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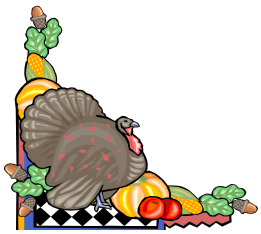
Happy Thanksgiving!



"Tip of the Month"

New Restrictions for Non-Compete Agreements

In a recent case, Merrimack Valley Wood v. Near, the New Hampshire Supreme Court has again clarified the law of non-compete agreements in the Granite State. The court ruled that an employer does not have a legitimate interest in protecting all of its customers from the solicitations of a former employee. A non-compete agreement is only valid to the extent it covers the employee's "actual sphere of influence."

Traditionally, many non-compete agreements have had a "distance and duration" format, often restricting former employees from competing within some territory for a period time after termination of employment. The Supreme Court has taken a hard look at that tradition under the general principles that (1) New Hampshire law does not look with favor upon contracts in restraint of trade or competition, and (2) such contracts are to be narrowly construed.

Before the Near case, our Supreme Court had already established that non-compete agreements are reasonable only where necessary for the protection of the employer's legitimate interest, if they do not impose undue hardship on the employee, and are not injurious to the public interest.

In the Near case, the Court concluded that a valid non-compete agreement can only bar former employees from soliciting the clients with whom they actually had contact. The Court reasoned that the employee does not have any advantage in soliciting the business of a client of former employer if they had no personal dealings with the client. Agreements that prohibit contact with all of a company's clients are too broad and are not permitted under this reasoning.

In its decision, the Supreme Court said that non-compete agreements can be revised by judges to make them reasonable, provided the employer has acted in good faith. In the Near case, however, the Court also found that the employer did not propose the non-compete agreement in good faith because it did not offer the agreement at the start of employment, but then made the employee's continued employment contingent on signing the non-compete. As the agreement was not made in good faith, the court declared the non-compete void instead of reforming it, even though it appears the employee did violate the agreement.

Many NH employers may need to reexamine their non-compete and non-solicitation agreements to ensure that they comply with this new analysis. Under the logic of the "actual sphere of influence" standard, non-competes that prevent employees from competing within a certain distance may be suspect. Employers may need to keep closer track of those customers or prospects with whom their employees are in contact.

We can provide you with the necessary review and recommendations for your company's non-compete and non-solicitation agreements. To set up a review, call us at 668-1971 or contact us through the internet at *mailbox @ biz-patlaw.com.*

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