

## OKLAHOMA SUPREME COURT ISSUES OPINION INTERPRETING STATUTE GOVERNING EMPLOYEE NON-COMPETITION AGREEMENTS

The Oklahoma Supreme Court recently issued a far-reaching interpretation of the Oklahoma non-compete statute, Okla. Stat. tit. 15, § 219A. In the case of *Howard, et al. v. Nitro-Lift Technologies, L.L.C.*, 2011 OK 98, the Court addressed the enforceability of various restrictive provisions commonly inserted in employment contracts and separation agreements. The agreement before the Court contained the following restrictive covenants applicable for 24 months following termination of employment:

1. Prohibition against working for any competitor of the employer;
2. Promise not to recruit any employees of the employer to leave their jobs;
3. Agreement not to solicit past or present customers and suppliers to cease doing business with the employer.

In reviewing this employment agreement, the Court issued its first interpretation of Title 15, section 219A, which was enacted in 2001. The statute provides as follows:

- A. *A person who makes an agreement with an employer, whether in writing or verbally, not to compete with the employer after the employment relationship has been terminated, shall be permitted to engage in the same business as that conducted by the former employer or in a similar business as that conducted by the former employer as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer.*
- B. *Any provision in a contract between an employer and an employee in conflict with the provisions of this section shall be void and unenforceable.*

After leaving the employ of Nitro-Lift to join a competitor, the Plaintiffs filed suit seeking a declaratory judgment that the non-competition provisions were void for violation of Oklahoma public policy. The trial court denied the Plaintiffs' requested relief, but, on review, the Oklahoma Supreme Court found each of the restrictive covenants to be unenforceable under the above-quoted statute. The Court found that the legislature intended to void any agreement restricting post-termination employment by a competitor or restricting the solicitation or hiring away of employees or suppliers of the former employer. The Court pointed out that the only exception in the statute covers restrictions on the solicitation of *established customers* of the employer. The Court further held that judicial modification of the covenants not to compete would be inappropriate because the contractual provisions would have to be substantially excised, leaving only a shell of the original agreement, and would require the addition of at least one material term.

In reviewing that portion of Nitro-Lift's non-competition agreement prohibiting solicitation of "past or present customers," the Court held that "present customers" is not the same as "established customers," which connotes "those businesses and customers wherein a relationship was ongoing and anticipated to continue into the future" not "temporary or single-event relationships," which may be encompassed by the term "present customers." The Court further declined to reform the non-solicitation restriction to apply only to established customers of the employer. The Court reasoned that such judicial modification would require the addition of a material term not negotiated by the parties.

Based on the guidance provided by the Court, the ability of Oklahoma employers to contractually restrict post-termination competition by employees will be significantly curtailed in the following respects:

- Restrictions on employment by competitors or engaging in a competing business are void under the statute;
- Restrictions on the hiring or solicitation of employees to leave the employ of the former employer are similarly unenforceable;
- Inducement of suppliers and contractors to cease doing business with the former employer also conflict with the statute;
- Non-solicitation provisions related to customers will be enforced only to the extent the agreement clearly limits and delineates those established customers covered by the restriction;
- Going forward, Oklahoma courts will likely be inclined to void rather than reform an overly broad non-competition agreement.

Notably, the Court did not address Nitro-Lift's allegations that the Plaintiffs were disclosing or otherwise using its confidential information. Thus, the Court's ruling does not appear to have any effect upon the ability of an employer to pursue claims against former employees for unfair competition in the improper disclosure and/or use of its confidential, propriety information post-termination.

In view of this decision we recommend that employers review current employment agreement and separation agreement forms for compliance with the Court's statutory interpretation. If you have any questions or would like assistance with this process, please do not hesitate to contact us.

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