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Labor and Employment Alert: Court's Ruling on "Poorly Drafted" Non-compete Agreement Shows Why Grammar Matters

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CLIENT ALERT | 5.11.2016

"Conjunction Junction, what's your function? Hooking up words and phrases and clauses." ~ Schoolhouse Rock

The U.S. District Court for the Northern District of Ohio recently delved into the meaning of the word "or" and showed how its meaning affects the enforceability of a non-compete agreement. In *Alloy Bellows & Precision Welding, Inc. v. Cole*, Alloy Bellows sought a preliminary injunction and temporary restraining in order to prevent its former employee (Jason Cole) from working for a competitor.

Cole had worked for Alloy Bellows as its business development manager. His job involved developing "highly sensitive and confidential sales, operational and marketing information." As a condition of his employment with Alloy Bellows, Cole was required to sign a non-compete agreement. The non-compete agreement prohibited him from working for a competitor:

***Either** during your working relationship with Alloy Bellows, or for a period of two(2) years after your working relationship and/or severance period ends with Alloy Bellows, you agree and accept that you shall not, (I) directly or indirectly engage in any business that completes (sic) with Alloy Bellows in any way in North America...."*

Cole challenged the enforceability of the non-compete agreement on several grounds. Notably, he argued that the restriction is written in the disjunctive using the word "or" instead of "and." Thus, a plain reading of the provision meant that Cole would be prohibited from competing with Alloy Bellows "either while he worked for them or after he stopped working for Alloy Bellows, but not both." Alloy Bellows did not allege that Cole competed with it during his employment, and so "Cole contended he did not violate the express terms even if he competed with Alloy Bellows after he left its employ." Alloy Bellows, by contrast, argued that the language in the non-compete is conjunctive (notwithstanding the use of the word "or") and that any other reading is "absurd."

To prevail on its motion, Alloy Bellows had to demonstrate by clear and convincing evidence that it had a substantial likelihood of success on its claims. The Court found that the ambiguity in the “poorly drafted” non-compete provision caused by the word “or” precluded granting Alloy Bellow’s motion. The Court explained its rationale with a grammar lesson: “The use of ‘either, or’ is disjunctive, and generally is used to state a choice between two things i.e.- ‘Sam will either exercise or rest today.’ However, in some context it may include both choices - i.e., ‘You may buy bread at either Giant Eagle or Safeway.’” Because the intent of the parties is critical on this issue, it is a question of fact that cannot be determined at this point.

The case highlights the importance of careful drafting of contractual provisions and restrictive covenants. Contact your Vorys lawyer if you have questions about non-compete and similar agreements.