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Legal Update

Massachusetts Supreme Judicial Court Set to Rule on Scope of Massachusetts Non-Competition Agreement Act

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On March 3, 2025, the Massachusetts Supreme Judicial Court ("SJC") heard arguments in *Miele v. Foundation Medicine, Inc.*, Case No. 13697, a case that could have serious implications for employers using restrictive covenants and forfeiture provisions in employment-related agreements. In *Miele*, the SJC will determine whether a non-solicitation covenant, combined with a forfeiture provision in case of breach, is a "forfeiture for competition agreement" under the Massachusetts Non-Competition Agreement Act ("MNAA"), M.G.L. c. 149, §24L.

The MNAA governs Massachusetts non-competition agreements made on or after October 1, 2018, and sets forth strict requirements in order for non-competition agreements to be valid and enforceable. Prior to *Miele*, non-solicitation agreements (a prohibition from soliciting former colleagues or clients to join an employee at their new employer) were generally exempt from the strict requirements of the MNAA because the statute explicitly excludes "covenants not to solicit or hire employees of the employer" from the definition of "non-competition agreement." In *Miele*, the Superior Court held that a non-solicitation agreement, when combined with a forfeiture provision, was tantamount to a forfeiture for competition agreement and, therefore, must comply with the strict requirements of the MNAA. In *Miele*, the SJC will now decide whether that ruling was correct.

Facts of the *Miele* Case

In June 2017, Susan Miele began working for Foundation Medicine, Inc. ("FMI") and signed a Non-Competition, Non-Solicitation, Confidentiality and Assignment Agreement (the "2017 Agreement"). In the 2017 Agreement, Miele agreed that, for a period of one year following the termination of her employment with FMI, she would not "directly or indirectly … solicit, entice or attempt to persuade any other employee … of [FMI] to leave the services of [FMI] for any reason or otherwise participate in or facilitate the hire … of any person who is employed or engaged by FMI".

In February 2020, Miele entered into a transition agreement in connection with her separation from FMI (the "Transition Agreement"). In the Transition Agreement, Miele reaffirmed and acknowledged that the terms of her obligations under the 2017 Agreement "remain binding and enforceable in all respects, and [were] incorporated into this [Transition] Agreement by reference." In exchange, FMI agreed to provide Miele with payments and benefits beyond what she would otherwise be eligible to receive. Most significant to this dispute, the Transition Agreement provided that, if Miele breached the Transition Agreement or "any other agreement between [Miele] and [FMI]," then "any unpaid Transition Benefits will be forfeited, and to the extent that any Transition Benefits have been paid, such Transition Benefits (or the value thereof) must be immediately repaid" by Miele to FMI.

FMI alleges that Miele thereafter breached the Transition Agreement by soliciting, participating in or facilitating the hire of multiple FMI employees. Therefore, FMI notified Miele that she was in breach of the Transition Agreement, that FMI would cease paying Transition Benefits, and demanded that Miele repay the Transition Benefits already received. Litigation thereafter ensued.

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The Litigation

Miele sued FMI for breach of the Transition Agreement for failing to make the remaining payments Miele claimed were due to her under the Transition Agreement. FMI responded by asserting counterclaims alleging that Miele had breached the Transition Agreement and the 2017 Agreement by soliciting FMI employees. FMI also brought a declaratory judgment claim seeking to claw back benefits already paid out (over $1 million).

Miele moved for judgment on the pleadings on FMI's counterclaim. The Superior Court held that the Transition Agreement is subject to the MNAA, does not comply with the MNAA's strict requirements and, therefore, FMI cannot recover on its counterclaim for breach of the Transition Agreement. The Superior Court, however, limited its ruling by stating that FMI was not precluded from asserting Miele's breach of the 2017 Agreement as a defense to her breach of contract claim, or from affirmatively seeking damages from Miele for her breach of the 2017 Agreement.

The Issue on Appeal

Non-competition agreements covered by the MNAA include "forfeiture for competition agreements," which the MNAA defines as "an agreement that by its terms or through the manner in which it is enforced imposes adverse financial consequences on a former employee as a result of the termination of an employment relationship if the employee engages in competitive activities." The MNAA, however, does not define the term "competitive activities." As a result, the SJC must decide whether solicitation is a "competitive activity" under the MNAA to determine whether the Transition Agreement is a "forfeiture for competition agreement" that must satisfy the strict requirements of the MNAA.

Potential Implications for Employers

While we await guidance from the SJC, employers must be aware that there is a possibility that restrictive covenants that would not otherwise be considered non-competition agreements under the MNAA, when combined with a forfeiture provision, could be treated as a forfeiture for competition agreement and, therefore, subject to the MNAA's strict requirements for a non-competition agreement. Employers should consider whether the forfeiture provision is truly necessary to protect their business interests or, rather, whether a non-solicitation agreement and the ability to recover damages for breach of that covenant – without forfeiture – are sufficient. Employers may also consider combining the protections of a non-solicitation covenant with other contractual provisions, such as non-disclosure and confidentiality provisions, to protect their business interests.

Eckert is closely monitoring the *Miele* decision. Please stay tuned for more information when the SJC issues its decision.

This Legal Update is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact Carson Shea at 617.342.6830 or cshea@eckertseamans.com or Trevin Schmidt at 617.342.6814 or tschmidt@eckertseamans.com, or any attorney at Eckert Seamans with whom you have been working.

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