

New Caselaw Sheds Light on Enforceability of No-Hire Agreements Between Companies

The Bottom Line

- *Parties entering into no-hire provisions should ensure that the provisions protect legitimate interests of the contracting parties, and that they are narrowly tailored to serve those interests.*
- *Parties should be mindful that no-hire provisions may not be enforced where the employees being poached did not work with the party bound by those no-hire provisions.*

Recent decisions signal that courts will carefully scrutinize “no-hire” and “no-poaching” agreements between companies, and that the enforceability of such agreements is not guaranteed. These agreements provide that one party will not hire — or poach — the employees of the other party to the agreement.

In *Lodging Sols, LLC v. Miller (Lodging Sols)*, the Southern District of New York refused to enforce a no-hire provision entered into in connection with a potential corporate transaction. Similarly, in *Pittsburgh Logistics Systems, Inc. v. Beemac Trucking, LLC, et al. (Pittsburgh Logistics Systems)*, the Pennsylvania Supreme Court refused to enforce a no-hire provision entered into in connection with a services agreement.

The *Lodging Sols* Decision

In *Lodging Sols*, a federal court addressed the enforceability of a no-hire provision in the context of a potential M&A transaction. The plaintiff, Accommodations Plus International (API), a travel management company, was approached by a potential purchaser (Fleetcor). Before commencing acquisition negotiations, API required Fleetcor to enter into a non-disclosure agreement that contained a no-hire provision. API included this no-hire provision because Fleetcor would obtain confidential information concerning API employees during the negotiations.

Ultimately, negotiations broke down and Fleetcor did not acquire API. A Fleetcor subsidiary then hired API's former Vice President of Business Development (Miller). API brought suit alleging that Fleetcor had breached the no-poach provision by hiring Miller. In considering the enforceability of the no-poach provision, the Southern District noted the lack of New York authority addressing how to interpret such provisions in the M&A non-disclosure agreement context. The court found that the provision was a restrictive covenant and, therefore, considered three possible tests for determining its enforceability:

- The stricter test applicable to employment contracts,
- The more-lenient standard used for the consummated sale of a business, and
- The “rule of reason” test.

Without reaching the issue of which test to apply, the court found that the no-hire provision at issue would fail any of the three tests because there was no allegation that Miller's hiring had anything to do with

information obtained by Fleetcor during the acquisition negotiations. Because the court found no connection between Miller's hiring and the M&A negotiations, it found that enforcing the provision would be unreasonable.

The *Pittsburgh Logistics Systems* Decision

Similarly, the Pennsylvania Supreme Court recently addressed a no-hire provision. Plaintiff Pittsburgh Logistics Systems (PLS) is a third-party logistics provider that arranges for the shipping of its customers' freight with selected trucking companies. Defendant Beemac Trucking (Beemac) is a shipping company that conducts non-exclusive business with PLS. PLS and Beemac entered into a services contract that contained a no-hire provision prohibiting Beemac from soliciting or hiring any PLS employees. Beemac subsequently hired four PLS employees.

PLS brought suit, arguing that the hiring of these four employees violated the no-hire provision. In analyzing the dispute, the court focused on the parties' protectable interests, as well as the potential harm to other contractual parties and the public.

While the court found that PLS had a "legitimate interest" in preventing its business partners from poaching its employees, it held the no-hire provision to be unenforceable because it was both "greater than needed to protect PLS's interest," and created a "probability of harm to the public." The court also found that the provision was overbroad because it precluded Beemac from hiring or soliciting *any* PLS employees regardless of whether the employees had done work for Beemac. The court further held that the provision created a likelihood of harm to non-parties to the contract (i.e. PLS employees) without their knowledge or consent, by limiting their employment opportunities and depriving the four relevant former PLS employees of their current jobs at Beemac.

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