# Restrictive Covenant Agreements

## Description

### COVID Furloughs, Layoffs or Job Modifications May Void Your Existing Non-Competition Agreements

With Rhode Island and Massachusetts having recently commenced Phase 2 of each of their respective "Reopenings," more and more employers are currently bringing employees back to work who had been previously furloughed or laid off due to the COVID-19 pandemic. Employers are also finding that the temporary adjustments to workflow during the pandemic are causing them to reexamine their workforce and personnel and as a result substantively modify the job duties of employees.

In any of these situations, employers may need to require employees to sign new restrictive covenant agreements, such as non-competition, non-solicitation and non-disclosure agreements. A furlough is essentially a leave of absence for a current employee (which generally should not trigger the need to sign a new agreement) while a layoff is a termination of employment (which should always trigger the need to sign a new agreement). However, because employers commonly use these terms interchangeably or sometimes incorrectly, employers planning to furlough employees should be explicit that the furlough is taking the form of an unpaid leave of absence to mitigate the risk of restrictive covenants being invalidated should a new agreement not be obtained. A recent decision from the First Circuit Court of Appeals (which has jurisdiction over both Rhode Island and Massachusetts) shows why issuing new restrictive covenant agreements is so crucial.

In *Russomano v. Novo Nordisk Inc*., Russomano signed a non-competition agreement in 2016 that prohibited him from competing for twelve months following his termination. The company eliminated his position and terminated his employment on August 3, 2018. However, Russomano was then transferred to another position within the company only three days later. Russomano was not required to sign a new non-compete agreement as part of accepting this new job (as Russomano described it) or transfer (as the company described it).

Fast forward to January 6, 2020, when Russomano leaves the company and begins working for a competitor shortly thereafter, and the company then claimed that his conduct violated the non-competition agreement.

The First Circuit disagreed with the company, finding that the twelve-month restrictive period started to run on August 4, 2018, when Russomano was terminated, and ended twelve months later on August 3, 2019. Because Russomano did not sign a new agreement when his new job started, the Court ruled that, as of the time his employment was terminated in 2020, there was no non-competition agreement in place.

While Russomano is a somewhat easy decision based upon the Court's finding that there was a clear break in service when Russomano was terminated on August 3, 2018 and technically unemployed for a few days, courts have long held that any substantive change in even a current employee's job duties may void an existing restrictive agreement and trigger the need for the employee to sign a brand new restrictive agreement.

Employers need to be particularly careful to examine the restrictive covenants in place for all employees who, because of COVID issues, may be returning from any break in service or just having their job duties substantively modified on a going-forward basis, to make sure that the recent events and alterations to "business as usual" did not have the unintended consequence of voiding the current restrictive agreement.

Employers are encouraged to contact the Partridge Snow & Hahn Employment & Labor Group with regards to the drafting of any such restrictive covenant agreement, particularly when it comes to non-competition agreements because Massachusetts and Rhode Island each have relatively new state laws curtailing the

enforceability of new agreements, which we discussed in previous client alerts here and here.

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