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Labor: Ohio Supreme Court rules on the effect of mergers on noncompetes

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To prevent the loss of business, employers should draft noncompetes that also apply to successor companies

Noncompetes are one of the best tools employers have to prevent the loss of valuable business. While employers use noncompetes to protect themselves, a recent Ohio case reminds them to plan for the future and draft noncompetes that also apply to a successor company in the event of a merger or other change. In ***Acordia of Ohio v. Fishel, et al.***, the **Ohio Supreme Court** considered whether the surviving company of a merger that was not the original contracting employer in a noncompete can enforce the noncompete as if it had stepped into the shoes of the initial employer. The Ohio Supreme Court held that although a merger transfers a noncompete to the surviving company, the noncompete is only enforceable according to its terms, which can lead to unexpected results if not drafted properly.

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In *Acordia of Ohio v. Fishel*, four employees signed noncompetes with an insurance services company that became known as Acordia of Ohio Inc. (Acordia). In the noncompetes, the employees agreed to forgo competition with Acordia for two years after termination of their employment. Significantly, the noncompetes did not contain language that extended to other employers, including the company's successors or assigns.

Acordia underwent several mergers, acquisitions and reorganizations between 1993 and 2001. In late 2001, Acordia underwent a merger with Acordia of Ohio, L.L.C. (the L.L.C.), after which only the L.L.C. existed. The four employees continued to work for the L.L.C. until August 2005 when they left to begin work at Neace Lukens Insurance Agency. Within six months of their move to Neace Lukens, the employees had recruited and transferred 19 customers from the L.L.C. to Neace Lukens, amounting to $1 million in revenue.

The L.L.C. sued the employees and Neace Lukens, seeking to enforce the employees' noncompetes and recover money damages. The trial court denied the L.L.C.'s motion for a preliminary injunction and granted the employees' motion for summary judgment. Th**e First District Court of Appeals** affirmed, reasoning that the employees' noncompetes had expired because Acordia had been merged out of existence more than two years before the employees left the L.L.C. The L.L.C. appealed to the Ohio Supreme Court, which upheld the appellate court.

The court examined Ohio's merger statute, which provides that, after a merger, the surviving company possesses all the absorbed company's assets and property. As a result, after the merger, the employees' noncompetes were transferred to the L.L.C. However, the court held that the merger does not alter the language of the noncompetes and, therefore, the noncompetes were only enforceable according to their terms.

In this case, the noncompetes did not include language stating the agreements could be assigned or carried over to successors. Because of the noncompetes' language, the L.L.C. could not enforce the noncompetes as if it had stepped into the shoes of the original contracting company. Instead, the L.L.C. was only able to prevent the employees from competing for two years after ending their employment with the company that was a party to the noncompetes.

The court held that the employees did not violate their noncompetes because a merger involves the absorption of one company by another and the absorbed company ceases to exist after a merger. As a result, the employer-employee relationship ends, triggering the start of the noncompete period. In this case, after the L.L.C. absorbed Acordia, the companies with which the employees agreed not to compete ceased to exist. Accordingly, the employees' two-year noncompete periods had already expired when they began working at Neace Lukens, and the L.L.C. was not able to enforce the noncompetes against the employees.

Guidance for employers

This decision should remind employers of the importance of careful contract drafting. Employers should review their noncompetes to make sure they include language that provides for an agreement's continuation in the event of acquisition by another company. Employers that are considering a merger should evaluate the effect of a merger on their noncompetes. If successor companies cannot enforce noncompetes, the employer should require employees to sign new noncompetes. Indeed, the Ohio Supreme Court pointed out that the L.L.C. could have protected its goodwill and proprietary information by requiring the employees to sign new noncompetes as a condition of continued employment. Taking such proactive steps will place employers in the best position to protect their business.