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Legal Update

Overbroad "No-Hire" (a/k/a "No-Poach") Provision Unenforceable in Pennsylvania: Five Takeaways from the Winning Trial Team at Eckert Seamans

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In a matter successfully handled by Eckert Seamans Cherin & Mellott, LLC, the Pennsylvania Supreme Court recently held that the specific "no-hire" (also known as a "no-poach") provision in the commercial contract between two companies was not enforceable under Pennsylvania law. *Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC*, No. 31 WAP 2019, --- A.3d ----, 2021 WL 1676399 (Pa. Apr. 29, 2021). The Court held that the no-hire provision unreasonably restrained trade because it was broader than necessary to protect a legitimate business interest and created a likelihood of public harm by restricting the employment opportunities and job mobility of employees who were not parties to the contract, without their knowledge, consent, or receipt of consideration. This decision has important ramifications for Pennsylvania employers considering or implementing no-hire clauses as well as other restrictive covenants.

WHAT DID THE NO-HIRE PROVISION PROHIBIT?

The no-hire provision at issue prohibited Beemac Trucking (and its employees, agents, independent contractors, or "other persons performing" any services for it or on its behalf) from hiring, soliciting for employment, or inducing or attempting to induce any employees of Pittsburgh Logistics Systems, Inc. ("PLS") or any of PLS' affiliates to leave PLS' employ. The provision was in effect for the term of the self-renewing contract and two years after its termination.

HOW DID THE COURT ASSESS THE ENFORCEABILITY OF THE PROVISION?

Initially holding that the enforceability of a no-hire provision ancillary to a services contract between two companies was an issue of first impression in Pennsylvania, the Court applied a "rule of reason" test. Under that analysis, the purported need for the restraint and the interests it aims to protect are balanced against the harm that the restraint imposes both on the other contracting party and the public.

THE NO-HIRE PROVISION WAS BROADER THAN NECESSARY.

The Court held that the no-hire provision was overbroad and greater than necessary to protect a legitimate business interest because it precluded Beemac (and all of Beemac's agents and independent contractors) from hiring, soliciting, or inducing to leave all PLS employees, regardless of whether those employees had ever worked with Beemac during the term of the contract and without regard to whether those employees held positions of commercial significance or had access to proprietary information within PLS.

Notably, the provision also applied to all PLS employees, regardless of their location, skills and expertise, and job titles and responsibilities, and regardless of whether PLS employed them before or after it entered into the no-hire agreement.

THE NO-HIRE PROVISION CREATED A LIKELIHOOD OF HARM TO THE PUBLIC.

The Court also held that the no-hire provision was likely to harm the public because it impaired the employment opportunities and job mobility of PLS employees, without their knowledge, consent, or receipt of consideration. In other words, the PLS employees were unaware of, and received nothing in exchange for, an agreement restricting their employment. Further, the provision was deemed to undermine free competition in the labor market in the shipping and logistics industry, thereby creating a likelihood of harm to the general public.

KEY TAKEAWAYS:

1. Although the Court did not rule that all no-hire provisions are unenforceable as a matter of law, it strongly signaled that, at a minimum, such provisions are disfavored and must be narrowly tailored to be upheld. No-hire provisions may be lurking in existing commercial agreements (e.g., long-standing master services agreements) and Pennsylvania businesses would be wise to identify them and consider alternatives.

2. The broader the contractual restraint of trade, the more likely it will not be enforced. At the injunction phase, courts are not required to "blue pencil" or modify an overly broad restriction in order to render it enforceable. Employers must carefully consider how any contract in restraint of trade affords protection to a legitimate business interest.

3. The Court indicated that the no-hire provision should be disclosed to the employees impacted by the provision and that such employees should receive some form of consideration in exchange for it. The suggestion that employees must be notified of a provision ultimately affecting their job mobility raises further questions about the enforceability of employee non-solicit provisions in restrictive covenant agreements. Employers should carefully consider the Court's guidance in this regard.

4. Even if the no-hire provision withstands the "rule of reason" test outlined by the Court, it may still expose employers to potential antitrust issues. No-poach agreements have been the recent target of both the U.S. Department of Justice and state attorneys general investigations and lawsuits, implicating both civil and criminal antitrust issues.

5. Employers should consider whether the interests they aim to protect via no-hire provisions may be adequately protected by other restrictive covenants, including narrowly tailored non-competes and/or non-solicits that they directly enter into with their employees.

Through the *Beemac Trucking* decision, Pennsylvania joins courts (and legislatures) around the country in viewing any type of restraint on trade with increasing disfavor. If you have questions about how this decision impacts your business or its agreements with other companies or employees, please contact your Eckert Seamans attorney.

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This Legal Update is intended to keep readers current on developments in the law. It is not intended as legal advice. If you have any questions, please contact authors Daniel B. McLane at 412.566.6152 (dmclane@eckertseamans.com), Thomas E. Sanchez at 412.566.6128 (tsanchez@eckertseamans.com), Lindsey Conrad Kennedy at 412.566.2105 (lkennedy@eckertseamans.com), or any attorney at Eckert Seamans with whom you have been working.