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Noncompetes Supported by 'Intending to Be Legally Bound' Phrase?

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Special to the Legal

You receive an email from one of your business clients asking you to call. It seems their current sales force has no employment contracts and they want you to draft employment agreements, including a noncompete, to stop them from leaving to work for their competition across the county. You pick up the phone and prepare to deliver the speech.

Many Pennsylvania employment lawyers have lived this client exchange ad nauseum: "In Pennsylvania, you must provide current employees with additional consideration for a noncompete to be effective." The client responds, "Like what?" You start to offer some possibilities: "You could provide a cash payment, participation in a bonus plan, additional vacation days, favorable change in job duties, a peppercorn." The consideration is resolved, or possibly not if the client abandons the idea, concluding the consideration is more expensive than the future competition.

But are you that daring attorney who advises the client they do not need to provide anything extra? Is there support for that notion?

Under the Uniform Written Obligations Act, 33 Pa. Cons. Stat. Ann. §6 (UWOA), a written agreement may not be avoided for lack of consideration if it contains language expressing the intent of the parties to be legally bound by the agreement. Every first-year associate has it drilled into him or her that no contract under Pennsylvania law may be drafted without the familiar "intending to be legally bound" phrase contained somewhere therein.

But contrary to what is normally discussed by and among employment attorneys, both state and federal courts in Pennsylvania have expressly held the UWOA applies to employment agreements and satisfies the element of consideration required for a noncompetition covenant entered into subsequent to the commencement of employment.

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The UWOA states: "A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound."

On at least two occasions, common pleas courts have held that the UWOA provides consideration for a noncompete provision entered into subsequent to the commencement of employment. In Losman v. Obritz, 25 Pa. D. &. C.2d 484 (Pa. Com. Pl. 1961), the defendant alleged his noncompete signed approximately seven months after the commencement of employment failed for lack of consideration. In support of its determination that consideration existed for the agreement, the court relied in part upon the UWOA stating, "In addition, the contract contains a provision in accordance with the [UWOA] to the effect that the parties 'intend to be legally bound.' An instrument containing such a statement is enforceable even though no consideration passes."

In Liberty Mut. Ins. v. Millham, 33 Pa. D. &. C.2d 97 (Pa. Com. Pl. 1963), the defendant also challenged the enforceability of a noncompete entered into during the employment relationship on the basis of lack of consideration. In reaching its conclusion that consideration existed for the restrictive covenant, the court relied, in part, upon the UWOA stating, "The language of the agreement itself, executed by the parties, points to the defendant's intention to be legally bound by its terms, placing the agreement within the purview of the [UWOA]."

More recently, federal courts sitting in Pennsylvania have addressed the precise issue of whether the UWOA provides consideration for a noncompete provision entered into subsequent to the commencement of the employment relationship, and have expressly held that it does.

In Latuszewski v. Valic Financial Advisors, No. 03-0540, 2007 WL 4462739, at *1 (W.D. Pa. Dec. 19, 2007), the U.S. District Court for the Western District of Pennsylvania held the UWOA can provide consideration for a noncompetition covenant entered into subsequent to the commencement of the employment relationship. The court stated, "Under the Uniform Written Obligations Act, a written agreement may not be avoided for lack of consideration if it contains language expressing the intent of the parties to be legally bound by an agreement. ... The statement of intent of the parties to be legally bound acts as a valid substitute for consideration. We find that the Uniform Written Obligations Act applies to the 2002 agreement."

The court significantly relied on the fact that the UWOA does not exempt employment contracts, or more specifically, noncompete covenants, from its coverage, noting that its research revealed the state Supreme Court, U.S. Court of Appeals for the Third Circuit nor any

other appellate court in Pennsylvania has ever ruled as such.

The court held the provision in the defendant's agreement that the employee "agree[s] to be legally bound by all the terms and conditions of this registered representative agreement" satisfies the requirements of the UWOA and expressed the defendant's intention to be legally bound by the agreement. Accordingly, the court held "the statement of intent to be legally bound acts as a substitute for consideration, fulfilling the requirement under Pennsylvania law that noncompete covenants added after the commencement of employment be supported by new consideration."

