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LEGAL INFORMATION, NEWS AND COMMENTARY FOR EMPLOYERS

EMPLOYMENT LAW UPDATE 12.13.2011

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Are noncompetition and nonsolicitation agreements enforceable?

On November 22, 2011, the Oklahoma Supreme Court decided *Howard v. Nitro-Lift Technologies, L.L.C.*, which could impact existing agreements with employees containing noncompetition and nonsolicitation provisions that restrict an employee's ability to compete with the employer after the employee separates from employment. As a result of this case, we highly recommend that employers revisit past agreements containing noncompetition or nonsolicitation provisions.

The applicable statute governing these types of agreements is 15 Okla. Stat. § 219A. Section 219A provides that where an employee has executed a covenant not to compete with the employer, the employee "shall be permitted to engage in the same 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 or services from the 'established customer' of the former employer." The statute then provides that any provision in a contract between an employer and employee in conflict with the mandate of Section 219A "shall be void and unenforceable."

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The agreement at issue in *Nitro-Lift Technologies* had several problematic covenants. The agreement contained a noncompete clause that restricted the employees from working for, leasing to, or selling equipment to competitors for a period of two years following the termination of the employee's employment. The agreement also contained a nonsolicitation provision that prohibited the employees from canvassing, soliciting, approaching or enticing away any past or present customer or supplier for a period of two years after separation from employment. After two employees resigned and went to work for a competitor, the employer commenced an arbitration proceeding seeking relief for the employee's breaches of the restrictive covenants. In response, the employees instituted a declaratory judgment action seeking a declaration that the agreement was unenforceable.

The troubling part about the opinion is that the Court refused to judicially modify the covenants to bring them into compliance with Section 219A by finding that the provisions at issue did not specifically comply with Section 219A. For example, one of the provisions at issue restricted the employees from soliciting the employer's "past or present" customers. The Court indicated that it would not rewrite the provisions of the agreement to confirm to Section 219A's requirement that only established customers can be subject to a nonsolicitation provision.

The Court also found that the term "present customers" conflicted with Section 219A's "established customer" as it could encompass temporary or single-event relationships and implied that such do not fall within the confines of an "established customer" under the statute. While the Court did define established customer as an ongoing relationship with the customer that is anticipated to continue into the future, it appeared to find that utilizing the term "present customer" violated Section 219A.

A CAUTIONARY WORD FOR EMPLOYERS

The Court's refusal to modify the covenants appears to be based in part on the vast extent of the problems with the agreement at issue. Nonetheless, this case underscores the importance of ensuring that you have properly drafted noncompetition agreements. In order for a noncompetition agreement to be enforceable under Section 219A, its restrictions should be limited to prohibiting the "direct solicitation" of the employer's "established customers." Any other phrase could result in a finding by a court that the agreement is unenforceable. Again, we strongly suggest that you contact counsel to review any noncompetition or nonsolicitation agreements you are currently using for employees, and also to address the best way to approach employees regarding past agreements with questionable restrictions.

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