

Nebraska Court Enforces Forum Selection Clause

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Nebraska's legal history on the enforceability of non-compete agreements is usually a surprise for employers who view Nebraska as pro-business. Nebraska courts routinely invalidate employee non-compete agreements that venture beyond restricting the employee from doing business with and soliciting customers with whom that employee did business and had personal contact. If there is a non-compete component to the agreement, or if the non-solicitation applies to all customers, Nebraska courts typically invalidate the entire agreement. Companies using a one-size-fits-all agreement for their Nebraska employees are routinely victimized by this surprise. The reaction is typically a scramble to litigate in a venue outside the Cornhusker state.

The reverse is also true. In a recent case, six former employees received cease and desist letters threatening litigation over non-compete agreement violations. Those employees and their new employer selected Nebraska as their venue - likely with knowledge a Nebraska court could invalidate the agreement.

In that case, *Consolidated Infrastructure Group, Inc., et al. v. USIC*, the former and current employer had a litigious history. Upon receiving cease and desist letters, six former employees and the new employer knew litigation was likely. Of the six, one was a Nebraska resident who lived and worked in Nebraska and two were Iowa residents who worked in Nebraska. The remaining three former employees did not allege they worked in Nebraska, nor were they Nebraska residents. The six, likely recognizing that a Nebraska court may invalidate the non-compete agreement with

their former employer, filed a declaratory judgment lawsuit in Nebraska federal court. The six asked the court to declare their agreements void and enjoin their former employer from future litigation relating to the restrictive covenant agreements. Almost simultaneously, the former employer filed a lawsuit against the individuals and their new employer in Indiana, the choice of law and forum in the non-compete agreements at issue.

The former employer moved to transfer venue of the Nebraska lawsuit to Indiana based on lack of personal jurisdiction and the venue selection clause in the agreements. The Nebraska court denied the motion to dismiss for lack of personal jurisdiction, finding that the former employer had sufficient minimum contacts. However, the court enforced the choice of venue clause in the agreement and granted the motion to transfer venue to Indiana. In enforcing the forum selection clause, the court also found the plaintiffs did not demonstrate the clause is unconscionable, the result of fraud, or that the agreements were not freely negotiated.

By securing a transfer of the case, the former employer likely saved its agreements from an expected finding of unenforceability by the Nebraska court.

The immediate takeaways from this case for employers are:

- Ensure the non-compete agreement is enforceable for the state in which the employee works. In this manner, there should be no surprises as to enforceability if the Company needs to file a lawsuit, or needs to defend against a declaratory judgment action.
- A valid forum selection clause in any agreement, including non-compete agreements, coupled with a choice of law provision, may help save the agreement. Choice of forum and choice of law provisions may not always be enforced, but in some cases, like this one, it could mean all the difference.

The case is CIG Inc. et al. v. USIC et al., Civil Action No. 8:16 cv 472 (D. Neb. May 18, 2017).

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