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EMPLOYMENT LAW ALERT

COURT SETS NEW STANDARD FOR REVIEWING NONCOMPETE AGREEMENTS IN THE DISTRICT OF COLUMBIA

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If an employer imposes an overly broad noncompete agreement on an employee, will the courts be amenable to salvaging the agreement by narrowing it? If so, what process will the courts apply in revising restrictions that go too far? One might think the law on this point would be settled by now, given that noncompete covenants are hardly newfangled. Yet, the D.C. Court of Appeals did not set the standards for revising noncompete covenants until its decision earlier this month in *Steiner v. American Friends of Lubavitch (Chabad)*.

Steiner engaged in campus outreach on behalf of a religious institution (AFL) at George Washington University. He promised in his employment contract that after his termination he would not work for any similar institution in the District or suburban Maryland and Virginia. Eventually, AFL discharged Steiner. He continued to proselytize at the school, so AFL sought a preliminary injunction against him based on the noncompete covenant. Although the trial court granted an injunction, the court deemed the noncompete obligations too broad. Accordingly, the court imposed a time limit on the noncompete restrictions (two years), narrowed the geographic scope, and enjoined Steiner only from engaging in certain student-related activities.

Steiner appealed the injunction. He argued that, among other things, the trial court essentially, and unlawfully, rewrote his agreement with AFL. In its decision on that appeal, the Court of Appeals agreed with Steiner in part. Along the way, the Court established the rules that courts should apply when presented with overly broad noncompete covenants.

As a rule, courts will not enforce noncompete covenants that are too broad in duration, scope, or geographical coverage. These covenants should be no more restrictive than necessary to protect the employer's legitimate business interests. They should neither unduly impede the worker's ability to earn a living nor restrain trade to the public detriment. In the District, it has been clear for some time that courts may modify overly broad covenants. The Court of Appeals many years ago "rejected the view that covenants not to compete must be enforceable in whole or not at all." Just how far courts may go in modifying noncompete covenants is a question that had not been answered until Steiner appealed the injunction against him.

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The Court of Appeals recognized two competing modification theories adopted by other jurisdictions. One theory, the "blue-pencil doctrine," permits a court to cross out overly broad provisions in a noncompete provision. The amended contract remains enforceable to the extent it remains coherent. That doctrine does not permit courts to redraft contract terms or add new language; they are literally limited to striking language that makes the covenant too broad. Maryland courts favor the blue-pencil doctrine.

Courts will not enforce overly broad noncompete provisions in employment contracts. While courts have the power to modify them, there are limits.

The other approach —and the one the Court adopted —is the doctrine of equitable reformation. That doctrine allows courts to modify noncompete agreements to achieve an equitable result, without the limitation that revisions be made only by striking contract language. The Court held that equitable reformation "affords greater flexibility to make reasonable modifications when necessary and thus is the better approach" when compared to the blue-pencil doctrine.

The Court agreed with Steiner that the trial court actually expanded Steiner's obligations when it modified the parties' pact. The original contract barred Steiner from entering into an employment or similar arrangement with any other institution like AFL, whereas the modified injunction detailed activities that Steiner could no longer perform even in his personal capacity (such as hosting student dinners). The Court upheld the geographical and durational limits on the noncompete (as the trial court had narrowed them) but remanded the case so that the trial court could reconsider the scope of the injunction under the newly announced principles.

The decision provides several points for consideration by employers that use noncompete covenants:

1. Courts will not enforce overly broad noncompete provisions in employment contracts. While courts have the power to modify them, there are limits. The Court noted in *Steiner* that it adopted the equitable reformation doctrine mainly because the blue-pencil doctrine was too rigid, not due to "any suggestion that courts should be at liberty to wholesale rewrite overbroad clauses."

2. The ability of courts to modify overly broad employee noncompete promises does not license employers to draft them as broadly as possible in the hopes that either: (a) the employee will willingly comply; or (b) if not, a court will uphold as much of the covenant as possible. The Court recognized this potential and noted that "extensive judicial reformation may run counter to public policy." If significant modifications are needed to salvage a noncompete clause, a court might simply refuse to enforce it altogether.

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3. The aim of a noncompete agreement should be to protect the employer's legitimate business interests, but no more than that. On this point, the Court noted the importance of precise drafting. The Court added: "The assertion of a legitimate interest does not automatically require the court to reform a covenant that was not drafted to properly protect that interest in the first place." Ambiguities will be resolved against the employer.

4. In reforming an overly broad noncompete covenant, courts will take a variety of equitable factors into account, including whether the employer made the agreement "in good faith and in accordance with reasonable standards of fair dealing," and whether modification is possible without injustice to the parties or injury to the public.

5. One factor the courts consider in the enforcement of a noncompete clause is the public interest. The *Steiner* case involved a nonprofit employer with a "client base" of college students and a mission to provide religious guidance. The Court observed that in this context "the public" had an interest that AFL not unduly restrain Steiner's activities. Accordingly, the greater the degree to which the employer's business involves a public mission (e.g., healthcare), the more closely the court will scrutinize restrictions imposed by the employer in a noncompete agreement.

If you have any questions regarding the above summary, please do not hesitate to contact us.