



Court to Decide on Transfer of Non-Compete Agreements – Up Front

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by Amanda Bronstad

Finding a highly skilled employee is hard enough.

Now, the state Supreme Court is considering a case that could tip the scales against California employers by allowing out-of-state employers to enforce non-compete agreements in cases where a departing employee has moved to California.

The Court's decision, due within 90 days of the Oct. 9 hearing, could make hiring out-of-state job applicants with non-competes much riskier for California employers. It comes as part of a squabble between Medtronic Inc. and Sylmar-based Advanced Bionics Corp., which hired a former Medtronic employee.

"If out-of-state companies can enforce non-competes, then California employers will have difficulty in hiring employees from other parts of the country," said Robin Meadow,

an attorney at Greines Martin Stein & Richland LLP representing Advanced Bionics. "But because California cannot enforce non-competes, employers can come to California and hire employees any way they like."

Non-compete agreements forbid an employee from working for a competitor within a certain period of time in order to protect the employer's proprietary information and trade secrets. California is one of the only states that does not recognize non-compete agreements, including those made in other states.

Non-competes have been around for decades but have become increasingly important for large companies hiring high-level executives with knowledge of customer lists and other proprietary information. They are increasingly prevalent among high-tech companies, which in L.A. includes several computer electronics and biotech companies.

Ways around agreements

Marc Pelton, senior corporate counsel at Candle Corp., said the El Segundo-based software firm does not include non-compete clauses in its employment contracts because it knows it cannot enforce them in California court.

But the 300-person company does make employees sign a "conflict of interest" policy, which prevents an employee from working for a competitor or starting his own business while employed at Candle.

"We want to make sure a developer doesn't take trade secrets," said Christine Von Wrangel, its general counsel. "It doesn't protect us as much as we would hope, but when an employee terminates his employment, from that point on they don't have access to trade secrets."

Many California companies use other wording in employment contracts to protect their trade secrets in the absence of a non-compete agreement, said Jonathan Brenner, a labor and employment partner at Sidley

Austin Brown & Wood in L.A. Still, most of those agreements have failed when tested in court.

In a recent California 4th District Court of Appeal case involving Schlage Lock Co., a judge ruled the "inevitable disclosure doctrine" -- another device used by employers -- is unenforceable in California, said Lauraine Bifulco, president of Vantaggio HR Ltd., a human resource management and consulting firm.

"The California Appellate Court struck that down, saying this concept of inevitable disclosure does not fly because it's at odds with the same public policy regarding non-competes," Bifulco said.

Candle executives would not go so far as to say their out-of-state competitors have an advantage over them because they have non-competes. Rarely do non-competes end up in court, and most cover only the most specific and technical of jobs.

Still, they conceded that a non-compete agreement would help them protect themselves from competitors who steal their most valuable employees.

Candle's attorneys say the company would be hesitant to hire a new employee who comes

from another state with a non-compete agreement. "We would be concerned about that because we don't want to find ourselves in a position where he divulges trade secrets to us and the competitor comes after us," Von Wrangel said.

Close ties

Alfred Mann, co-chief executive and chairman of Advanced Bionics, also founded MiniMed, which was sold to Medtronic in August 2001, and the legal dispute between the two is not the first.

In February 2002, Advanced Bionics sued Medtronic for \$30 million after the Minneapolis conglomerate breached its contract to co-develop a neural pump with Advanced Bionics.

The fight over the employee, a former a senior product manager who left Medtronic in 2000, has been working its way through both the California and Minnesota courts almost from the moment the employee resigned.

Advanced Bionics argued in L.A. Superior Court that the non-compete agreement was void under the California Business and Professions Code.

Now, the California Supreme Court will decide whether California companies that hire out-of-state employees can file injunctions to prevent the previous employer from enforcing its non-compete agreement in its home state.

Rita McConnell, senior legal counsel for Medtronic, said that allowing an injunction challenges all out-of-state contracts, not just employment agreements.

Advanced Bionics, in filings to the Supreme Court, said opening up other states' ability to enforce non-competes could encourage more out-of-state employers to file suits against California employers.

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