Strategic Perspectives

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STRATEGIC PERSPECTIVES—'No-hire' provision in commercial contract between two businesses is unenforceable in Pennsylvania

By Daniel B. McLane, J.D., and Thomas E. Sanchez, J.D.

On April 29, 2021, the Pennsylvania Supreme Court unanimously affirmed a decision of the Pennsylvania Superior Court, sitting *en banc*, to hold that a "no-hire" provision in a commercial contract between two companies – *i.e.*, an agreement by which one company agrees not to solicit or hire the employees of the other – was unenforceable under Pennsylvania law. *Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC,* No. 31 WAP 2019 (Pa. Apr. 29, 2021). The Court held that the no-hire provision unreasonably restrained trade and created a likelihood of harm to the public because it restricted the employment opportunities and job mobility of persons who were not parties to the contract, without their knowledge or consent.

Background

Plaintiff-Appellant Pittsburgh Logistics Systems, Inc. (PLS) engaged Defendant-Appellee Beemac Trucking, LLC (Beemac) to fulfill the transportation needs of its customers on a non-exclusive basis, conditioned upon Beemac's execution of PLS' "standard template" motor carriage services contract (the Contract), which contained certain non-solicitation and no-hire provisions. In particular, the Contract's no-hire provision prohibited Beemac (and its employees, agents, independent contractors, or other persons performing services for it or on its behalf), for the term of the contract and a two-year period after its termination, from hiring, soliciting for employment, or inducing or attempting to induce "any employees of PLS or any of its Affiliates" to leave PLS' employ.

In November 2016, two individuals resigned from PLS and accepted positions with Beemac. Around the same time, two other individuals resigned from PLS and accepted positions with Hybrid Global Logistics Services, LLC (Hybrid), a company affiliated with Beemac.

The trial court proceedings

On November 18, 2016, PLS brought suit in the Beaver County Court of Common Pleas against the four individuals who resigned from PLS and accepted positions with either Beemac or Hybrid. PLS moved to enjoin those individuals from working for Beemac or Hybrid and soliciting certain PLS customers pursuant to the non-competition and non-solicitation provisions contained in their employment agreements with PLS.

Later that month, PLS filed a separate second suit in the Beaver County Court of Common Pleas against Beemac, claiming, *inter alia*, that Beemac had breached the no-hire provision in the Contract by hiring the four former PLS employees. PLS moved to enjoin Beemac from employing those individuals and soliciting certain PLS customers. On December 1, 2016, the Court entered an injunction, enjoining the four former PLS employees from working for Beemac, and scheduled a consolidated preliminary injunction hearing, which was held over three days later in December 2016.

Following the hearing, the trial court declined to further enjoin Beemac from employing the four former PLS employees after holding that the no-hire provision contained in the Contract was an unreasonable restraint of trade and violated public policy. The trial court concluded:

> "We believe these types of no-hire contracts should be void against public policy because they essentially force a non-compete agreement on employees of companies without their consent, or even knowledge, in some cases. We believe that if an employer wishes to limit its employees from future competition, this matter should be addressed directly between the employer and employee, not between competing businesses."

The trial court also held that the no-hire provision "goes beyond the protected interest of PLS" because the non-solicitation provision contained in the Contract, which the trial court enforced, prohibited Beemac from soliciting PLS customers and, thus, sufficiently protected PLS' legitimate business interests.

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The Superior Court proceedings

PLS filed separate appeals in the Superior Court, challenging the trial court's denial of injunctions based on the individual employees' non-competition agreements and the Contract's no-hire provision between PLS and Beemac. The Superior Court affirmed the trial court's denial of the non-competition injunction for the four individual former PLS employees, finding that the non-competition provisions were "facially overbroad" and "demonstrated an improper intent to

oppress the employee[s].” *Pittsburgh Logistics Sys., Inc. v. Ceravolo*, No. 135 WDA 2017, 2017 WL 5451759 (Pa. Super. Ct. Nov. 14, 2017), *appeal denied*, 646 Pa. 124 (Pa. 2018).

The Superior Court also affirmed the trial court’s denial of the no-hire injunction in an *en banc* opinion. *Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC*, 202 A.3d 801 (Pa. Super. Ct. 2019). The Superior Court found that PLS intended for the no-hire provision “to have effect in the broadest possible terms” by “preventing non-signatories, PLS employees, from exploring alternate work opportunities in a similar business.” The Court concluded that restrictive covenants between an employer and an employee are unenforceable if not supported by consideration and that “PLS should not be entitled to circumvent that outcome” by limiting its employees’ employment opportunities “through an agreement with a third party.”

