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NONCOMPETE NOT AIMED AT PROTECTION OF GOODWILL DOES NOT QUALIFY FOR SALE OF BUSINESS EXCEPTION

A limited exception to California's general prohibition against non-competition restrictions is Bus. & Prof. Code § 16601, which permits enforcement of reasonable covenants not to compete entered into in connection with the sale of a business. The rationale behind this exception is to protect the value of the purchaser's acquisition, by reasonably preventing competition from the seller which would have the effect of reducing the value and goodwill of the acquired business.

A recent California Court of Appeal decision, *Fillpoint, LLC v. Maas,* reminds us that employers may not use the so-called "sale of business" exception to restrict competition beyond the scope of the acquired entity's business. Such a restriction will be unenforceable in violation of Bus. & Prof. Code § 16600.

The *Fillpoint* plaintiff purchased the assets of a video game company, Crave Entertainment Group, Inc., that was previously acquired by another entity through a purchase agreement dated October 18, 2005. As part of the 2005 purchase agreement, defendant Michael Maas sold all of his stock in Crave and agreed to a three year noncompete restriction after the closing date, and also agreed to execute a new employment agreement with Crave. In this regard, on November 22, 2005, Maas executed a 3-year employment agreement with Crave that also broadly prohibited Maas from competition and solicitation for one year following the termination of his employment.

After working for Crave for three years, Maas resigned on November 22, 2008 and six months later, began working for a competitor to Crave. The plaintiff, which had acquired Crave's assets several months prior, sued Maas and his new employer for breach and tortious interference. The trial court dismissed the case, and the plaintiff appealed.

On appeal, the Court of Appeal initially agreed with the plaintiff's contention that the employment agreement must be read together as part of the purchase agreement because both agreements referenced each other and were part of the same transaction. However, even though the two agreements were read together, the court disagreed that the plaintiff could obtain the benefit of the "sale of business" exception to California's prohibition against non-competition restrictions. The court noted that the three year covenant not to compete that Maas entered into in connection with the sale of his stock protected the goodwill of Crave and satisfied the purpose of the "sale of business" exception. In contrast, the one year post-employment covenant not to compete was much different: it was broader in scope, improperly prohibited Maas from soliciting both existing *and* potential customers of Crave (a similar type of restriction was held unlawful by an earlier case), was not focused on protecting the acquired goodwill, and appeared to target the employee's fundamental right to pursue his profession. Accordingly, the Court of Appeal held that the one year post-employment restriction was unenforceable and affirmed judgment for Maas and his new employer.

Businesses looking to apply the sale of business exception in California should review *Fillpoint* and draft their post closing restrictions on competition accordingly.

FEDERAL AGENCIES ISSUE CAUTIONARY GUIDANCE REGARDING CONFIDENTIALITY OF EMPLOYMENT INVESTIGATIONS

Typically, employers desire to maintain the confidentiality of a workplace investigation, to protect both the integrity of the investigation and the privacy of the individuals involved in the investigation. However, both the Equal Employment Opportunity Commission ("EEOC") and the National Labor Relations Board ("NLRB") have recently taken the position that it may be unlawful for employers to require, or even request, that certain employees involved in workplace investigations maintain the confidentiality of the investigations.

The NLRB was the first to opine on this issue in its July 30, 2012 *Banner Estrella Medical Center* decision, which held that a company's standard and non-discretionary procedure of having its workplace investigator ask complaining employees not to discuss the investigation while it was pending violated the National Labor Relations Act. The NLRB determined that this blanket rule was an unlawful restraint on the rights of employees to, among other things, discuss the terms and conditions of their employment. On the other hand, the NLRB suggested that if the employer performed an individualized assessment as to whether witnesses needed protection, evidence was in danger of being destroyed, witness testimony was in danger of being fabricated or there was a need to prevent a cover up, a request for confidentiality during the investigation may not violate the law.

A few days later, a regional office of the EEOC informed an employer that its practice of warning employees involved in a harassment investigation that they could be subject to discipline or discharge for discussing the investigation is unlawful. The EEOC stated: "An employer who tries to stop an employee from talking with others about alleged discrimination is violating Title VII rights, and the violation is 'flagrant' not trivial." The EEOC further stated that such a policy was a violation of Title VII, even if there was otherwise no adverse action (*i.e.*, a violation may be found regardless of whether any employee was disciplined pursuant to the policy).

