

Virginia court voids employer's noncompete

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Noncompete agreements can be an effective way to prevent your employees from leaving to work for a rival business using the skills, information, and contacts they acquired while working for you. However, for the noncompete to be effective, it has to be enforceable. This isn't always easy to determine, as a Virginia business recently learned.

Judge says nope to geographic scope

David Nelson worked for NVR, Inc., a multistate home builder based in Northern Virginia. While at NVR, he signed a noncompete agreement that prevented him from working for a competitor within a restricted area for one year after the end of his employment with NVR. When he left to work for a competitor, NVR filed suit in Alexandria federal court, seeking an emergency court order.

The question presented to the judge was whether the noncompete Nelson signed was enforceable. The judge easily found that the noncompete agreement properly identified the specific prohibited activities. However, the geographic scope of the agreement required further analysis because it defined the restricted area in two separate clauses. Under the first clause, the restricted area included "counties and other units of government" in which NVR engaged in enumerated related home-building activities over which Nelson had management responsibility. The judge found that the physical scope of this restricted territory was sufficiently defined and not overbroad.

The second clause of the noncompete further defined the restricted area as areas "from which you received, as part of your work duties, Confidential Information regarding such business activity, at any time during" the 24 months prior to termination.

The problem with this clause, according to the judge, was that "confidential information consisting almost entirely of digital content" could come from anywhere in the 14 states in which NVR has operations.

As a result, the judge found that Nelson couldn't reasonably determine which areas were restricted, and therefore he couldn't comply with the terms of the agreement. For example, the judge asked rhetorically, "Would an e-mail containing confidential information sent by one of [his] Chicago employees qualify as information sent from Chicago? Would the answer change if the confidential information was contained in an attachment to the e-mail [that] was created by the home office in Virginia? What about an e-mail . . . from a Charlotte employee forwarding the information sent to her by Chicago employees?"

Because there were no certain answers to the judge's rhetorical questions, the judge ruled that the geographic scope of the agreement was indefinite, and therefore the noncompete was overbroad and invalid. In ruling that the uncertain extent of the geographic scope of the definition of confidential information invalidated the noncompete, the judge explained that "the hypotheticals posed in this case are practical realities for employees in nearly any white-collar industry." *NVR, Inc. v. Nelson*, Civil Action No. 1:16-cv-1328 (E.D. Va., Feb. 14, 2017).

Bottom line

The court's decision emphasizes the need to draft your noncompetes carefully to ensure that the restrictions are clear and definite and don't unduly restrict the work opportunities of a former employee. Importantly, the court in this case didn't limit its analysis to jobs from which Nelson likely would be restricted, but rather to the employment

opportunities from which he *hypothetically* could be restricted.

It's advisable to have experienced legal counsel help draft your noncompete agreements. That way, you can ensure the scope of any restriction isn't subject to the same type of legal infirmity identified by the court in this case.

Editor's note: For a further discussion of noncompete agreements in Virginia, see the following articles from previous issues of *Virginia Employment Law Letter*: "Are your noncompetes enforceable?" (May 2014); "Protecting your trade secrets from former employees" (February 2016); and "Hair today, gone tomorrow: Former employees can't shed noncompete duties" (October 2016).

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