PUBLICATION

Alabama Passes New (and More Restrictive) Non-Compete Statute

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Effective January 1, 2016, Alabama has passed a new non-compete and non-solicitation statute, repealing Section 8-1-1 of the Alabama Code ("the New Act"). The New Act begins with the same general statement as the prior statute stating that any contract that restrains anyone from exercising a lawful profession, trade or business is void unless allowed by the New Act. It also states that the provisions of the New Act express a fundamental public policy of the state of Alabama and any contrary foreign laws would not apply if they violate the New Act, thus prohibiting parties from attempting to avoid the New Act by choosing to apply another state's law.

The New Act attempts to codify principles the Alabama courts have previously addressed. It sets out explicitly the types of agreements allowed, including agreements (1) restricting parties to a contract from hiring an employee of the other party who holds a position "uniquely essential" to the business, (2) limiting commercial dealings to the parties to the contract, (3) preventing the seller of the good will of a business from opening a competing business or soliciting the buyer's customers within a specified geographic area, (4) preventing an employee from engaging in a similar business (i.e., a non-competition agreement), (5) preventing employees from soliciting current customers (i.e., a non-solicitation agreement), and (6) allowing owners in the event of dissolution of a business or contemplation of dissolution to agree not to carry on a similar commercial activity in the relevant geographic area. The New Act addresses what is a protectable interest that can support the agreements allowed, including trade secrets; certain confidential information (including pricing and customer lists); relationships with specific prospective or current customers, clients, patients or vendors; the good will associated with a business's customers, clients, patients or vendors; and specialized training that involves significant expense if that training is set forth in the agreement as the reason for the restraint.

The New Act continues the previous practice of allowing courts to modify agreements where they find either the duration or the geographic scope to be excessive. It requires both parties to sign any non-competition/non-solicitation agreement and requires the agreement to be supported by consideration, without stating whether continuing employment is sufficient consideration. The New Act also specifically continues any professional exemptions already recognized, although it also recognizes that a protectable interest can arise from "[c]ustomer, patient, vendor, or client good will associated with . . . an ongoing …. professional practice," thus setting up what appears to be a conflict that the courts will have to resolve.

Most notably, the New Act sets time limits of what it presumes to be reasonable for certain restrictions, including the following:

1. Two years is presumed to be reasonable for a non-competition agreement.
2. Eighteen months is presumed to be reasonable for a non-solicitation agreement.
3. One year or less is presumed to be reasonable for a non-compete or non-solicitation involving the sale of the good will of a business.

The new provision regarding the sale of the good will of a business may be the most distressing, as some Alabama courts have upheld non-competition agreements with a term of five years that arise out of the sale of a business. The New Act's treatment of non-solicitation agreements may also be a significant change in the law. Following the Alabama Supreme Court's 2006 decision that partial restraints of trade were not governed

by Alabama's prior statute, some courts have held that non-solicitation agreements did not require a protectable interest and were only governed by a notion of reasonableness in scope and duration. The New Act now seems to require a protectable interest similar to that needed for a non-competition agreement and only allows non-solicitation of current customers and not prospective or past customers with whom an employer hopes to establish or re-establish a relationship. The New Act also limits agreements to commercial entities (instead of using the term "employer" as was originally suggested) raising some concerns about using these agreements with non-profit or religious entities. The New Act references franchises specifically, finding that a protectable interest includes customer, vendor and client good will in connection with an ongoing franchise or business, thus specifically allowing franchises to enter into protective agreements to protect these interests, but also subjecting those agreements to the time limits set forth in the New Act.

Finally, the New Act is silent on whether it applies to agreements entered into before the effective date, but Alabama statutes are generally not applied retroactively if they impact substantive rights as opposed to procedural or remedial rights. The Alabama Supreme Court has stated on multiple occasions that a statute is not to have retroactive application unless the statute has an express provision of legislative intent that it applies retroactively. Thus, a strong presumption exists that a statute will apply only prospectively unless there is a clear and explicit intention otherwise. An exception exists for statutes that are merely remedial, which are those that impair no contracts or vested rights and do not disturb any past transactions. Although application of the New Act to reduce the time limits of agreements or to limit, for example, non-solicitation agreements to current customers would certainly impact substantive rights in contracts, it may set up an interesting argument with those who may argue that the New Act is merely an attempt to codify what the Alabama courts are already holding.