

Louisiana Employment Law Letter

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COVENANT NOT TO COMPETE

Special legislative session to provide opportunity to amend law on noncompetes

Last summer, we reported on a Louisiana Supreme Court decision that stripped employers of the ability to protect their businesses through noncompete agreements. As you may recall, the court ruled that noncompete agreements may prevent your former employees only from directly soliciting your customers or starting up their own competing businesses (see "Taking the 'non' out of the noncompete agreements?" Louisiana Employment Law Letter, August 2001, Vol. 10, No. 5, p. 1).

Unfortunately, the court did away with your ability to stop your former employees from going to work for a competitor unless the new position requires them to solicit your customers. The court's decision is contrary to the Louisiana Legislature's intent when it enacted the noncompetition law. The decision conflicts with the clear language of the law and almost every other court's interpretation of the law. But there may be some light at the end of the tunnel. Read on to find out why.

Why the earlier ruling was so bad

The noncompetition statute currently allows you to require your employees to agree not to solicit your customers or "carry on or engage in a like or similar business" for a period of two years after their dismissal in any parish or municipality (which must be specified) in which you carry on your business. The supreme court had no problem prohibiting solicitation, but four of the seven judges who decided the case said you can prohibit an employee from "carry[ing] on or engag[ing] in a like or similar business" *only as an owner*. That's not what the statute says, and it's not what the Legislature intended when it passed the law in the first place.

If allowed to stand, this decision will have a serious adverse effect on Louisiana's economic development and ability to attract businesses, and some companies already in the state are contemplating relocation. Why would major employers move their workforce to (or keep it in) a state where their key employees could be lured away by a competitor with no recourse? The inability to prevent executives and key employees (such as computer professionals and research and development specialists) from jumping ship to a competitor is a serious consideration for many employers in competitive industries when they're determining where to make their home.

Good news

Fortunately, support has been building for a legislative effort to correct the court's misinterpretation of Louisiana's noncompetition law. The good news is that Governor Mike Foster is expected to call a special legislative session to begin on March 25, 2002, to address economic development initiatives for the state.

The governor may call for a "special session" or an "extraordinary session" during the year (or an extraordinary session must be called if a majority of each house of the Legislature petitions for it). The governor's or the Legislature's "call" for the special session defines its scope, and the power to legislate is limited to the session's stated purpose. The anticipated special session to address economic development is the perfect opportunity for the Legislature to review and hopefully correct the court's erroneous decision on noncompete agreements.

Supporters of the effort to correct the court's decision expect that at least one bill will be introduced to overrule the decision and reaffirm the Legislature's original intent to allow employers to prevent key employees from going to work for a competitor *as an employee or an owner*. Such a bill would certainly fit into the special session's anticipated purpose — attempting to stimulate Louisiana's economy — because of its potential effect on the state's ability to attract and keep employers.

The desired result is that employers may again prevent employees with valuable knowledge of their trade secrets or other proprietary business information — and who have relationships with their customers — from using their knowledge and customer relationships for the benefit of a competitor for a reasonable time and within a reasonable territory. Another desired result would be to keep businesses that are already here and attract new ones to stimulate Louisiana's economy.

The plans for both the special session and the bill are still being formulated. But an important step at this juncture is to garner support in the business community and the Legislature for such a bill. We will keep you informed about any developments.

In the meantime, you can check for the upcoming legislative session and bills that are introduced on the Legislature's website at www.legis.state.la.us. You can also contact your legislators to voice your support. House members may be reached by phone at (225) 342-6945, by e-mail at webreps@legis.state.la.us, or by mail addressed to the Louisiana State House of Representatives, P.O. Box 94062, Baton Rouge, LA 70804. Senate members may be reached by phone at (225) 342-2040, by e-mail at websen@legis.state.la.us, or by mail to the Louisiana State Senate, P.O. Box 94062, Baton Rouge, LA 70804.

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