Does the Mere Intention To Be Legally Bound Make a Non-Compete Agreement Enforceable? Pennsylvania Superior Court Answers No!

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To be enforceable, a non-compete agreement that restricts a former employee from going to work for a competitor must be supported by "sufficient consideration." This is particularly important if the agreement was entered into after the employment relationship started. But what and how much consideration is "sufficient"?

Enter the Pennsylvania Uniform Written Obligations Act (UWOA), which in the realm of contracts, permits the express written language "intending to be legally bound" to serve as adequate consideration and prevents the avoidance of any written agreement for the lack of consideration.

But can merely inserting the language "intending to be legally bound" into a non-compete agreement with an existing employee be enough to render it enforceable? Until last week, a Pennsylvania appeals court had never decided this issue, although two federal trial courts in Pennsylvania that considered the question came to opposite conclusions.

The issue recently reached the Pennsylvania Superior Court in *Socko v. Mid-Atlantic Systems of CPA, Inc*. While employed by Mid-Atlantic as an at-will employee, Socko signed a non-competition agreement containing a two-year covenant not to compete. Mid-Atlantic, though, did not provide Socko with any benefit (or "consideration") for signing the agreement. After resigning from Mid-Atlantic about a year later, Socko went to work for Pennsylvania Basement Waterproofing, Inc. in Camp Hill, Pennsylvania. Mid-Atlantic sent a letter to Socko's new employer, attaching the non-competition agreement and threatening litigation. Ten days later, Basement Waterproofing terminated Socko's employment.

Socko then filed a lawsuit against Mid-Atlantic seeking a declaratory judgment that the non-competition agreement was unenforceable because it was not supported by adequate consideration. Mid-Atlantic argued that the non-competition agreement was enforceable because it included the express language "intending to be legally bound." The trial court agreed with Socko and ruled that the non-compete agreement was invalid due to lack of consideration. Mid-Atlantic appealed.

On appeal, the Pennsylvania Superior Court affirmed the ruling for Socko, distinguishing non-compete agreements from other types of business contracts because historically non-competition covenants are disfavored as restraints on trade. As to non-competition agreements entered into after the commencement of employment, like Socko's, the Court reiterated the requirement of adequate consideration:

When the restrictive covenant is added to an existing employment relationship, however, it is only

enforceable when the employee who restricts himself receives a corresponding benefit or change in status. An employee's continued employment is not sufficient consideration for a covenant not to compete which the employee signed after the inception of his employment, where the employer makes no promise of continued employment for a definite term.

The Superior Court disagreed with Mid-Atlantic that application of the UWOA rectified the lack of consideration because "[l]anguage in an employment contract that the parties intend to be legally bound does not constitute valuable consideration" to support a covenant not to compete.

In light of this ruling, businesses should not assume that non-competition agreements with their employees are valid, unless those employees were provided sufficient consideration for giving up their right to compete. Also, there are several other important rules regarding the enforceability of these agreements. So businesses should consider reviewing these agreements with legal counsel.

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