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COMPETITION FOR NONCOMPETES: THE OHIO SUPREME COURT LIMITS ENFORCEMENT OF NONCOMPETITION AGREEMENTS BY SUCCESSOR ENTITIES

The Supreme Court of Ohio recently dealt a major blow to the ability of a surviving employer in a corporate merger to enforce the noncompetition agreements of its predecessor companies. In a 4-3 decision by the Court in a case called *Acordia of Ohio, L.L.C. v. Fishel*, it was held that when companies merge, noncompetition agreements between an acquired company and its employees transfer to the acquiring company as a matter of law, but those agreements are enforceable against the acquired employees *only according to the terms of the original agreement*. Consequently, when a noncompetition agreement does not explicitly provide that it can be assigned or carried over to successors, the agreement can only be enforced to the extent that the original employer could have enforced the agreement.

Justice Lanzinger, who wrote for the majority, explained, "[b]ecause the statute [Ohio Revised Code Section 1701.82] specifies that the new company takes over all the previous company's assets and property post-merger, it is clear that employee contracts transfer to the resulting company." However, the majority concluded, the successor company cannot enforce the noncompetition agreements as if it had stepped into the shoes of the specific company that had contracted with the employees. The majority reasoned that when a merger between two companies occurs, the company with which the employees have agreed to avoid competition ceases to exist and thus employment with that company ends. The merger , constitutes a separation from employment under the terms of the non-competition agreement, thus triggering the commencement of the restricted competition period.

In this particular case, because the noncompetition agreements at issue did not provide that they could be assigned to a successor, the Court found that the named parties intended the agreements to operate only between themselves—the employees and the original employer. The successor employer acquired the rights that the predecessor would have had at the time of merger, and, according to the Court, nothing more, and nothing less. That is, the successor employer would have the ability to prevent the employees it had acquired from the merger from competing for the contractually restricted period contained in the noncompetition agreement. This noncompetition period would; however, commence on the date of the merger by virtue of the same reasoning identified above: that the relevant employment relationship terminated with the original company named in the agreements when that company ceased to exist, thus starting the running of the noncompetition period.

For example, say Company A is merged with Company B on July 1, 2012. The employees of Company A had previously signed two-year noncompetition agreements with Company A, but those agreements did not assign any rights to Company A's successors. Company B will only be able to prevent those employees from working for a competitor for two years from the date of the merger, or until July 1, 2014.

The Court suggests that the successor company could have protected its goodwill and proprietary information by requiring that the employees sign a new noncompetition agreement as a condition of their continued at-will employment. In light of this landmark decision, Employers are advised to, at the very least, review their form noncompetition agreements. An audit may be preferable, which would include checking whether every employee who should have a noncompetition agreement has one that is consistent with current Ohio law.

Benesch has significant experience reviewing, drafting, and enforcing noncompetition agreements, and regularly assists clients in these types of matters.

To discuss the implications of the Ohio Supreme Court's decision and how it might affect your business, please contact one of the following Benesch attorneys:

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