Louisiana Employment Law Letter

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August 2001 **Vol. 10, No. 5**

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COVENANT NOT TO COMPETE

Taking the 'non' out of noncompete agreements?

A new decision by the Louisiana Supreme Court has crippled your ability to protect your business from employees who quit to go to work for a competitor. The decision also removes a significant obstacle for your competitors that may be seeking to get a leg up by hiring away your best employees.

By applying a restrictive interpretation to a portion of the Louisiana law that allows so- called noncompetition agreements, the court held that such agreements may be used only to prevent your former employees from directly soliciting your customers or from starting up their own competing businesses. In other words, no matter what your contract says, you can't stop an employee from going to work for a competitor unless the new job requires him to solicit your customers.

Let's take a look at how this unfortunate decision came about and what, if anything, you can do to minimize the damage.

Facts

Robbie Bond was employed as a production manager with a company called SWAT 24 in Shreveport. He signed an employment agreement with a noncompete clause that prohibited him from, "directly or indirectly, engag[ing] in competition" with his employer in certain specified Louisiana parishes for a period of two years following the termination of his employment. His contract complied with Louisiana's noncompetition law, which states:

> [A]ny person . . . who is employed as an . . . employee may agree with his employer to refrain from *carrying on or engaging in* a business similar to that of the employer *and/or from soliciting customers* of the employer within a specified parish or parishes . . . so long as the employer carries on a like business therein, not to exceed two years from termination of employment.

Bond quit and went to work for a competitor in the same job he had with SWAT 24. The company then sued and asked the court for an injunction to prohibit him from working for the competitor, which set the stage for the supreme court's decision.

Court's decision

Both sides agreed that Bond couldn't solicit SWAT 24's customers, but that wasn't his job -- either with SWAT 24 or its competitor. So the bone of contention in this case was the meaning of the phrase "carrying on or engaging in a business similar to that of the employer." Bond argued it meant he could be prevented only from opening his own competing business. SWAT 24 said that didn't make any sense and pointed out that every other Louisiana court of appeal agreed with its position that the noncompetition law allowed employers to prohibit their employees from going to work for a competitor in any capacity. Unfortunately, four of the seven Louisiana Supreme Court members who heard the case agreed with Bond. According to those four justices, "carrying on or engaging in" means "owning and operating."

Although you won't see anything about "owning and operating" in *Webster's* under the definition of "carrying on or engaging in," the court gave a couple of reasons for its decision -- one logical and one philosophical. First, the court said that if the disputed language meant an employee couldn't work for a competitor in any capacity, there would have been no need for the Legislature to include the part about soliciting customers.

Second, the court said that while it's reasonable to have an agreement that prevents a former employee from soliciting your customers, it's not reasonable to try to prevent an employee from working for a competitor in any capacity. That's the philosophical reason with which we don't necessarily agree. You probably don't either, but let's not put too much blame on the court. That's too easy a target. *SWAT 24 Shreveport-Bossier, Inc. v. Bond*, 2001 WL 754754 (La. S.Ct. Jun. 29, 2001).

Analysis

In fairness, in a case like this one, all the court can do is interpret the language the Legislature put in the statute. We doubt the Legislature meant what the court said it meant, but the Legislature should have done a better job of making its intentions clear. Before the current law was enacted, most noncompete agreements were unenforceable. In fact, before the current law, no Louisiana court had ever enforced a noncompete agreement.

So when the Legislature passed the current law, it was trying to make it easier for you to protect your business from employees who "go over to the other side." We think the Legislature probably meant to allow agreements that prohibited employees from going to work for a business similar to their former employer's, provided the other conditions of the law were met. But if that was the Legislature's intent, it did a poor job of writing the law.

As a result, the Louisiana Supreme Court now has interpreted the law in a way that ignores the realities of the modern business world. An agreement that prevents your former employee from working for a competitor only if he owns the business or solicits your customers isn't worth much when you're trying to protect yourself against executives and key technical and professional employees taking their knowledge of your business to a competitor and turning it against you. The supreme court's interpretation of the law also makes it too easy for employees to get around their noncompete agreements even if they work for you in sales and marketing. All they have to do is turn over their knowledge about your customer base and marketing practices to your competitor's sales staff, who then can do the soliciting.

Bottom line

So what can you do to repair the damage done by this decision? Lobby your legislators to redraft the law to give you the protection you need (and we think the Legislature intended to provide in the first place). But under the Louisiana Constitution, the next regular session of the Legislature will be limited to fiscal (*i.e.*, tax and spend) measures. Thus, it won't have a chance to correct the problem created by the supreme court's decision until 2003.

In the meantime, there's no need to rush out and change your agreements to comply with the supreme court's decision. One good thing the decision makes clear is that the courts won't throw out your agreements if they're broader than what the supreme court says is OK. They'll just enforce your agreements only against former employees who solicit your customers or try to start their own competing businesses. But that still leaves you with the problem of potentially losing a key executive or professional or technical employee. Under the supreme court's interpretation of the noncompetition law, there's not a thing you can do to stop one of those employees from going to work for one of your competitors.

A couple of things that might help: Make sure your agreements include strong language that prohibits employees from disclosing trade secrets and other confidential information to competitors and other persons outside your company. You might also want to include a so-called "no-raiding" clause that will prohibit an employee who leaves your company from coming back and trying to recruit or hire away other key employees to join him with a competitor. The supreme court's decision doesn't prevent you from taking any one of these steps to protect your business, and at this stage, you better take all that the law allows.