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NLRB Issues Complaint Against Company For Maintenance And Enforcement Of Noncompete And Non-Solicit Provisions

Article By:

Erik W. Weibust

Erin E. Schaefer

As we have previously discussed, the National Labor Relations Board's General Counsel is seeking to invalidate noncompete agreements on the untested legal theory that they violate the National Labor Relations Act. The NLRB recently fired its latest salvo in those efforts to outlaw noncompetes.

On September 1, 2013, the Regional Director of Region 9 of the NLRB, located in Cincinnati, Ohio, issued a Consolidated Complaint against Harper Holdings, LLC d/b/a Juvly Aesthetics (the "Company"), alleging that the Company maintains unlawful noncompete provisions in its offer letters, agreements and handbook, along with other allegedly unlawful provisions regarding confidentiality, non-disparagement and non-solicitation.

It is alleged in the Complaint that the Company, which provides advanced aesthetic and cosmetic services, requires some employees, depending on their position, to enter into various restrictive covenants. For example, the Company's Offers of Employment prohibit employees from (i) soliciting or encouraging any person to leave the employment or other service of the Company or its Affiliates, or (ii) hiring any current or former employee of the Company or its Affiliates either for another employer or for their own business purposes. The Offers of Employment also provide that employees will not "intentionally interfere with any relationship of the Company or its Affiliates or its Employees, or endeavor to entice away from the Company or its Affiliates, any person who during the term of the Agreement is, or during the preceding two-year period, was a tenant, co-investor, co-developer, joint venture, contractor, advisor, Employee or another client of the Company or its Affiliates."

In addition to the above prohibitions, the Company's Non-Compete and Confidentiality Agreement prohibits certain employees from working within a 20-mile radius of "any Company office" where the Company offers services competitive with those performed by the employee. These restrictions are in effect from the time of employment until 24 months after termination. It similarly limits certain employees from, "…having an ownership interest, investing in, or providing services to, directly or indirectly, in or to any medical practice within a 20-mile … radius that competes against or provides similar services to any Company location."

This noncompete provision also requires that in the event of breach or if the employee leaves

employment within the first twelve months of employment, the employee must repay the Company for the full costs of training. If the employee leaves between the thirteenth and twenty-fourth month of employment, the training cost repayment would be prorated.

The Company also maintains a non-solicitation provision that prohibits solicitation of clients, employees or contractors. In Exit Agreements, the Company also prohibits departing employees from notifying clients of their departure from the Company or attempting to engage with them about their departure from the Company.

The NLRB alleges in the Complaint that by maintaining and taking steps aimed at enforcement of the restrictive covenants set forth above, the Company violated the National Labor Relations Act.

As it works its way through the administrative process, this case will be instructive as an example of the NLRB's efforts to invalidate noncompetes. The case is scheduled for a hearing on November 28, 2023.

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