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Pa. Businesses: Beware the Unlimited Noncompetition Agreement

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By **Andrew J. DeFalco** | September 26, 2018

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To many businesses, so-called “noncompetition” agreements are essential, particularly where employees or independent contractors will have access to confidential or proprietary business information during the course of their employment. Such agreements help businesses protect goodwill, customer lists and trade secrets, and help to retain key employees—particularly those in whom the business has made a substantial investment.

However, business owners in Pennsylvania should take note that if a noncompetition agreement is unlimited in geographic scope or purports to be a "worldwide noncompete," Pennsylvania courts may find the agreement to be per se absolutely void, and the employee will be able to compete with the employer after her engagement without any geographic restriction.

It is widely known that because noncompetition agreements are disfavored, courts will impose restrictions on the scope of noncompetition agreements. Generally, in Pennsylvania noncompetition agreements are enforceable only if they are ancillary to an employment relationship; supported by adequate consideration, the restrictions are reasonably limited in duration and geographic extent, and the restrictions are designed to protect the legitimate interests of the employer. See *Socko v. Mid–Atlantic Systems of CPA, (http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037621425&pubNum=0007691&originatingDoc=Id5856b70c9d4(sc.Search)#co_pp_sp_7691_1274)*126 A.3d 1266, 1274 (Pa. 2015) (http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037621425&pubNum=0007691&originatingDoc=Id5856b70c9d4(sc.Search)#co_pp_sp_7691_1274). Historically, the appropriate geographic extent of a noncompetition restriction would be determined generally by the scope of the employee's duties, not the geographic area in which the employer sells its goods or services, as in *Boldt Machinery & Tools v. Wallace,* 366 A.2d 902, 909 (Pa 1976).

In most cases where an employer seeks to enforce an overly broad noncompetition agreement against an employee, a court will exercise its equitable power to narrow the overly broad restriction, tailor the geographic scope of the restriction to a reasonable territory, and enforce the noncompetition agreement as if it had originally been written properly, as held in *Sidco Paper v. Aaron*, 351 A.2d 250, 254 (Pa. 1976). However, as noted by two relatively recent Pennsylvania opinions, *Pittsburgh Logistics Systems v. Ceravolo*, No. 135 WDA 2017, 2017 WL 5451759 (Pa.Super. Nov. 14, 2017) (marked not precedential) and *Adhesives Research v. Newsom*, No. 15-0326, 2015 WL 1638557 (M.D.Pa. April 13, 2015), when a noncompetition agreement contains an unlimited

geographic scope inconsistent with the employee's territory, even where the nature of the business is such that a relevant geographical area could have been specified, the agreement will be void, and courts will not use their equitable power to alter the agreement. In that event the employer will be left with no restriction on the employee at the conclusion of her engagement.

As explained in *Adhesives*, the Pennsylvania Supreme Court adopted this rule in *Reading Aviation Services v. Bertolet*, 211 A.2d 628 (Pa. 1973). *Adhesives* explained the rationale for this rule: "When a covenant not to compete contains an unlimited geographic scope, although the nature of the business was such that a relevant geographical area could have been specified, the agreement is void, and courts may not use their equitable power to alter the agreement. The Supreme Court of Pennsylvania has instructed that such overbreadth militates against enforcement because it indicates an intent to oppress the employee and/or to foster a monopoly, either of which is an illegitimate purpose. An employer who extracts a covenant in furtherance of such purpose comes to court with unclean hands and is not entitled to enforcement."

Although technically not controlling, *Pittsburgh Logistics* and *Adhesives* are important because they appear to buck the growing trend toward enforcement of broad noncompetition agreements. For example, in *Victaulic v. Tieman*, 499 F.3d 227 (3d Cir. 2007), the Third Circuit rejected a per se rule, and explained: "In this information age, a per se rule against broad geographic restrictions would seem hopelessly antiquated, and, indeed, Pennsylvania courts (and federal district courts applying Pennsylvania law) have found broad geographic restrictions reasonable so long as they are roughly consonant with the scope of the employee's duties."

Moreover, *Victaulic* explained that a court must consider the scope of the geographic restriction in the context of the overall restriction. For example, in *Victaulic*, the employee signed a restrictive covenant that was worldwide and unlimited, but only precluded the employee from working for nine named competitors. In reversing the

grant of a motion to dismiss in favor of an employee based upon the geographic scope of the restrictive covenant, the U.S. Court of Appeals for the Third Circuit explained "these competitors might be able to use a former Victaulic employee's specialized knowledge of Victaulic's product lines and sales strategies anywhere in the world that the two compete." See also *Quaker Chemical v. Varga*, 509 F.Supp.2d 469 (E.D.Pa. 2007) (citing cases and rejecting a per se rule utilizing the analysis in *Victaulic*).

It is difficult to reconcile the per se rule applied in *Pittsburgh Logistics* and *Adhesives* with the analysis of *Victaulic* and *Varga*. Recognizing this, in *Certainteed Ceilings v. Aiken*, No. 14–3925, 2014 WL 5461546 (E.D.Pa. Oct. 27, 2014), the U.S. District Court for the Eastern District of Pennsylvania enforced an unlimited noncompetition agreement, but only to the extent of the former employee's sales territory. In a footnote, *Certainteed* distinguished *Bertolet*, finding that a per se rule should apply only in "egregious" circumstances.

Still, *Bertolet* appears to be good law in Pennsylvania. Therefore, if a claim to enforce a "worldwide noncompete" is brought in Pennsylvania state court, a very good argument could be made that under *Bertolet*, the noncompete is simply void and unenforceable. In light of *Victaulic*, which is controlling federal court precedent, this argument may have less force in federal court, but as demonstrated by *Adhesives*, it could still carry the day.

In all cases, when considering the scope of a noncompete for employees or independent contractors, an employer should give significant thought to the objectives to be served by the noncompete agreement, and impose only the restrictions that are necessary to serve those objectives. Tailoring the noncompete to serve only the legitimate and reasonable objectives of the employer will make it far more likely that it will be enforced by Pennsylvania courts.

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