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EMPLOYMENT, LABOR & BENEFITS LEGAL UPDATE

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Go Figure: The Rule of Reason Prevails

The Wisconsin Court of Appeals in Selmer Company v. Timothy Rinn and Ganther Construction, Inc. ("Selmer Company") recently addressed whether restrictive covenants, such as non-solicitation and non-compete provisions, in agreements other than employment agreements are subject to Wisconsin's statute governing restrictive covenants. In Wisconsin, most restrictive covenants arising from an employment arrangement are governed by the restrictive covenant statute. The courts have said that if a restrictive covenant is governed by the restrictive covenant statute, it must withstand close scrutiny by a court in regard to its enforceability and it will be construed in favor of the employee. Restrictive covenants that are governed by the statute include employment agreements executed at the inception of employment and agreements where the employer has a bargaining advantage over an employee, such as a unilateral amendment to a profit-sharing or retirement plan.

However, not all restrictive covenants in the employment context fall under the terms of the statute. For those that do not, the courts apply a common law "rule of reason" standard to determine the enforceability of the restrictive covenant. The rule of reason standard is less demanding and, therefore, there is a greater chance that a restrictive covenant subject to this standard will be found enforceable. Consequently, it is advantageous to an employer if a restrictive covenant is reviewed by a court applying the rule of reason standard as opposed to the more limiting terms of the restrictive covenant statute.

In Selmer Company, an employee agreed to a stock option agreement which contained restrictive covenants. However, after receipt of the stock options, the employee tried to avoid his end of the bargain; that is he refused to abide by the restrictive covenants. The Court of Appeals reviewed the restrictive covenants contained in the stock option agreement. The Court found that the restrictive covenant should be reviewed using the lesser rule of reason standard, rather than the statutory restrictive covenant standard, because the employee did not sign the stock option agreement as a condition of his continued employment (i.e., did not sign because of the employment arrangement), as evidenced by the fact that the employee would not have suffered any adverse consequences with regard to his

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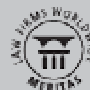

employment if he had refused to sign the agreement. In fact, the agreement was of substantial benefit to the employee because it granted him stock options that permitted him to purchase stock in the company at favorable prices. Applying the rule of reason standard, the Court upheld the restrictive covenants.

In light of this decision, it is clearly possible for employees to enter into agreements containing restrictive covenants without the covenants being subject to the restrictive covenant statute. For employers, this is beneficial because a court is more likely to uphold a restrictive covenant that is evaluated under the rule of reason standard than under the statute.

Employers should keep the Court's ruling in mind when several agreements may be used with regard to an employee because including restrictive covenants in something other than an employment-type agreement may render it enforceable, whereas inclusion in the employment agreement may not.

If you have questions regarding the above, please contact Jeff Jones or Terri Smith, the authors of this article, or any of the attorneys in the Employment, Labor & Benefits Practice Group of Ruder Ware: Ron Rutlin, Dean Dietrich, Mary Ellen Schill, Chris Toner, or Sara Ackermann in the Wausau office at 715.845.4336 or Shawn Rauckman in the Eau Claire office at 715.834.3425.

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Ruder Ware's Employment, Labor & Benefits practice group works in tandem with private and public employers providing counsel on all aspects of human resource management. The breadth of services offered, unique for a law firm headquartered in Wausau, Wisconsin, includes counsel on highly sensitive issues such as workplace harassment, employee privacy, drug and alcohol testing, and disciplinary issues. In addition, attorneys design and assist with the development, implementation, and enforcement of policies and procedures relating to benefits, hiring practices, employee handbooks, state and federal discrimination laws, FMLA, FLSA, ADA, OSHA, and workers' compensation.

Attorneys in the group regularly represent public and private sector employers in collective bargaining, negotiations, union elections, unfair labor practices, and grievance arbitration matters in addition to guiding nonunion clients on maintaining their union-free status.

Actively involved in organizations with human resource professionals as the primary member base, our attorneys are in tune with the various sensitivities and complexities of the profession. Our attorneys often present seminars and in-house training on employment law topics both across the state and nationwide.

Areas of practice by the Employment, Labor & Benefits practice group:

- Employee Benefits & Executive Compensation
- Employment Law
- Labor Law

Wausau - 500 First Street, Suite 8000, P.O. Box 8050 Wausau, WI 54402-8050 | Phone: 715.845.4336
Eau Claire - 402 Graham Avenue, P.O. Box 187, Eau Claire, WI 54702-0187 | Phone: 715.834.3425
www.ruderware.com

Employment, Labor & Benefits Attorneys

Dean Dietrich, Chair
ddietrich@ruderware.com

Jeff Jones
jjones@ruderware.com

Ron Rutlin
rrutlin@ruderware.com

Mary Ellen Schill
meschill@ruderware.com

Sara Ackermann
sackermann@ruderware.com

Shawn Rauckman
srauckman@ruderware.com

Chris Toner
ctoner@ruderware.com

As part of a full-service law firm, our attorneys provide clients with a one-stop approach to their legal needs. Ruder Ware, the largest Wisconsin law firm headquartered north of Madison, also provides legal counsel in Business Transactions; Litigation & Dispute Resolution; and Trusts & Estates.