SmartTalent Employment Law Note November 2004

Independent Consideration Is Required For Non-Compete Agreements Entered Into After Employment Begins

By Nichole Chiappini and Jeff James

A general principle of contract formation is that there must be a bargained-for exchange of promises (i,e,, consideration) for a contract to be valid. Consideration is rarely an issue when non-complete agreements are entered into before employment commences. However, consideration becomes an issue when such agreements are entered into after employment commences. This month *Labriola v. Pollard Group, Inc.,* the Washington Supreme Court reinforced that non-compete agreements entered into after employment has commenced require independent consideration at the time the agreement is made.

Reported Facts

Labriola began working in 1997 as an at-will commercial print sales person. Labriola's initial employment agreement included a covenant not to compete in the custom printing business for three years after his employment ended with Pollard Group. Nearly five years later, at Pollard's request, Labriola executed a second non-compete agreement. The new agreement required that Labriola not except employment with any competitor within 75 miles of Pollard Group for three years after his employment ended. Labriola remained an at-will employee and he did not receive any additional benefits for executing the second non-compete agreement.

Shortly thereafter, Pollard Group announced a new commission sales compensation schedule that would reduce Labriola's income. Consequently, Labriola sought employment with one of Pollard Group's competitors. When Pollard Group became aware of Labriola's activity, it fired Labriola and sent a letter to the competitor interested in hiring Labriola threatening to enforce the non-compete agreement. The competitor did not hire Labriola. Labriola sought a court judgment declaring the second non-compete agreement to be unenforceable.

The Washington Supreme Court Voids Second Non-Compete Agreement

Unfortunately, for Labriola, he lost the first round in the trial court, which upheld the non-compete agreement as enforceable. Labriola then sought direct review to the Washington Supreme Court, which proved to be more sympathetic to his cause. Finding that the second non-compete lacked independent consideration, the Supreme Court reversed the trial court's decision. The court recognized the general rule in Washington that consideration exists if employees enter into non-compete agreements when they are first hired. The Court then stated that a non-compete agreement entered into *after* employment has begun will not be enforced unless it is supported by independent consideration. Pollard Group argued that its continued employment and training of Labriola constituted independent consideration for the second non-compete agreement, in accordance with previous Washington case law. While recognizing that continued employment and training *may* serve as sufficient consideration, the Court determined that it did not so serve in this case because there was no evidence that Pollard Group promised Labriola he would have continued employment or training if he signed the new agreement.

What Constitutes Independent Consideration?

The Court indicated that independent consideration may include increased wages, a promotion, a fixed-term of employment, and access to protected information. Additionally, although not supported by the specific facts in Labriola, continued employment and job training *may* constitute independent consideration by an employer in exchange for an employee's promise not to compete.

What Labriola Means for Employers

- Independent consideration must be given in exchange for an employee's promise not to compete after employment ends. This is true whether the non-compete agreement is entered into before or after the employee starts working.

- In most instances, the offer of initial employment serves as the consideration for the non-competition agreement. It is best to have the employee sign the agreement before starting work. If the employee is allowed to start work before actually signing the agreement, the offer letter or other documentation should note that employment is contingent on the employee signing a non-competition agreement.

- While the *Labriola* decision leaves open the possibility that continued employment or job training can serve as the independent consideration, the employer must be explicit that the employee will receive these in exchange for signing the agreement. *Labriola* suggests the better practice when a non-compete agreement is sought from an existing employee is to offer additional consideration beyond continued employment, such as increased wages, bonus, or a promotion.

- Non-competition agreements are often subject to challenge by departing employees. A well-drafted agreement will be enforced by Washington court; a poorly drafted agreement will not. Employers considering using such agreements should consult with counsel to determine whether and how to best enforce desired post-employment restriction.

This Employment Law Note is written to inform our clients and friends of developments in labor and employment relations law. It is not intended nor should it be used as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular factual situations.

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