

July 2005

## NewsFlash!

### EMPLOYEE'S NON-COMPETE AGREEMENT UNENFORCEABLE AFTER TRANSFER TO THIRD PARTY

By: Jeffrey R. Schmitt

People make a business go. Thus, a company's workforce is a valuable asset. One way for a company to maintain its workforce and protect the investment it makes in its employees is through the use of non-compete agreements. This is especially true where employees are either highly trained, such as in the medical or other scientific and professional fields, or have access to valuable company information, such as sales personnel.

#### Non-Compete Agreements as Assets

Non-compete agreements for these and other employees provide valuable protection not only to the employer, but can also be an attractive protection for a company's potential purchasers. In the eyes of a purchaser, employees and the terms of their employment represent assets. Certainly, following the purchase or acquisition of a business, a major source of concern for new ownership is a smooth transition and continuation of the business. The use of non-compete agreements provides extra incentive for employees to stay, and keeps them from competing with new ownership if they go.

#### Roeder v. Ferrell-Duncan Clinic, Inc.

A recent decision from the Missouri Court of Appeals for the Southern District greatly limits an employer's ability to transfer or assign an employee's non-compete

agreement to a third party. The Court, in the case of *Roeder v. Ferrell-Duncan Clinic, Inc.*, 155 S.W.3d 76 (Mo. App. S.D. 2004) ruled that a physician in a group practice was no longer bound by his non-compete agreement after the practice assigned his employment contract to a hospital. The Missouri Supreme Court denied a request for review of this case in March 2005.

In *Roeder*, the physician, Dr. Roeder, entered into an employment contract with a private group medical practice in Springfield, Missouri. The contract included a non-compete clause. In 2002, the practice entered into an agreement with a local hospital, providing for a joint employment agreement that would make the group's physicians employees of the hospital for purposes of medical malpractice coverage, essentially assigning the group physicians' employment contracts to the hospital. Dr. Roeder voted against the agreement.

The Court ruled that the group could not assign Dr. Roeder's employment contract to the hospital without his consent. It based its ruling in part on public policy prohibiting the assignment of contracts for personal services without the consent of both parties to the contract. Thus, because Dr. Roeder did not consent to the assignment of his contract to the hospital, he could leave the group and compete against it.

Questions? Call 314.726.1000

[www.dannamckitrick.com](http://www.dannamckitrick.com)

## The Impact

This Missouri decision is consistent with the law of other states that also prohibits the transfer, sale or assignment of a non-compete agreement under certain conditions. Any attempted assignment of an employment contract to a third party, as part of a sale, for benefit purposes, or otherwise, and without the employee's consent, is void and constitutes a breach of the employment contract. The third party will have no ability to enforce the employment contract against the employee, including any non-compete or other valuable provisions found in it. The original employer will have no ability to enforce the employment contract because it caused the breach.

It is important to recognize that a non-compete agreement will survive a change in business structure, such as statutory merger between two companies. The company surviving the merger can enforce an employment agreement against an employee because the merger does not cause an assignment to a third party, it is merely a change in the way in which the employer conducts business.

## What Should Employers Do?

Employers desiring the protection afforded by non-compete agreements and seeking to negotiate a sale or transfer of the business should obtain appropriate con-

sent from employees to ensure that these valuable protections also serve as assets that will make the business more attractive to potential purchasers.

Proper consent for the assignment of a non-compete agreement is also vital for employers not planning to sell, in order to avoid a situation like that in the *Roeder* case, where there was no sale, but merely an assignment of the employment contract for other strategic purposes, such as insurance benefits.

The employer should obtain the employee's consent to transfer or assign the non-compete agreement when the employee signs it. If the non-compete agreement is a provision of a larger employment contract, the employer would be wise to have the employee consent not only to the assignment or transfer of the employment agreement as a whole, but specifically consent to the assignment or transfer of the non-compete provision. Taking these steps provides the employer with the utmost protection in the event its future business strategies force a transfer or assignment of its employment contracts to a third party.

Of course, employers should not forget that non-compete agreements are generally not enforceable unless they are reasonable in terms of duration and geographic scope.

Questions? Call 314.726.1000

[www.dannamckitrick.com](http://www.dannamckitrick.com)

150 N. Meramec, Fourth Floor  
St. Louis, MO 63105



*Jeffrey R. Schmitt is an attorney in the firm concentrating in commercial and general civil litigation. His experience also includes corporate law, intellectual property, and a broad range of matters for small to mid-size businesses.*