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Virginia Bans Non-Competition Provisions Against "Low-Wage Employees" and Further Restricts the Reach of Such Restrictive Covenants:

How Can Employers Protect Themselves From Unfair Competition by A Departing Employee?

Virginia's New Code Section 40.1-28.7:8

In the 2020 Legislative Session Governor Ralph Northam signed House Bill (HB) 330, Virginia's first law banning covenants not to compete for "low-wage employees"— effective as of July 1, 2020. The definition of "covenant not to compete" included in the new statute further provides that employers may not "restrict an employee from providing a service to a customer or client of the employer if the employee does not initiate contact with or solicit the customer or client."

The law broadly defines the term "covenant not to compete" to include a "covenant or agreement, including a provision of a contract of employment, between an employer and employee that restrains, prohibits, or otherwise restricts an individual's ability, following the termination of the individual's employment to compete with his former employer."

The law defines "low wage" as one whose average weekly earnings are less than the average weekly wage of the Commonwealth (which is equal to the maximum workers' compensation benefits allowed by the Virginia Workers' Compensation Commission). This amount is adjusted annually but as of July 1, 2020 this threshold was $1,137 per week, which equates to an annual salary of $59,124. The law specifically excludes employees whose earnings are derived, in whole or in predominant part, from sales commissions, incentives, or bonuses.

The new law does contain some ambiguity related to enforcement of a customer and/or employee non-solicitation provision. If a customer and/or employee non-solicitation provision is interpreted to fall under the broad term of "covenant not to compete" contained in the new statute, then they may be prohibited in their entirety against "low-wage" employees. However, as noted above, the definition of the term "covenant not to compete" now provides that employers may not "restrict an employee from providing a service to a customer or client of the

employer if the employee does not initiate with or solicit the customer or client" leading to a compelling argument that a narrowly tailored customer non-solicitation provision may still be lawful even for "low-wage" employees.

The new law applies to covenants not to compete that are entered on or after July 1, 2020 only. It also requires that employers post a copy of the law or a summary approved by the Department of Labor and Industry in the workplace or be subject to a fine of up to $1,000 for repeat violations. The new law also includes a stiff penalty against employers of $10,000 that violate the law. Specifically, an employer cannot "enter into, enforce, or threaten to enforce" a covenant not to compete with any "low-wage employee." The new law also provides that a prevailing plaintiff may also recover liquidated damages, lost compensation, and reasonable attorney's fees and costs (including expert witness fees).

The new law also contains a specific provision making it clear that nondisclosure agreements "intended to prohibit the taking, misappropriating, threatening to misappropriate, or sharing of certain information, including trade secrets, as defined in §59.1-336, and proprietary or confidential information" are still allowable.[1]

In light of newly enacted Va. Code §40.1-28.7:8 employers are well-advised to take the following actions now:

- ***Ensure that you are not requesting that "low-wage employees" enter a non-competition provision after July 1, 2020.***

- ***Ensure that you post a notice in the workplace advising of this new law.***

- ***Ensure that any non-competition provision entered after July 1, 2020 includes language that any restrictive covenant is limited only to instances where the departed employee has initiated contact with or solicited the customer or client.[2] Further, as***

[1] Va. Code Ann. §40.1-28.7:8(C)

[2] Va. Code Ann. §40.1-28.7:8(A).

always, be sure that your restricted covenants are limited in terms of duration, geographic reach and the scope of activity restricted.

- ***Be certain that you have employees execute nondisclosure agreements that prohibit the taking, misappropriating, threatening to misappropriate, or sharing of trade secrets and proprietary information.***

- ***Take inventory of your company's trade secrets (customer lists, manufacturing processes, etc.) and be certain that you are taking reasonable measures to protect them so as to trigger a claim under Virginia's Uniform Trade Secrets Act (discussed more fully below) should they be misappropriated.***

In evaluating a non-competition provision Virginia courts use a three prong test: (1) Is the restraint, from the standpoint of an employer, reasonable in the sense that it is no greater than necessary to protect the employer in some legitimate business interest? (2) From the standpoint of an employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to mean a livelihood? and (3) Is the restraint reasonable from the standpoint of a sound public policy?[3]

In assessing reasonableness, Virginia courts focus on three factors: (1) the duration of the restraint; (2) the geographic scope of the restraint; and (3) the scope and extent of activity being restricted.[4] Non-competition provisions remain disfavored as a matter of law since they are restraints on trade and any ambiguities will be construed in favor of the employee.