These rulings are troublesome, in that they place employers in the difficult situation of balancing the interests in preserving the integrity of the investigation and the privacy rights of those involved against the employees' rights to discuss the workplace investigation and any alleged unlawful activity. At a minimum, employers should review their investigation policies and procedures with counsel to ensure that blanket mandates that prohibit disclosure of the investigation are "modified" in a manner consistent with these rulings.

NEWS BITES

California Strengthens Religious Accommodation Protections

On September 8, 2012, Governor Brown approved amendments to the California Fair Employment and Housing Act that clarified and strengthened the religious accommodation protections of California law. The new law applies to all California employers with five or more employees and goes into effect January 1, 2013.

Under existing law, California employers are required to reasonably accommodate the religious beliefs or observances of employees absent undue hardship. The new law clarifies that religious dress (e.g., clothing, jewelry and head or face coverings) and grooming practices (e.g., head, facial and body hair) are religious beliefs protected by law and entitled to accommodation, and that segregation of employees from the public view is not a reasonable accommodation.

According to the EEOC, religious discrimination claims rose by 9.5% in 2011, particularly with regard to members of the Sikh and Muslim communities.

Statistical Abnormalities Insufficient To Establish Pattern Or Practice Age Discrimination

In 2005, Boeing sold one of its aircraft facilities to Spirit Aerospace and terminated the entire workforce at the facility of more than 10,000 workers. Spirit immediately rehired 8,354 of the workers, but a group of about 700 employees aged 40 and over who were not hired subsequently sued both companies for "pattern and practice" age discrimination.

In *Apsley v. Boeing Co.*, the plaintiffs primarily relied on evidence that showed that Spirit's hiring decisions deviated from the expected norm by a statistically significant amount (*i.e.*, 3 to 4 standard deviations). However, while the court found that this could constitute evidence of isolated or sporadic instances of age discrimination, it was not enough to show a pattern or practice of intentional age discrimination, *i.e.*, that age discrimination was the company's "standard operating procedure." Key to the decision was that Spirit recommended and hired over 99% of the older employees that the company would have been expected to hire in the absence of any age discrimination, and that the percentage of older workers before and after the layoff was relatively similar (87.4% before and 86.6% after). The lawsuit was dismissed as to the pattern or practice age discrimination claim.

Employee Terminated For Job Abandonment States FMLA Retaliation Claim

In a case that reminds employers how not to handle medical leave, the court in *Pagan-Colon v. Walgreens* held that an employee who was terminated for job abandonment following a two-week absence from work stated a claim for FMLA retaliation.

The plaintiff was an assistant manager at Walgreens and left work abruptly due to chest pains and for treatment in an emergency room. The employee's wife informed the store manager that her husband was in the hospital and was unsure of when he could return to work. Following surgery and discharge from the hospital a week later, the employee delivered a medical certificate to the store manager that explained his absence and stated that he would need another week of leave (which the store manager claimed he never received, although the store's video surveillance footage showed otherwise). During the leave period, Walgreens then sent the employee a "48 hour notice" to contact the company or be subject to discipline. The employee did not timely respond to Walgreens because he received the letter well after the 48-hour deadline imposed by the letter, and he was terminated. When the employee presented medical documentation of the need for medical leave, Walgreens agreed to reconsider the termination, but eventually concluded that the employee was being dishonest about the communications regarding his leave and terminated him for that reason. After a jury trial, the jury found Walgreens unlawfully terminated the employee for exercising his FMLA rights and awarded damages to the employee.

This is a shining example of how to mishandle an employee's protected medical leave, and of the legal risk associated with hasty employment decisions in this context and having managers who are poorly trained on legal compliance.

Reminder: California Employers Must Give At Least 90 Days' Notice Prior To Mandating Use Of Accrued Vacation/PTO During Holiday Shutdown

Many businesses elect to shut down all or a majority of operations during the year-end holidays. According to the California Division of Labor Standards Enforcement, if an employer desires to mandate the use of accrued vacation or paid time off ("PTO") by employees during such shutdowns, the employer must provide no less than one full fiscal quarter or 90 days' (whichever is greater) notice of the employer-mandated usage of vacation or PTO. If such notice is not provided, employers may permit employees to voluntarily draw down on their balances, but cannot require such a draw down.

Reminder: EEO-1 Reports Due On September 30

Those employers who are subject to federal EEO-1 reporting requirements – *i.e.*, employers with 100 or more employees and federal contractors with 50 or more employees – must file their EEO-1 reports by September 30, 2012. For additional information and instructions on filing, please see http://www.eeoc.gov/employers/eeo1survey/index.cfm.

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