Employment & Labor Relations Law

AMERICAN BAR ASSOCIATION

Section of Litigation Spring 2007 Vol. 5 No. 3

Plan of Attack: Evaluating and Litigating Noncompete Cases

By John W. Simmons

Your client calls and says the star of the business who has the relationships with the most valuable customers has just jumped ship. The customers are now all using the former employee and his or her new employer. The former employee is hiring away your client's other employees, too. It all happened so fast and with such a smooth transition that the client suspects this was planned before the employee departed. The client called the former employee and demanded he or she comply with the noncompete agreement, but the former employee said it was not enforceable and that he or she did not intend to stop. What do you do? This article provides observations of what to look for in deciding what to do to assert your client's rights under a noncompete agreement.

Is there an agreement and what are the chances of enforcement?

The first step is to find the agreement containing the noncompete. It is not always easy to find the agreement, and the passage of time from the time of execution increases the possibility that the agreement will be difficult to obtain. If we find the agreement, then what does it say? Does the noncompete language match the job the employee is or was doing? Old agreements often do not fit the job the employee was performing at the time he or she left. The terms of the restrictive covenant may not provide the protections needed. For instance, the client may need protection from the solicitation of certain customers and the use of confidential information related to those customers, but the restrictions may only address competition in a geographic area, often not the area where

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Kentucky River Trilogy Challenges Big Labor's Organizing Strategy

By Todd P. Photopulos

In the fall of 2006, the National Labor Relations Board (NLRB) issued three decisions clarifying the definition of "supervisor" under the National Labor Relations Act (NLRA). These decisions, collectively referred to as the *Kentucky River* Trilogy, will have a profound impact on labor's organizing strategy, especially in the healthcare sector, as these cases call into question one of the cornerstones of organized labor's campaign strategies: using frontline workplace leaders to organize a facility.

The Impact of the *Kentucky River* Trilogy on Organizing Strategy

The *Kentucky River* Trilogy significantly expanded who could be considered a supervisor under the act. Individuals considered supervisors under the NLRA do not have the right to join, form, or assist unions; cannot vote in NLRB elections; and cannot engage in strikes. More significantly, the NLRA allows employers to demand the loyalty of statutory supervisors, including the requirement that such individuals participate and assist in the employer's policy of remaining union-free during an organizing campaign.

In the healthcare industry, unions have enjoyed significant organizing

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