Click Here for a Preliminary Injunction: The Third Circuit Affirms an Employer's Use of Electronic Non-Solicitation Agreements

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On February 7, 2017, the United States Court of Appeals for the Third Circuit affirmed a decision of the United States District Court for the District of New Jersey finding that employers may use electronic signatures in certain circumstances to bind employees to restrictive covenants, such as non-competition and non-solicitation agreements. The decision also shows that courts are more likely to enforce non-solicitation agreements tied to current customers and goodwill and, practically speaking, require a greater showing before enforcing an agreement that prohibits former employees from any and all competition with their former employers.

The decision from the Third Circuit arose from two companion cases, *ADP v. Halpin* and *ADP v. Lynch*. The central controversy arose when two employees from payroll processor ADP checked a box on the company website indicating that they had "read all associated documents" - including a non-compete agreement - in order to accept an award of stock in ADP. The stock award's acceptance was expressly conditioned upon the employees' checking this box and the non-compete agreement was accessible by clicking on a separate link next to the checkbox. According to the allegations in the complaint, the employees later resigned from ADP to join a direct competitor and began soliciting former ADP clients.

ADP thereafter brought an application for a preliminary injunction against both former employees. The trial court found that the employees were in fact bound by the non-compete agreement but granted ADP's application for a preliminary injunction only in part, enjoining the employees from soliciting current ADP customers and restricting solicitation of prospective customers only to the extent that the employees had knowledge of them while working for ADP. However, the Court permitted the employees to continue working for the competitor while the matter was fully litigated.

On appeal, the former employees argued principally that mutual assent for the agreements was lacking because they were not required to specifically acknowledge that they had agreed to the restrictive covenants at issue. The Third Circuit rejected this rationale, and concluded that the trial court had appropriately found a sufficient

showing of assent because the employees checked the box indicating that they had "read" the terms and conditions of the stock award and the documents explicitly advised that the non-compete agreement was a condition of accepting the stock award.

The Third Circuit also affirmed the trial court's ruling on the scope of the preliminary injunction, finding that the trial court did not abuse its discretion when it found that the injunction was "reasonably tailored" to protect ADP's legitimate business interests in that it permitted the employees to work for their new employer and solicit prospective customers about whom they had no knowledge while employed at ADP.

Moving forward, several lessons ring true. The first is that, as a general matter and under many circumstances, employers may use electronic click-wrap agreements to bind employees to restrictive covenants, although the better practice would be to specifically include language in electronic signatures stating that the employee has both read and agreed to the restrictive covenant. However, employers should be careful about the manner in which restrictive covenants, including non-compete and non-solicitation agreements, are presented to prospective employees, which can raise legal obstacles to the covenant's enforceability that are particularly apt in circumstances involving click-through agreements and electronic signatures. The second point may be less obvious, but equally important. That is, even in situations where, as here, there appears to be little doubt that former employees are violating the express terms of their restrictive covenants, courts may not enforce the agreement in its entirety absent a strong showing of specific, identifiable harm. Remember, the trial court did not prevent the former employees from continuing their employment with the competing business. Additionally, they were not restrained from soliciting ADP prospective customers of whom they had no knowledge while employed at ADP. Finally, the trial court limited its injunction to one year, the time period identified in the agreement. Thus, this case confirms the very fact-specific nature of cases of this nature and illustrates a general reluctance of some courts to prohibit employees from working for a competitor altogether absent a compelling reason.

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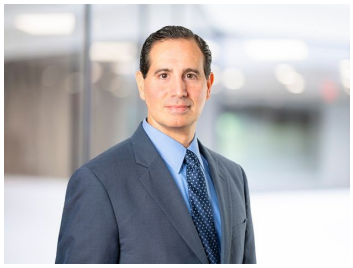

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