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# Noncompete Considerations As Businesses Reopen, Rehire

By: James Hays and Jamie Moelis

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In light of the COVID-19 pandemic, many employers have been forced to conduct staff layoffs as businesses were closed in compliance with shelter-in-place orders and subsequently rehire employees as lockdown restrictions have been lifted. One concern employers should bear in mind is how the layoffs and later rehiring of employees impact the enforceability of any previously agreed upon restrictive covenant agreements.

On June 2, the U.S. Court of Appeals for the First Circuit provided some guidance and a cautionary tale for the unsuspecting employer.

In Russomano v. Novo Nordisk Inc., the First Circuit affirmed a district court judgment that prevented pharmaceutical company Novo Nordisk from enforcing a confidentiality and noncompete agreement that it had entered into with employee Thomas Russomano, who was briefly laid off and rehired before leaving the company for a competing company.[i] Novo Nordisk sought to enforce the agreement signed with Russomano prior to his brief hiatus from the company in an effort to prohibit him from working for a competitor and sharing certain confidential information.

Russomano first joined Novo Nordisk in January 2016, and as a condition of his employment, signed a confidentiality and noncompete agreement. Russomano was laid off in November 2016, but was rehired in December 2016, and signed a new noncompete and confidentiality agreement.

In June 2018, Novo Nordisk informed Russomano that his employment "will end effective August 3, 2018" but three days later he was rehired into a new position with a start date of Aug. 6, 2018. Importantly, he was not asked to sign a new restrictive covenant agreement.

Russomano resigned from Novo Nordisk in January 2020. As Russomano was preparing to start his new position, he brought suit in Massachusetts state court seeking a declaratory judgment against Novo Nordisk that his future employment with a competitor of Novo Nordisk would not violate the confidentiality and noncompete agreements he signed while working at Novo Nordisk. Novo Nordisk removed the case to federal court and filed breach of contract, unfair competition and misappropriation of trade secret counterclaims in addition to seeking a restraining order and injunction.

Novo Nordisk argued that the confidentiality and noncompete agreement Russomano signed when he was rehired in 2016 still applied because he had been continuously employed since his rehire in December 2016. The U.S. District Court for the District of

Massachusetts denied the motion, finding that Novo Nordisk was unlikely to succeed on the merits.

On appeal, the First Circuit affirmed the district court's judgment, holding that the district court did not err in concluding that Novo Nordisk's June 2018 termination letter was unambiguous and that Russomano's employment ended on Aug. 3, 2018. While Novo Nordisk argued that it did not lay off Russomano, but rather transferred him to a different position in the company, the court held that the language in the June 2018 layoff letter and subsequent rehire letter were plain and unambiguous.

While the facts of each case will determine the enforceability of post-employment restrictive covenants, the lesson of Russomano v. Novo Nordisk is instructive for all employers. Employers should not assume that a rehired or recalled employee will be bound by the post-employment restrictive covenants signed prior to the layoff or termination.

Rather, as COVID-19 restrictions are lifted and businesses continue to reopen, employers are advised to assess each rehired or recalled employee's post-employment restrictive covenants and when appropriate have them sign a new post-employment restrictive covenant agreement following such breaks in service.

Further, in certain states, merely requiring the rehired or recalled employee to sign a new version of the agreement that they had signed previously will not be sufficient. For example, in Massachusetts, for a new noncompete agreement to be valid and enforceable certain additional requirements must be met.

For one, noncompete agreements entered into during employment must be supported by independent consideration beyond continued employment. Additionally, notice of the agreement must be provided at least 10 business days before the agreement is to be effective, the agreement must be in writing and signed by both the employer and employee, and the agreement must expressly state that the employee has the right to consult with counsel prior to signing.

Agreements that fail to comply with these procedural safeguards and other provisions of the Massachusetts Noncompete Law, which applies to all noncompete agreements entered into after Oct. 1, 2018, will not be enforceable.

In light of this ruling, employers should be wary of short gaps in employment, especially those that have occurred during the current COVID-19 pandemic. Employers should be particularly careful to examine the restrictive covenants in place for all employees who, because of COVID-19, may be returning from any break in service, to make sure that the recent events and alterations to business as usual did not have the unintended consequence of voiding their current post-employment restrictive agreement. [ii]

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[i] Russomano v. Novo Nordisk, 960 F.3d 48 (1st Cir. 2020).
[ii] Mass. General Laws c.149 § 24L.