Commentary

The Editorial Board Got It Wrong: Restrictive Covenants Always Hurt Workers

By Evan L. Goldman

The Law Journal's Editorial Board recently wrote (in a commentary titled "Valid Reasons for Noncompete Clauses") that, in essence, restrictive covenants are not that bad, and criticized President Biden's Executive Order asking the Federal Trade Commission to question their use by employers. Clearly, most if not all the members of the Editorial Board have never represented clients who, once discharged, find it hard to obtain employment due to vindictive and draconian restrictive covenants.

While there may be times when restrictive covenants are necessary (someone who has been involved in the strategic development of a project, and then attempts to move to a competitor), these instances are extremely rare. Employers are using these restrictive covenants more and more to prevent their former employees from obtaining jobs in the same industry, not for fear that the employee is going to reveal some secret or steal customers, but merely because they can. There was a case involving the sandwich franchisor, Jimmy Johns, who attempted to prevent their employees (sandwich makers) from moving to other similar franchises. What makes matters worse is the fact that in this world of conglomerates, many of these restrictive covenants contain language that covers not only the actual employer but also any affiliate, customer, or supplier of the employer.

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There are very few secrets that most employees know that would hurt their former employer. What could a doctor know about his or her former practice that should prevent him from hanging a shingle in the next town? What does any salesperson really know about the product they are selling other than it's the "best" or most "efficient" or "cheapest"? We already know that courts will never prevent a patient from going to a doctor of his or her choosing, so what's the purpose other than "fear" on the part of the former employer, that they will lose all their patients?

Restrictive covenants are not used by law firms. Why? The free movement of attorneys from firm to firm is expected and often encouraged. There are also conflict laws that would protect the former law firm in certain instances. Yet, even if a firm could argue that an attorney or group of attorneys who move to another firm will negatively affect their revenues, no court would ever attempt to prevent the free movement of attorneys.

When an employee decides to leave his/her former employee or gets fired, we should be encouraging them to seek employment that fits their qualifications and needs. It helps the employee to be able to support his family and prevents the seeking of unemployment benefits. Free movement of employees is good, for the employee, the economy, and for society in general. Former employees should not have to worry about being sued or be forced to hire an attorney when they do get sued, especially when it is virtually impossible to claim a protectable interest.

President Biden got it right. The Editorial Board should have analyzed the issue more before providing their opinion. And perhaps, more importantly, the Law Journal should have more of a cross section of attorneys on their Editorial Board. ■

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