

# **Recent New Jersey Decision Offers Guidance on Employers’ Efforts to Restrain Employees from Soliciting “All Clients” or “Prospective Clients”**

**By Kevin J. O’Connor and Michael J. P. Schewe**

Non-compete and non-solicitation agreements – which fall under the umbrella category of “restrictive covenants” – seem to be constantly under fire, with certain jurisdictions even taking the drastic measure of an outright ban. By contrast, New Jersey case law has developed over decades to strike a balance between protecting the needs of employers to safeguard their legitimate corporate interests and the crippling effects on fair competition caused by overbroad and unduly-burdensome restrictions. In light of a recent New Jersey Appellate Division decision, employers should revisit their restrictive covenants to make sure that the scope is reasonable and not more restrictive than necessary to achieve their legitimate purpose.

New Jersey is one of many states that allow its courts to “blue pencil” restrictive covenants. “Blue penciling” refers to a procedure by which a court can delete, amend or supplement offensive provisions, allowing for enforcement of the revised restrictions while avoiding the harsh penalty of striking them down entirely.

Last Friday, the New Jersey Appellate Division took liberty to utilize its blue pencil powers in scaling back the scope of a potentially-offensive restriction. The Appellate Division’s decision offers much-needed guidance on whether an employer can prohibit a departing employee from soliciting “all clients” (without regard to whether the employee had contact with

the client) or “prospective clients” of a business. The decision stems from a series of cases<sup>1</sup> brought by powerhouse ADP against former salesmen who left ADP to work for competitors. This opinion comes only months after a decision by the Third Circuit Court of Appeals which largely validated ADP’s non-compete and non-solicitation restrictions. However, in these cases, although the Appellate Division ruled that ADP has demonstrated a “legitimate business interest” in seeking to enforce its restrictive covenant agreements with six high-performing, former sales employees, it also found that certain provisions had to be narrowed to avoid being overly broad and unduly burdensome to the employees.

The published decision (link in footnote, above) brings needed clarity to the issue of whether an employer is permitted to restrain a departing employee from soliciting each and every client of the employer, or, as many employees often argue, only those customers with whom the employee had contact with prior to leaving. It also shed light on whether courts will accept restrictions as to potential clients of a business.

The Court ruled that the provisions of ADP’s agreements which barred the employees from soliciting all actual or prospective ADP clients for a year after leaving the company were too broad and had to be “blue-penciled,” referring to the “court’s modification or tailoring of a restrictive covenant.” The panel ruled that ADP may only prohibit its former employees from soliciting actual ADP clients for which they “had substantial dealings with while at ADP or [...] knowledge of during their prior employment.” Regarding ADP’s potential clients, the court

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<sup>1</sup> The cases are *ADP LLC v. Erik Kusins*, *ADP LLC v. Ryan Hopper*, *ADP LLC v. Anthony M. Karamitas*, *ADP LLC v. Nick LeNoble*, *ADP LLC v. Michael DeMarco* and *ADP LLC v. Daniel Hobaica*, case numbers A-004664-16-T01, A-000692-17-T03, A-000693-17-T03, A-002990-17-T04, A-004407-17-T04 and A-004527-17-T04, respectively, in the Superior Court of New Jersey, Appellate Division (<https://pecklaw.box.com/s/o0psi3aw8ip1jjc2he2nem9jnromqgnn>).

limited the restriction to only those that “a former employee gained knowledge of during his employment at ADP.”

The Court observed that it was “satisfied [that] these blue-pencil modifications result in ‘narrowly tailored’ provisions that ‘ensure the covenant is no broader than necessary’ with respect to its duration, area and scope of prohibited activities in order to ‘protect the employer’s interests.”” The appellate panel found that the prohibition against soliciting “all of ADP’s 620,000 existing clients” was unreasonable: “That restrictive language is untenable as an ADP employee could not possibly know all of ADP’s actual clients.”

Likewise, the panel struck down the provision barring the former employees from soliciting prospective clients that “ADP ‘reasonably expects’ to provide business to within the two-year period following the employee’s departure.” The panel concluded that, “[d]ue to the breadth of ADP’s worldwide reach, any company defendants approach might be a potential ‘prospective’ ADP client” and that the panel “cannot envision any practical manner in which defendants could conduct business without offending this provision.”

In light of this decision, employers should review their restrictive covenants to determine whether they are reasonable and not overly restrictive. If there is reason to question enforceability, competent New Jersey employment counsel can help tailor the restrictions to avoid judicial scrutiny in the future.

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