Issue before the Pennsylvania Supreme Court

On July 24, 2019, the Pennsylvania Supreme Court granted PLS’ petition for allowance of appeal to review the following issue: “Are contractual no-hire provisions which are part of a services contract between sophisticated business entities enforceable under the law of this Commonwealth?”

The Pennsylvania Supreme Court’s decision

On April 29, 2021, the Pennsylvania Supreme Court unanimously affirmed the *en banc* decision of the Superior Court, affirming the trial court’s denial of the no-hire injunction. Recognizing the dearth of Pennsylvania law on the issue of whether no-hire provisions are enforceable, the Court began its analysis by reviewing decisions of other jurisdictions, including the Supreme Courts of Illinois, Virginia, and Wisconsin, which had assessed similar provisions.

Reasonableness test. The Supreme Court began its analysis by recognizing that Pennsylvania treats restrictive covenants as restraints on trade that are void as against public policy unless they are ancillary to an otherwise valid contract, such as an employment agreement. Finding that the enforceability of a no-hire provision ancillary to a services contract between two companies was “an issue of first impression,” the Court applied the reasonableness test typically applied in determining whether a contractual restraint of trade is enforceable. Under that test, the reasonableness of the restraint is assessed in light of the interests that the restraint aims to protect against and the harm it imposes on other contractual parties and the public.

Following a balancing of PLS’ interests in protecting its investment in its employees against “the overbreadth of the no-hire provision and the likelihood of harm to the public,” the Supreme Court held that the no-hire provision was “both greater than needed to protect PLS’s interest and creates a probability of harm to the public.”

Overbreadth. First, the Court determined that the no-hire provision was overbroad “because it precludes Beemac, and any of its agents or independent contractors, from hiring, soliciting, or inducing any PLS employee or affiliate for the one-year term of the [self-renewing] contract plus

two years after the contract ends" and precluded Beemac from hiring *all* PLS employees, "regardless of whether the PLS employees had worked with Beemac during the term of the contract."

Harm to public. Second, the Court determined that the no-hire provision created a likelihood of harm to the public because it impaired "the employment opportunities and job mobility of PLS employees, who are not parties to the contract, without their knowledge or consent and without providing consideration in exchange for this impairment." Significantly, such harm was "not hypothetical" because PLS "enforced the no-hire provision by seeking to enjoin Beemac from employing the former PLS employees who had already left PLS and obtained employment with Beemac" or Hybrid. Indeed, as noted above, the trial court initially enjoined the four former PLS employees from working for Beemac. Had PLS been successful, those employees would have been deprived "of their current jobs and livelihoods."

Undermines competition. Finally, the Court determined that the no-hire provision "undermines free competition in the labor market in the shipping and logistics industry, which creates a likelihood of harm to the general public." The Court observed that recent studies have shown that worker wages are four-to-five percent higher in states that do not recognize or enforce worker non-compete restraints.

Impact

Daniel B. McLane and Thomas E. Sanchez represented Beemac and have been involved in the litigation since it began in November 2016. They believe that the Pennsylvania Supreme Court's decision represents a growing nationwide trend of courts disfavoring no-poach agreements as they suppress wages and prevent workers, who are not parties to these agreements, from freely choosing employment. In response from questions from *Labor & Employment Law Daily*, Sanchez said. "The growing trend across multiple states is to view these types of provisions with strong disfavor."

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It is not just the courts that disfavor no-poach agreements. Both the U.S. Department of Justice and several state Attorneys General have declared their opposition to no-poach agreements. Both McLane and Sanchez say that this development is not surprising and noted that the Attorney General of Pennsylvania filed an amicus brief in the Beemac case opposing no-poach agreements as violating public policy, antitrust law, and harming the economic interest of workers.

Further, DOJ has filed criminal charges against companies for using no-poach agreements, and there is no sign that the agency will be changing its position on these agreements. "DOJ initially declared that no-poach agreements are per se illegal under President Trump's Administration,

and there is no indication that this will drop off under President Biden's Administration," McLane said.

The Pennsylvania Supreme Court's decision makes clear that broadly drafted no-hire restrictions between two employers are not enforceable in Pennsylvania. Although employers may have a legitimate business interest in protecting their investment in their employees, Pennsylvania employers are capable of protecting those interests by directly entering into reasonably tailored restrictive covenants with their employees in exchange for valid consideration. The Court's ruling protects Pennsylvania workers by limiting the ability of their employers to trade away their job mobility and future employment opportunities without their knowledge, consent, or receipt of consideration.

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