This line of cases broadens the already expansive gray area of noncompetes and makes accurately predicting how an injunction will be decided that much more difficult.

In Wound Care Centers v. Catalane, No. 10-336, 2011 WL 553875, at *1 (W.D. Pa. Feb. 8, 2011), the court held the agreement at issue (provided to the employee after the employment relationship had begun) fell within the purview of the UWOA and "cannot fail for lack of consideration if the writing contains a statement that the signer intends to be legally bound." The court concluded the agreement, which contained the language "intend to be legally bound" was therefore supported by consideration.

In QVC v. Tauman, No. Civ. A. 98-1144, 1998 WL 156982, at *1 (E.D. Pa. April 3, 1998), the U.S. District Court for the Eastern District of Pennsylvania held the language "intending to be legally bound and in consideration of the promises and agreements made by QVC ... in the foregoing agreement" directly above the signature lines of the agreement met the requirements of the UWOA and constituted sufficient consideration to support a restrictive covenant entered into subsequent to the commencement of the employment relationship. See also McGuire v. Schneider, 534 A.2d 115 (Pa. Super. 1987), (in a dispute over which of two documents regarding employment agreements were to govern the parties' employment relationship, the court ruled that under the UWOA, a statement of intention to be legally bound removed lack of consideration as a ground for avoiding one of the contracts).

The one case found that does not concur, although older than the subsequent federal court decisions above, is Surgical Sales v. Paugh, 1992 U.S. Dist. LEXIS 3893 (E.D. Pa. March 31, 1992), holding that the UWOA does not supersede the requirement under Pennsylvania law that noncompete covenants added after the commencement of employment must be supported by new consideration.

Let's be clear: It's not that consideration isn't required. It is, although some cases refer to the UWOA as providing a "substitute" for consideration. And the UWOA doesn't quite say that the expression of intent is sufficient consideration, but states the converse, that an agreement "may not be avoided for lack of consideration," which under the case law seems to be a distinction without a difference. Also, this concept only applies to noncompetes (not nonsolicitation provisions, which, incidentally, are a separate frustration because there is no clear answer under Pennsylvania case law whether a nonsolicitation provision needs to be supported by additional consideration) of current employees, because the hiring of new employees is sufficient consideration to support the noncompete.

Moreover, the so-called "magic language" of "intending to be legally bound" is unnecessary to satisfy the consideration requirement of the UWOA. The language of the agreement in Millham stated, "The company, in addition to other legal and equitable rights and remedies, shall be entitled to injunctive relief to restrain any actual or threatened violation of this agreement." The fact that the overall language of the agreement manifested the intent of the parties to be legally bound without the actual words "intending to be legally bound" did not deter the court from holding that the agreement fell within the purview of the UWOA. The court stated, "I should not look to defeat the patent purpose of the act and construe the agreement's wording to be beyond the scope of the act merely because of the absence of the words 'I intend to be legally bound.'" Most attorneys state that intention succinctly. The following familiar phrase, under the case law, should be sufficient to defeat a challenge that a noncompete fails for lack of consideration: "Employee and the company, both intending to be legally bound by each term of this agreement, agree as follows."

Although these cases may be well and good, we cannot ignore the practical and business advice to the client given there is no case support from the Superior Court, Commonwealth Court or Supreme Court. And with the general presumption against the enforcement of noncompetes, it certainly feels as if the UWOA argument would be difficult standing in front of a judge at an injunction hearing.

So are you that daring and bold attorney? Would you advise your client not to provide anything extra and rely on the UWOA? I suspect most would not. Although it would be exciting to argue the case to the Pennsylvania Supreme Court (and be the hero of employer-side attorneys across the state if you prevail), your client may not share your enthusiasm for a multi-year appeal. But I presume the appellate case will not arise from courageous advance advice, but defensively, i.e., an employer relying upon the UWOA because it has no other choice — because additional consideration simply was not provided to current employees at the time of signing.

This line of cases broadens the already expansive gray area of noncompetes and makes accurately predicting how an injunction will be decided that much more difficult. So if you have nothing else in your case, argue the UWOA with confidence, and maybe it will stand as the one to eliminate tangible consideration for noncompetes in Pennsylvania. •