Labor Alert

Strasburger ATTORNEYS AT LAW

October 20, 2006 ● STRASBURGER & PRICE, LLP

Texas Supreme Court Clarifies Enforceability of Noncompetes

In 1994, the Texas Supreme Court set the standard for enforceability of covenants not to compete ("noncompete agreements") under Texas law. Based upon this construction, most Texas appellate courts endorsed a noncompete enforceability test which essentially required an employer to simultaneously exchange appropriate confidential information with the employee at the time the employee signed the noncompete agreement.

Practically speaking, this approach was usually burdensome for employers and often simply impossible. Moreover, this approach failed to acknowledge that employers need to protect the valuable confidential and proprietary information employees did actually receive during their employment, even if they did not receive the information on the very day they signed the agreement. This approach provided employees with an easy way to avoid noncompete agreements – if the agreement did not recite that consideration would be simultaneously exchanged, the agreement as written was unenforceable.

Today, the Texas Supreme Court re-entered the noncompete arena in *Sheshunoff Mgmt. Servs., LP v. Johnson, et. al*, holding that:

> An at-will employee's non-compete covenant becomes enforceable when the employer performs the promises it made in exchange for the covenant. In so holding, we disagree with the language in *Light* stating that the Covenants Not to Compete Act requires the agreement containing the covenant to be enforceable the instant the agreement is made.

Thus, a noncompete will become enforceable once the employer actually provides confidential information to the employee in accordance with its promise to do so.

In addition, the Court emphasized the following:

- An employer cannot create an enforceable noncompete by promising to give notice before termination, or by paying monetary consideration. Instead, as before, only promises related to the provision, receipt and non-disclosure of confidential information can support a noncompete agreement. Therefore, the employer's promise must be to provide confidential information to the employee and the employee must, in turn, promise to maintain the confidentiality of the information and refrain from disclosing it.

- Employers cannot obtain enforceable noncompete agreements with existing employees simply by having them sign an agreement. The employer must, instead, promise to and actually provide the existing employee with new confidential information.

IF YOU HAVE QUESTIONS REGARDING THIS MATTER, PLEASE CONTACT:

TIFFANY HILDRETH
Partner, Austin
600 Congress, Suite 1600
Austin, Texas 78701
512.499.3661
512.499.3660 direct fax
tiffany.hildreth@strasburger.com

LABOR AND EMPLOYMENT GROUP

Kim Moore
Katie Anderson
Monica A. Velazquez
Debra W. Biehle
Francine W. Breckenridge
Jerae Carlson
Sonya Sledge Chandler
Tiffany Hildreth
Cliff Husted
David N. Kitner
David J. LaBrec
Jadd F. Masso
Jack M. Murchison
Paul L. Myers
Clinton A. Rosenthal
Scott A. Shanes
Gary J. Siller
Joseph A. Turano
Robert B. Tyler
Catherine Wall
Jana H. Woelfel

DISCLAIMER: Articles contained within this newsletter provide information on general legal issues and are not intended to provide advice on any specific legal matter or factual situation. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this information without seeking professional counsel.

*STRASBURGER & PRICE, SC

Strasburger ATTORNEYS AT LAW

● The enforceability of noncompetes under Texas law was never intended to depend upon “overly technical disputes.” Rather, the “core inquiry” is whether the noncompete’s restrictions as to time, geographical area, and scope of activity are reasonable and are not greater than necessary to protect the employer’s goodwill or business interests.

What does this mean? Employers still need to prepare noncompete agreements which affirmatively state that the employer promises to provide confidential information and the employee promises to maintain confidentiality and not disclose the information. The Court opinion emphasized an employer “promise” to the employee. Consequently, nothing in this opinion provided direct or implied approval of agreements stating that an employee “may have access to” confidential information. After making the promise in writing, employers need to give employees confidential information, and the sooner the better. The Court noted that undue delay in providing the information – such as waiting until the employee’s termination – would weigh against the noncompete being reasonable. When confidential information is provided, it would be prudent for employers to document that the information was given at that time. Finally, as always, employers need to draft reasonable noncompetes which do not overly restrict an employee’s post-employment actions.

DISCLAIMER: Articles contained within this newsletter provide information on general legal issues and are not intended to provide advice on any specific legal matter or factual situation. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this information without seeking professional counsel.