



**EMPLOYMENT LAW360**  
BREAKING NEWS ON LITIGATION AND POLICY

February 05, 2009

## **Death Of The Noncompete For NY Broadcasters?**

Law360, New York (February 04, 2009) -- For years, broadcast industry employees such as news anchors and radio disc jockeys saw their opportunities in the job market severely limited because their employment agreements contained noncompete clauses. Upon the expiration or termination of the individual's employment contract, a noncompete clause within that contract prevented employees from working for their former employer's competitors or within their former employee's market for a specified period of time. Courts regularly enforced these noncompete clauses if their restrictions were reasonable in scope, duration and geographic range.

In August 2008, however, New York enacted the Broadcast Employees Freedom to Work Act (BEFWA), which prohibits broadcast industry employers from including certain noncompete clauses in employment contracts. The statute's enactment was due in part to successful lobbying by prominent entertainment labor unions including the American Federation of Television & Radio Artists (AFTRA). AFTRA's members testified at legislative committee hearings and sent hundreds of letters and emails in support of the statute to state legislators and New York Governor David A. Paterson.

The enactment of the BEFWA is a major victory for New York broadcast employees because it vastly expands the job market for many of them. As a result, the number of broadcast industry employees leaving New York in order to find work that did not violate their previous employment agreements will be reduced significantly. This is a win-win for broadcast industry employees who now have expanded job opportunities as well as New York because it will keep jobs within its borders.

It may appear that the only losers are the broadcast industry employers whose ability to restrict former employees' post-employment actions has been curtailed significantly. Employers, however, may also benefit because this should provide an increased pool of talent available for hire. Here are three things employers and employees should know about the BEFWA:

## **What Does It Say?**

The BEFWA states that a broadcast industry employer may not require as a condition of employment that a broadcast employee (or prospective employee) refrain from obtaining employment: in any specified geographic area, for a specific period of time, or with any particular employer or in any particular industry, following the conclusion of his or her employment with the broadcast industry employer.

If a broadcast industry employer were to violate the BEFWA, it would be civilly liable for not only the broadcast employee's damages, but also attorney's fees and costs. Moreover, the BEFWA expressly provides that its protections cannot be waived, and that any attempt to do so shall be null and void and unenforceable in court.

The BEFWA carves out the following exception to its general provisions: "[The BEFWA] shall not apply to preventing the enforcement of such a covenant during the term of an employment contract." This should be an obvious conclusion as any employer should have the right to enforce the breach of a restrictive covenant violated while the employee is working for that employer.

Therefore, noncompete agreements concerning an employee's actions during the term of employment may still be enforceable (based upon the particular circumstances, such as when the employer is in breach of the employment contract). Other covenants limiting the post-employment rights of the broadcast employee are similarly unaffected.

## **Does BEFWA Concern Me or My Company?**

The BEFWA broadly defines "broadcast employee" as both "on-air" and "off-air" employees. Yet that term is not all-encompassing in that management employees do not constitute broadcast employees for the purposes of the statute. Accordingly, noncompete agreements concerning management employees remain enforceable and are subject to the traditional "reasonableness" test. Similarly, independent contractors do not reap the benefits of the BEFWA.

The statute's definition of "broadcast industry employer" is expansive and includes TV stations or networks, radio stations or networks, cable stations or networks, Internet or satellite-based services similar to a broadcast station or network, any broadcast entity affiliated with the aforementioned employers, or any other entity providing broadcasting services such as news, weather, traffic, sports or entertainment reports or programming.

## **What Lies Ahead?**

As with any new law, the courts will be left with the challenge of interpreting the parameters of the BEFWA and how it applies. It will be no surprise to see the statute's more ambiguous terms, such as "management employee" and "other entity providing broadcasting services," as the basis for litigation when parties seek clarification of the meanings of those terms in order to determine whether the statute governs their conduct.

Additionally, broadcast industry employers may seek to hire independent contractors, rather than "broadcast industry employees," in order to bypass the prohibitions of the BEFWA. Finally, employers may "beef up" other lawful post-employment restrictions, such as rights of first refusal, non-solicitation, nondisclosure and confidentiality agreements, in an attempt to compensate for the loss of the ability to enforce post-employment noncompete provisions.

These considerations demonstrate the significant impact the BEFWA is expected to have on New York's employment landscape within the broadcast industry.

--By David T. Harmon, Fernando M. Pinguelo and Andrew D. Linden, Norris McLaughlin & Marcus PA

*David Harmon is a member of Norris McLaughlin & Marcus in the firm's New York office. Fernando Pinguelo is a member of the firm in the Bridgewater, N.J., office. Andrew Linden is an associate with the firm in the Bridgewater office.*

*The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.*