While Va. Code §40.1-28.7:8 does significantly curb the use by Virginia employers of non-competition provisions, the Virginia employer should be aware of other potential civil claims against departing employees that unfairly compete. Moreover, potential claims against the departing employee's new employer should also be considered. We will quickly examine some typical claims available and then offer some final additional practical advice for employers.

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[3] New River Media Group, Inc. v. Knighton, 245 Va. 367, 369, 429 S.E.2d 25, 26 (1993); Simmons v. Miller, 261 Va. 561, 580-81, 544 S.E.2d 666, 678 (2001).

[4] Simmons, 261 Va. 561, 581, 544 S.E.2d 666, 678 (2001).

Breach of Potential Confidentiality/Non-Disclosure Agreement

As noted above, newly enacted Va. Code §40.1-28.7:8 specifies that confidentiality/non-disclosure agreements are still permitted in Virginia.

Breach of Potential Non-Solicitation of Employees and/or Customers

As noted above, the newly enacted Va. Code §40.1-28.7:8 does create some ambiguity as to whether non-solicitation of employees and/or customers would fall under the broad definition of "covenant not to compete"; thus, precluding use of these agreements with "low- wage employees." The Supreme Court of Virginia applies the same three prong test referenced above to these types of agreement that they do to non-competition agreements.[5]

Breach of Fiduciary Duty

All at-will employees owe a fiduciary duty to their employer during their employment.[6] An employee's fiduciary duty to his employer prohibits the employee from acting in a manner adverse to the employer's interest.[7] Included within this general duty of loyalty is the more specific duty not to compete with your employer during your employment.[8] This tends to be a very fact-specific determination. Further, a fiduciary duty continues after the termination of the employment when there is a continuation of "transactions" that began during the existence of the employment relationship or that were founded on information gained during the relationship.[9]

Violation of Virginia's Computer Crime Act

Under Virginia's Computer Crime Act— Va. Code Sections 18.2-152.1 through 152.15— it is "unlawful for any person, with malicious intent to … erase any computer data, computer programs or computer software….or…make or cause to be made an unauthorized copy…or

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[5] Lanmark Technology, Inc. v. Canales, 454 F. Supp. 2d 524, 528 (E.D. Va. 2006) (citing Richardson v. Paxton Co., 203 Va. 790, 127 S.E.2d 113, 117 (Va. 1962).

[6] Williams v. Dominion Tech. Partners, LLC, 265 Va. 280, 576 S.E.2d 752 (2003).

[7] Hilb, Rogal and Hamilton Co. v. DePew, 247 Va. 240, 440 S.E.2d 918, 921 (1994); Greenspan v. Osheroff, 232 Va. 388, 400, 351 S.E.2d 28, 37 (1986).

[8] Id. at 289.

[9] Today Homes, Inc. v. Williams, 272 Va. 462, 634 S.E.2d 737 (2006).

computer data, computer programs or computer software residing in… a computer or computer network." To recover in a civil suit, the employer must show injury.[10]

Misappropriation of Trade Secrets

The tort of misappropriation of trade secrets is codified in the Virginia Uniform Trade Secrets Act (VUTSA)— Va. Code §§59.1-336 through -343. The Act defines this tort as:

> "1. Acquisition of a trade secret by a person who know or has reason to know that the trade secret acquired by improper means; or 2. Disclosure or use of a trade secret of another without express or implied consent by a person who used improper means to acquire knowledge of the trade secret; or at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it; acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or acquired by accident or mistake.[11]

The Act defines a 'trade secret' as:

> "information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that: derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[12]

Acquisition through "improper means" includes acquisition through "theft, bribery, misrepresentation, breach of a duty to maintain secrecy, or espionage through electronic or other means."[13] This list is non-exhaustive.[14]

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[10] Va. Code Ann. §18.2-152.1, et *seq.,* and Va. Code Ann. §8.01-40.1.

[11] Va. Code Ann. §59.1-336.

[12] Id.

[13] Id.

