What Damages Can You Recover In A Non-Compete Case?

Labor & Employment Law Update

on May 6, 2021

In the typical non-compete lawsuit, an employer seeks to block the defendant, often an ex-sales representative, from calling on or doing business with the company's clients. However, in some cases, the defendant succeeds in taking some business, thereby raising the issue of monetary damages. So, how are damages calculated in a non-compete case?

In a recent decision, the U.S. District Court for the Northern District of Illinois addressed this issue. In *Zurich American Ins. Co. v. Hill*, the defendant insurance salesman admitted that he improperly did business with a certain client of the plaintiff; thus the only issue was calculating an appropriate monetary award. The court explained that, pursuant to Illinois law, the employer is entitled to recover "net lost profits" that were traceable to the defendant's breach. Net lost profit is gross revenue based on the contract price, less any expenses necessary for plaintiff's performance of the contract. Depending on the circumstances, a plaintiff's expenses could include direct costs (*e.g.*, labor, materials) and indirect costs (*e.g.*, overhead expenses). Direct costs, along with any portion of indirect costs that can be avoided by defendant's breach ("variable indirect costs") are subtracted from the gross revenue. But any portion of indirect costs that cannot be reduced by defendant's breach ("fixed indirect costs") are not subtracted, because plaintiff already incurred and paid those costs.

Applying this framework, the employer established that the company's overall customer retention record was over 90% and therefore the customer that the defendant "took" could reasonably have been expected to stay with the plaintiff for a year. Although the plaintiff argued that it should recover three years of net profit, the court declined this request based, among other things, on evidence that the customer in question had been somewhat inconsistent with its business

AMUNDSEN DAVIS

in recent years.

After holding that the employer was entitled to one year of net profit on the customer in question, the court then deducted direct costs. These were the commission that the sales representative would have received, and also insurable losses that reasonably could have been expected to have been paid out on the polices.

Finally, there was a dispute over whether some amount of variable overhead should be deducted, which would have further reduced the employer's net lost profit. The court stated that some type of variable overhead could only be deducted if the defendant could show that the overhead could have been avoided by the defendant's breach. Because the defendant could not prove any such overhead, the court declined to deduct any type of variable overhead.

Therefore, the final award represented the gross revenue that would have been received from the customer in question for one year, minus the sales representative's commission and the losses that would have been paid out on the policy.