Wisconsin Court Throws Out Choice-of-Law Provision, Then Enforces a Non-Compete Anyway

Insights
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A recent decision from the Eastern District of Wisconsin, *Schetter v. Newcomer Funeral Service Group, Inc.*, presented a smorgasbord of juicy noncompete issues, including:

- ignoring a choice of law provision;
- validating a geographic provision that reached beyond the employee's worksite to other locations;
- discussing the scope of activities restricted; and
- endorsing a $1,000 payment as additional consideration supporting enforcement of the noncompete.

The former employee had been the managing director at the Green Bay location of a company that operated a number of funeral homes. After leaving to work for a competitor, she filed a declaratory judgment action seeking to have her noncompete invalidated. After considering a number of issues, the Court ultimately refused to strike down the noncompete.

The former employer was Kansas-based and thus included a Kansas choice of law provision. However, because Kansas law regarding restrictive covenants is markedly different from Wisconsin law (Kansas law permits judicial modification of overbroad covenants whereas Wisconsin applies a "red pencil" approach), the Court refused to honor the choice of law provision. Notwithstanding its application of Wisconsin's more restrictive law, the Court went on to deny the former employee's request that the noncompete be deemed overbroad and unenforceable on its face.

The first substantive attack on the noncompete was the geographic scope which not only prevented competition within a 25-mile radius of the former employee's Green Bay work location but also such radius from other locations owned by the funeral home company. The Court rejected that argument based on the rationale that the former employee was privy to all sorts of confidential information about the company that "logically extend[ed]" not just to the location where she worked but to the other locations operated by the same employer. While this is certainly not the first time a court has accepted such an argument, it is not the norm for courts to endorse a geographic provision that reaches beyond the location where the former employee worked, especially in Wisconsin, which is a state that is hostile to the enforcement of restrictive covenants.

The next argument against enforceability focused on the scope of activity restricted by the noncompete – i.e., the former employee was prevented from engaging in services that "were substantially similar" to her former employer's "programs." The former employee attempted to frame such restriction as a stereotypical overbroad "janitor" clause. However, the Court again rejected the argument, noting that the employer's "programs" were funeral parlor services which would not prevent work as a janitor.

The Court further endorsed the noncompete's enforceability by pointing to the $1,000 payment that the former employee had received in return for signing the agreement more than two years after her employment had begun. Even though Wisconsin is not one of the states that requires additional consideration (beyond continued employment) for a noncompete signed post-employment, it is notable that the Court did place an emphasis on the fact that additional consideration was received.

Altogether, *Schetter* is interesting for a couple reasons. First, a Wisconsin court took a permissive view towards enforcing a non-compete restriction, even after throwing out an out-of-state choice of law provision. Second, it illustrates that there are benefits to offering payments to existing employees for signing restrictive covenant agreements, even in states where consideration beyond continued employment is not required.

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