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Client Alert: Another Federal Decision Confirms Scrutiny of Noncompete Clauses is Critical

Publications

December 22, 2022
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A recent decision from a federal court sitting in Atlanta reaffirms the importance – now more than ever – of evaluating or reevaluating employee restrictive covenants to ensure that they are narrowly tailored to protect confidential information and do not improperly restrain employee mobility. In this case, the court determined that former noncompete clauses at issue were too broad in that they would essentially restrict the employees from working at any competitor in any position, and that the plaintiff company had sued only on the basis of the noncompete clauses and not to protect any confidential information. The court also refused to blue-pencil the agreement to narrow the noncompete to be valid and enforceable under Georgia law. *Amspec, LLC v. Calhoun*, No. 22-cv-00120, 2022 WL 17740307 (S.D. Ga. Dec. 16, 2022).

AmSpec, LLC ("AmSpec") is a New Jersey limited liability company engaged in the business of testing and inspecting petroleum and petrochemicals. It filed a lawsuit against four of its former employees as well as their new employer, Camin Cargo Control, Inc. ("Camin"), alleging that the former employees violated their restrictive covenants when leaving AmSpec's employment to work for Camin, a direct competitor of AmSpec.

The employees' agreements contained identical noncompete clauses, which in relevant part provided:

> For purposes of this non-compete clause, "Prohibited Activity" is activity to which I contribute my knowledge, directly or indirectly, in whole or in part, as an employee, employer, owner, operator, manager, advisor, consultant, agent, partner, director, stockholder, officer, volunteer, intern or any other similar capacity to an entity engaged in the same or similar business as AmSpec, including those engaged in the business of petroleum and petrochemical laboratory, inspection and analysis services. Prohibited Activity also includes activity that may require or inevitably require disclosure to a third party of trade secrets, proprietary information or Confidential Information.

The parties disputed the meaning of the word "knowledge" in the noncompete clauses. The employees and Camin argued that the language "prohibits them from working in any capacity for any entity engaged in the same or similar business as Plaintiff, even if the work is not competitive with Plaintiff's business – including, for example, working as a secretary or janitor" AmSpec disagreed and argued that "[w]hile this description of the prohibited activity is generalized, any objective, reasonable person reading that definition understands that 'contribute my knowledge' means contributing the knowledge learned while employed by Plaintiff."

The court disagreed with AmSpec. It explained: "AmSpec argues that when the parties used the word 'knowledge,' they meant 'knowledge the employee learned while employed by AmSpec." Though AmSpec argues that "'any 'objective, reasonable person' would glean this meaning from the Noncompete Clauses, AmSpec provides no argument, much less a reasonable and objective one, in support of this conclusory statement. Moreover, the Court sees no support for AmSpec's interpretation in the four corners of the Agreements or elsewhere."

The court further reasoned and ruled:

> Put simply, because the word 'knowledge' in the Noncompete Clauses is plain and unambiguous, the Court cannot add to it or take away from its meaning as AmSpec proposes. *Walker*, 493 S.E.2d at 554; *see also* O.C.G.A. § 13-2-2(2) ('[w]ords generally bear their usual and common signification'). Thus, the Court will interpret the Noncompete Clauses just as they are written. Doing so, the Court finds that the Noncompete Clauses prohibit each of the Defendants from 'contribut[ing] [the employee's] knowledge, directly or indirectly, in whole or in part . . . to an entity engaged in the same or similar business as AmSpec.' Thus, if the clauses are valid, each Defendant cannot directly or indirectly give or supply to any competitor of AmSpec any of the facts and other things that the Defendant is aware of, regardless of when or how he became aware of them.

Like many other jurisdictions, in Georgia, noncompete clauses are enforceable "so long as the restrictions are reasonable in time, geographic area, and scope of prohibited activities."

The court held:

> Here, the practical effect of the Noncompete Clauses is a prohibition against Defendants working, consulting, or even volunteering with AmSpec's competitors in any capacity. The Court cannot envision a position in which an employee could work for a company without 'contribut[ing] [the employee's] knowledge, directly or indirectly, in whole or in part' to that company. As Defendants point out, the prohibition would apply to work as a secretary or janitor as they would have to indirectly contribute their knowledge of how to operate a computer or a broom to those fill those positions. The effects are even broader . . . Thus, Defendants are correct that the Noncompete Clause's "contribute my knowledge" restriction "prohibits them

> from working in any capacity for any entity engaged in the same or similar business as Plaintiff."

The court cited a number of cases from several jurisdictions to support its reasoning. It also noted that AmSpec acknowledged in its complaint that it sought to limit its former employees from working with any competitors of AmSpec in any capacity and that they had breached simply by accepting employment with a competitor. The count concluded that noncompete clauses were impermissibly too broad and unenforceable.

The court then addressed the possibility of blue-penciling any overbreadth in the noncompete clauses to make it enforceable, as Georgia law allows. The court refused:

> Because AmSpec has not specifically argued that the Court should revise the Noncompete Clauses' scope of prohibited activities, much less offered a proposed revision of that scope, the Court will not do so. . . .Moreover, even if AmSpec had specifically requested that the Court blue-pencil the scope of the restricted activities, the Court would not do so. . . .the plain language of the Noncompete Clauses demonstrates that the parties intended for Defendants to be prohibited from contributing any knowledge to AmSpec's competitors. Thus, adding the language 'learned while employed by Plaintiff' to the Agreements would create a limitation 'whole cloth' and the Court would be rewriting the agreements to save an otherwise unenforceable clause.

As we have counseled in the past, and in light of the decisions like *AmSpec* and continued activism by the federal and state governments, businesses should take stock of their existing restrictive covenants with employees. And if an employer seeks to enforce a restrictive covenant, it should consider engaging experienced counsel early in the dispute resolution process.

Also, employers should also seriously continue to consider using solutions beyond restrictive covenants to protect their business interests. Carefully drafted confidentiality agreements can provide companies with protection. Relatedly, companies should make sure they have robust audit processes in place to address departing employees who have access to particularly sensitive information. These proactive steps can protect competitive information.

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