NEWS

Employment Lawyers Clash While Lawmakers Weigh Limits on Noncompete Agreements

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Charles Toutant

Employment Law

6 minute read

While New Jersey lawmakers debate measures to limit the reach of employment noncompete agreements, litigation between employers and former employees accused of violating such pacts continues to surge.

In New Jersey, a fierce battle is being fought in the solar power industry, where employers have filed at least 10 suits against employees who left to join competing companies. Meanwhile, a measure to regulate noncompete clauses, A-1650, awaits passage by the Assembly after a 6-3 vote from its Labor Committee in February.

The suits generally claim that competitors have launched schemes to poach skilled managers, sales representatives and installers and to steal trade secrets and proprietary information in violation of noncompete, nonsolicitation and confidentiality clauses.

Trinity Solar, headquartered in Wall Township, has at least seven suits pending in New Jersey state courts accusing former employees of violating noncompete clauses. Momentum Solar of South Plainfield has filed two such suits, which are pending in the U.S. District Court for the District of New Jersey.

The debate over noncompete clauses is one where conflicting ideologies can find agreement, said Neil Mullin, an employment lawyer at Smith Mullin in Montclair who is not involved in the solar energy litigation. Those on the right often think noncompete clauses hamper competition

and those on the left tend to think that noncompete clauses unduly limit the options of workers, Mullin said.

Mullin said New Jersey courts have allowed noncompete agreements if they are narrowly tailored and focused on the business needs of the employer, such as safeguarding intellectual property or client lists.

“New Jersey courts have been pretty reasonable in terms of placing time and geographic restrictions. New Jersey courts look at what is really at stake: is this former employee really going to steal a customer or are they being unduly limited? That’s a line New Jersey courts are sensitive to,” Mullin said.

New Jersey courts have been fairly tolerant of noncompete clauses, a stance that’s consistent with a state economy that’s dominated by big pharmaceutical and chemical companies, rather than by startup companies, said Alan Hyde, who studies the economics of labor mobility at Rutgers Law School-Newark. New Jersey ranks low in the amount of venture capital expenditures, which is “ridiculous” for a state with such an affluent and highly educated population, he said.

“New Jersey likes stability. It doesn’t identify with the tech economy,” Hyde said.

Some states ban or severely restrict noncompetes, including California, North Dakota, Montana and Oklahoma. Washington, D.C., enacted a ban on noncompete clauses in January, and in 2018 Massachusetts adopted a variety of regulations limiting their role.

A-1650 would exclude certain groups from being subject to noncompete clauses, such as those who are nonexempt from overtime pay, those terminated without a determination of misconduct and employees who were on the job less than one year.

Hyde said the New Jersey bill is far weaker than the one adopted in Massachusetts. The Massachusetts law requires an employer who enforces a noncompete to pay the employee while they are out of the market, while the New Jersey bill lacks that provision. New Jersey would exempt low-paid employees, but, unlike Washington, Oregon or Hawaii, would not exempt technology workers. Otherwise, the New Jersey bill “mostly restates existing law,” Hyde said.

In one of Trinity Solar’s cases, the company names Sunrun Solar of Marlton and 24 individuals as defendants. The suit claims two of the individual defendants, Kristian Calibuso and James Allred, “purloined” Trinity’s employee remuneration and incentive pay information and detailed information about its customer base before abruptly departing the company for Sunrun. Later, Calibuso and Allred solicited more than 20 of Trinity’s regional, district and assistant district managers and other highly ranking sales representatives, the suit claims.

Lawyers for the defendants dispute the allegations. And in an answer filed Saturday, lawyers for 20 of the defendants brought a counterclaim accusing Trinity of adopting a policy that potential customers with surnames that sound Indian or Jewish were regarded as undesirable and were assigned to lower-level, nonwhite or minority sales representatives. The suit brings a counterclaim for violation of New Jersey’s Law Against Discrimination on behalf of two employees, one of Mexican descent and the other a Muslim immigrant from Egypt, who were assigned the prospective clients deemed undesirable due to their ethnicity or religion.

A lawyer for Trinity, Brett Schwartz of Lebensfeld Sharon & Schwartz in Red Bank, said of the allegations, “Trinity Solar is a multicultural, diverse, privately held company of the highest ethical and moral standards. It vehemently denies these outrageous and vile allegations, which are not only baseless, but are a smokescreen to detract from the merits of the case that it

commenced and which involves allegations that Sunrun and others poached nearly two dozen of its dealer network employees, notwithstanding the existence of enforceable restrictive covenant agreements between Trinity and its employees."

The solar industry is seeing intense efforts to enforce noncompete clauses because sales of home solar installations are heavily dependent on referrals, which are portable, said Christopher Keating of Wilentz, Goldman & Spitzer in Woodbridge who represents some of the defendants being sued by Trinity.

Keating said that with many Trinity employees leaving, the litigation may also be aimed at trying to intimidate current employees who might be considering leaving to work for a competitor. But the litigation could have unintended consequences such as chasing away future prospective employees, he said.

"I think that it's important to give low- and midlevel employees the ability to move freely and to encourage and foster competition between these big companies. When you have a bill that limits the ability of a company to enforce a noncompete like this, what that's really doing is benefiting employees who want to have that mobility," Keating said.

Louis Moffa Jr. of Montgomery McCracken Walker & Rhoads represents Sunrun and some individual defendants. He said the plaintiffs' use of restrictive covenants is unnecessary because trade secrets already enjoy protection under the law.

"I can't explain why this industry is so bent on restrictive covenants. The information is not particularly confidential. We're talking about sales leads. It's not a consultant business," Moffa said.

Moffa said the solar energy industry is a "contact-driven, referral-driven business. You have to make contact with individual homeowners. If this individual is satisfied, they'll often tend to refer friends and neighbors." And since only 7% of homeowners use solar power, the market is "huge," he said.

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