[14] MicroStrategy, Inc. v. Business Objects, S.A., 331 F. Supp.2d 396, 415 (2004).

A customer list may qualify as a trade secret presuming reasonable measures were taken to protect its secrecy and that it derives independent economic value in not being generally known.[15] The crucial characteristic of a trade secret is secrecy rather than novelty.[16]

The VUTSA also contains a preemption provision that "displaces conflicting tort, restitutionary, and other law of th[e] Commonwealth providing civil remedies for misappropriation of a trade secret"[17] except for contractual remedies (whether or not based upon misappropriation of a trade secret), other civil remedies that are not based upon misappropriation of a trade secret, and criminal remedies (whether or not based upon misappropriation of a trade secret.[18]

Common Law and/or Statutory Conspiracy

A common law conspiracy consists of two or more persons combined to accomplish, by some concerted action, some criminal or unlawful purpose or some lawful purpose by a criminal or unlawful means.[19]

Examples of unlawful means includes such things as conspiracy to breach fiduciary, contractual, employment, and other duties to a plaintiff, including unlawful conversion of confidential and proprietary information.[20]

A statutory conspiracy under Va. Code §§18.2-499 and-500 requires establishing that two or more persons have combined, associated, agreed, mutually undertaken or acted in concert for the purpose of willfully and maliciously injuring another in their trade, business, or profession

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[15] See e.g. SanAir Techs. Lab., Inc. v. Burrington, 91 Va. Cir. 206 (2015); Physicians Interactive v. Lathian Sys., No CA-03-1193-A; 2003 U.S. Dist. LEXIS 22868, at **23-24, (E.D., Va. Dec. 5, 2003); Int'l Paper Co. v. Gilliam, 63 Va. Cir. 485, 492 (2003).

[16] Dionne v. Southeast Foam Converting & Packaging, 240 Va. 297, 302, 397 S.E.2d 110, 113 (1990).

[17] Va. Code Ann. §59.1-341(A).

[18] Va Code Ann. §59.1-341(B).

[19] Commercial Business Sys.,Inc. Bellsouth Services, Inc., 249 Va. 39, 48, 453 S.E.2d 261, 267 (1995).

[20] Catercorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 26, 431 S.E.2d 277, 281 (1993).

by any means whatsoever. To prove a violation of this statute, the plaintiff must show that the conspirators acted with malice, meaning they acted intentionally, purposefully, and without justification. Treble damages and recovery of attorney's fees are available under this cause of action.

Conversion

Conversion is defined under Virginia law to include any wrongful exercise or assumption of authority over another's goods, depriving the other of possession and any act of dominion wrongfully expected over property in denial of the owner's right or inconsistent with it.[21]

Tortious Interference With Contract and/or Business Expectancy

The following must be established for a viable claim for tortious interference with contract and/or business expectancy: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of that relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted.[22]

If the disrupted contract is at-will employment, the plaintiff must allege and prove "not only an intentional interference that caused the termination of the at-will contract, but also that that the defendant employed improper methods."[23]

Employers should carefully consider the potential claims referenced above in instances where a departing employee unfairly competes.

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[21] Universal C.I.T. Credit Corp. v. Kaplan, 198 Va. 67, 92 S.E.2d 359 (1956).

[22] Duggin v. Adams, 234 Va. 221, 226, 360 S.E.2d 832, 836 (1987).

[23] Id. at 226-27, 360 S.E.2d at 836.

Some final recommendations for Virginia employers to consider to protect their business interests:

- ***Review a departing employee's computer devices to determine potential violations of Virginia's Computer Crime Act, misappropriation of trade secrets and/or evidence of breach of fiduciary duty.***

- ***Does your company have a policy requiring business be conducted only on employer issued cell phones and computers? Do your employment agreements specify that all such devices and other company property must be promptly returned upon termination of employment? If not, you may wish to consider enacting such policies.***

- ***Is your company employing reasonable measures to protect its trade secrets? For example, are you clearly communicating to employees that trade secret property is in fact a trade secret and further requiring execution of confidentiality agreements? Are you limiting disclosure of trade secrets within the company to only those individuals who need the trade secrets in order to perform their jobs? Are you employing password protections on computers containing trade secrets, restricting access to parts of your premises containing trade secrets, etc.?***

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