant to 12 Okla. Stat. § 2012(B)(6), the Court dismissed the case citing as controlling authority *Scanline Medical, L.L.C. v Brooks*, 2011 OK CIV App 88 (2011). In *Scanline*, the Court of Appeals held that a non-compete agreement limiting the defendant's exercise of his profession violated Oklahoma's public policy as stated in 15 O.S. §§217 and 219A. In so holding, the Court of Appeals followed other Oklahoma courts that have refused to enforce

non-compete provisions that go beyond a reasonable restraint or the narrow exceptions found in §§ 217 and 219A.

Oklahoma's public policy supports the freedom of individuals to exercise their chosen profession. The Oklahoma Legislature has allowed only very narrow exceptions to the rule that agreements purporting to restrain the free exercise of a lawful profession are void, allowing agreements between an employer and employee – not an independent contractor – that prohibit "***direct solicitation***" of the sales of goods or services from "***established customers***" and restrictions in agreements that involve the dissolution of a partnership or sale of goodwill. 15 O.S. §§ 217; 219A (emphasis added).

Accordingly, and as evidenced by the recent successful dismissal of the case, employers seeking to restrain employees from directly competing with the employer after employment has ended must be careful in crafting non-compete or non-solicitation agreements that conform to the narrow exceptions permitted under Oklahoma law. Employers must be mindful to have narrowly drafted provisions related to prohibited activities, geographic scope, and time. In addition, employers must also ensure that their agreements do not seek to ban employment in its entirety for the former employee and that they are mindful that independent contractors are not the same as employees under the law.

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