

Forum selection clauses can mean savings for employers

By Christopher J. Marino



When it comes to the enforcement of restrictive covenants, such as non-compete, non-solicitation and confidentiality agreements, not all states are created equal. The very same restrictive covenant enforced in one state may be unenforceable in another.

Most employment agreements address the issue by adding a choice of law provision, which chooses the state law that will apply to the agreement. Yet, a choice of law provision by itself is not enough.

Employers should also include a forum selection clause — a provision that selects where litigation will occur. While including a forum selection clause increases the employer's likelihood of success, a surprising number of agreements do not contain one.

The importance of a forum selection clause was reaffirmed by the U.S.

Supreme Court in December 2013 in *Atlantic Marine Construction, Co., Inc. v. United States District Court of Western Texas*, when the court held that, under federal law, a forum selection clause will be enforced in all but the most exceptional cases.

Companies use and enforce restrictive covenants because they spend tremendous resources creating trade secrets and confidential and proprietary information. A competitor should not be able to shortcut that development time and expense by hiring away key employees who, for example, created the marketing campaign, understand the company's price structure or profit margins, or developed the newest product line.

In today's world, losing key employees is inevitable. Restrictive covenants ensure that the loss of an employee does not result in the loss of a company's competitive advantage through the misappropriation of its business information.

If there was ever any doubt as to the value of a choice of forum provision, the Supreme Court's recent decision helped remove that doubt. Employees often file suit in their local court, arguing the forum selection clause should be ignored because it is unfair to make them travel

to a foreign state to litigate against a well-financed company.

But that is the very argument the Supreme Court rejected in *Atlantic Marine* as irrelevant, holding that the federal courts should not consider the hardship to an individual in litigating the case in a different state.

While the Supreme Court's decision is not binding on state courts, its reasoning is one that the state courts most likely will adopt.

Forum selection clauses allow the employer to move faster and more efficiently in protecting itself, while lessening the burden and risk on a company by providing it with the opportunity to choose where litigation will occur. They do not guarantee success, but they increase the likelihood that the company will avoid having to protect its business information in a potentially hostile foreign state.

The Supreme Court's decision should motivate employers to review their employment agreements to ensure they include a forum selection clause. **NEH**

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