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Oklahoma Supreme Court Clarifies Law Concerning Employee Non-Solicitation Agreement

The Oklahoma Supreme Court recently issued its opinion in the case *Howard v. Nitro-Lift Technologies, LLC*, deciding important issues related to non-solicitation agreements and defining the scope of a permissible non-solicitation clause.

Background of the Case

At issue in *Nitro-Lift* was whether Nitro-Lift could enforce its employment contract against former employees who were allegedly soliciting Nitro-Lift customers and employees. The non-solicitation provisions of the former employees' contracts limited for a period of two (2) years following separation: (1) employment by any business conducting the same business as the employer, (2) solicitation of any past or present customer or supplier of the employer, (3) engaging, employing, or recruiting for employment any employee or officer of the employer, and (4) loaning money to a business engaged in the same business as the employer, or selling or leasing equipment to any similar competing business. After Nitro-Lift served a demand for arbitration, the former employees filed a declaratory judgment action in state court, seeking an injunction to block the arbitration on the grounds that the employment contract was invalid.

Non-Compete Provision

The Oklahoma Supreme Court first reviewed the non-compete provision that prohibited the employees from working in any business competing with the former employer. Consistent with past cases, the Court recognized that (except in limited situations) employers cannot prohibit former employees from working in the same or similar business. The Court held the non-compete provision was void and unenforceable.

Non-Solicitation Provision

The Oklahoma Supreme Court then turned to the provision that prohibited the former employees from soliciting any past or present customer or supplier of Nitro-Lift. The Court held the employer could not restrict the former employees from interacting with the employer's suppliers and could not restrict the solicitation of the employer's past or future customers. Rather, the employer could only prohibit the employee from soliciting "established customers" defined as those with whom the employer had a relationship that was "ongoing and anticipated to continue into the future." Since the non-solicitation agreement used the term "present customer" and failed to define the term, the

Court found the entire provision void and unenforceable. This is significant because in past cases, courts would often rewrite an overbroad provision to make it conform with the law.

Non-Raiding Provision

The Court also examined the provision that prohibited the former employees from employing or recruiting any employee of Nitro-Lift. The Court found that it was improper to inhibit the former employees from employing Nitro-Lift employees, especially considering that those individuals might seek employment on their own initiative rather than from any solicitation by the former employees. The Court then held the entire non-raiding provision as void, suggesting that any non-raiding provision may be invalid under Oklahoma law. Oklahoma employers will have to wait for clarification from future cases to be certain whether it may restrict former employees from raiding current employees.

Effect on Employers

Given the Court's holding, employers should be careful to limit the scope of non-solicitation agreements as follows:

- Don't include expansive language prohibiting employees from being engaged in the same business as that conducted by the employer. Remember, in most cases, "non-compete" agreements are void.
- Don't place restrictions on the employee's ability to use suppliers of the employer.
- Do limit the non-solicitation provision to prohibit only the solicitation of "established customers" and provide a definition of "established customers" to comply with Oklahoma law.
- Do take a conservative approach when including non-raiding provisions in employment contracts until further clarification is provided by the Court.

Depending on the nature of the work performed and the employee's position, the agreement will need to be tailored to comply with these requirements. Should you have any questions concerning non-solicitation agreements or need assistance tailoring your non-solicitation agreements to conform with Oklahoma law, please contact any of our labor and employment law attorneys.

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