Employment Law News

ANOTHER STEP IN THE TREND DISFAVORING EMPLOYEE NONCOMPETES

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The North Carolina Court of Appeals, following a recent trend and joining what South Carolina courts have concluded, recently held a noncompete overbroad and unenforceable because it prohibited an employee from performing work after termination that was not related to the work that he did for the employer. *VisionAIR, Inc. v. James*.

The employee in *VisionAIR*, Douglas James, worked as a software designer. His employment agreement contained a restriction which stated that James could not "own, manage, be employed by or otherwise part icipate in, directly or indirectly, any business similar to Employer's . . . within the Southeast" for two years after the termination of his employment with VisionAIR. The court found this provision overbroad because it would prevent James from doing "even wholly unrelated work" at any company similar to VisionAIR. The court determined that this violated the principle that a restriction on an employee's ability to work should be no broader than what is reasonably necessary to protect the employer's business. Further, the prohibition on "indirect" ownership would have prohibited James from holding an interest in a mutual fund that invested in part in a similar company.

North Carolina courts also have found a noncompete overbroad if it prohibits the employee from working in a line of business in which the employer did not engage—for example preventing an employee from engaging in the manufacture of a product when the employer was only a distributor. Similarly, a restriction that covers a product that the employer sold but that was separate from what the employee did for the employer—such as a restriction prohibiting the employee from engaging in sale of coarse and industrial paper when the employee only worked in the fine paper division of the employer's business — could be overbroad. Above all, it has always been important that the activity from which the employee is barred be something that is competitive with the employer.

The court in *VisionAIR*, however, appears to take existing North Carolina case law a bit further. The court also found overbroad and unenforceable the second provision in James' agreement — which prevented James from "sell[ing] or develop[ing] any software products which will directly or indirectly compete with any of the Employer's software products." First, because James was only a software designer, the prohibition on his *selling* competitive products would prevent him from "engaging in . . . work unrelated to that which he did for VisionAIR." Thus, even though James presumably had intimate knowledge of VisionAIR's product, James could compete with VisionAIR by selling similar products because he was not engaged in sales work for VisionAIR. Second, and even more surprising, the court found that prohibiting James from *developing* software products that competed with VisionAIR's products would prevent him "from developing products that, while competitive with VisionAIR's, may, for example, be based on technology wholly unrelated to that upon which VisionAIR's products are based." The decision therefore suggests that a prohibition on work that prevents the employee from doing the same type of work that the employee did for the employer on a product

competitive with the employer's product may still be overbroad if it is possible that the restriction will prevent the employee from engaging in work that will not clearly call on the employee to use knowledge, contacts, or information gained solely by virtue of his employment. Whether subsequent decisions in North Carolina will follow *VisionAIR* remains to be seen.

Despite the tightening noose around what constitutes enforceable noncompetes in the Carolinas, employers do not have to give up on the hope of getting employees to sign an enforceable agreement. The *VisionAIR* decision was in part the result of the facts before the court. If the employee had been employed in a different position with broader responsibilities and more customer contact, the provision might have been enforceable at least in part. Further, in a footnote to the decision, the court suggested that if the time period of the restriction and the territory had been narrower, the noncompete might have been enforceable, despite the broad scope of prohibited activity. Therefore, employer's wanting to prevent employees from engaging in a broader range of activities may be able to do so by imposing a short duration and small area for the restriction. North Carolina employers also are well advised to structure their noncompetes so that they contain several separate prohibitions. This way, if the North Carolina court finds one provision to be overbroad, it can ignore it and simply enforce the more narrowly drawn provision. Because South Carolina courts will not "blue-pencil" a noncompete, South Carolina employers must continue to structure their prohibitions reasonably in a separate paragraph. Likewise, employers throughout the Carolinas should consider adding separate provisions prohibiting solicitation of customers and nondisclosure of confidential information. If the prohibition on competition is declared overbroad, the employer may be able to fall back on these other provisions to limit a former employee's ability to unfairly compete, provided the restrictions are properly drafted.

With the decision in *VisionAIR* and other recent decisions narrowing the enforceability of noncompetes, employers should consider having their current noncompete clauses revised for enforceability. In addition, going forward, employers should avoid a "one-size fits all" restrictive covenant and focus instead on the circumstances of the employee — or at the very least the position — involved. These changes could make the difference between having an enforceable covenant and having nothing.