Recent Shifts in Non-Compete Regulations

Niall McMillan: [00:00:00] Hi. Welcome back to Litigators Lounge devoted to exploring timely commercial litigation topics with Offit Kurman's commercial litigators. I'm Niall McMillan. Joining me today is my partner, Anders Sleight. Anders, good to see you.

Anders Sleight: Niall, how are you? Thanks for having me.

Niall McMillan: Doing well. So today I hear you have a topic for us, non-competes in some recent developments.

Anders Sleight: Yeah, there's been a lot of talk recently, a lot of developments and changes in the law nationwide about non-compete agreements. Right. I'll just take a step back. A non-compete agreement is typically some restrictive language that's put into commonly an employment agreement, but can be used in other contexts as well.

And it essentially is a stipulation that prevents an employee or some other individual from competing with the business or the employer in this case. There's been a trend nationwide of states regulating those non-compete agreements, really trying to restrict the enforceability of those or prohibit them entirely.

And recently a couple of weeks ago [00:01:00] here in Virginia, there was a decision from the Virginia Court of Appeals. It's the case of Sentry Force Security versus Barrera, which expanded Virginia's a ban on non-competes and put it into the context of an employee who leaves the company prohibiting that employee or, prohibiting a ban on that employee, taking other employees with them.

So in a context of an employee leaving a company, starting a new company that competes with their prior employer the court of appeals held that, you can still prohibit that employee from soliciting customers, but you can't prohibit that employee from soliciting coworkers to join their new venture.

Right. So it's an interesting decision, expanding on the concept of non-competes bringing it out of the context of looking at just customers or clients and looking at fellow coworkers and fellow employees and taking those [00:02:00] individuals over to a new business venture. And at least in Virginia for the moment that ruling is that the employer cannot prohibit the employee from soliciting those coworkers to join them in a new business venture.

So an interesting ruling that I think will have ripple effects and maybe copied or paid attention to in the jurisdictions across the country.

Niall McMillan: That's interesting. Yeah. So if you're an employer and you have, a non compete with your employees that leave, you have an issue like that, what's the steps that you could take to make sure that clause is gonna be enforceable or, enforcing that clause?

What do you need to look for?

Anders Sleight: Sure. You really Need to take a look at all of your restrictive covenants if you're an employer and really take a scalpel to those if necessary, because depending on the states in which you operate, those restrictive covenants might be permissible in one state and they might be prohibited in another.

For example, Virginia has their own statute on this. Many other states, Maryland, DC, New York, California, [00:03:00] have their own regulations and statutes that prohibit or restrict non-compete agreements. In some cases it's based upon the income level of the employee. For example, in Virginia there's an income cap on the employee.

So if it's a higher level employee earning a higher wage you can still include a non-compete clause in that employee's contract. But if it's a lower wage worker, then those tend to be frowned upon and not permissible. So you really need to look at where is your business operating?

What types of employees do you have? Do you have these restrictive covenants in your employment agreements? Do you have them in other agreements with vendors or other companies that you may work with? Because this trend seems to be here and seems to be increasing. We've seen the FTC and LRB are paying attention to the non-compete issue because for good reason it affects employees, it affects their ability to move and to transition [00:04:00] into another field if they may wanna do that or to start a new business. So it's an important topic worth taking a look at seriously, if you're an employer operating in a number of different states.

Niall McMillan: Yeah, no, it's definitely a changing world. So I appreciate your insight on that.

Anders Sleight: Yeah. And thank you. Go ahead Niall.

Niall McMillan: Well thank you Andrews for joining us. And thank You for everyone else for viewing for another episode of Litigators Lounge. Offit Kurman is a full service law firm with offices and litigators from coast to coast, and we provide litigation services regarding employment financial services, construction, government contracting, business disputes, matters.

So please reach out to me or Anders if you have any litigation matter that requires our attention. Thanks.

Anders Sleight: Thank you, Niall. Enjoyed it.