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Labor and Employment Alert: Ohio Supreme Court Limits Enforcement of Non-Compete Agreements By Successor Entities in a Merger

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In *Acordia of Ohio, LLC v. Fishel*, the Ohio Supreme Court recently held that in a merger non-compete agreements transfer as a matter of law to the successor entity; however, such agreements are only enforceable according to their specific terms. Looking to the specific terms of the non-compete agreements at issue in *Fishel*, the court found that the non-compete agreements, which referred solely to "the Company," only applied to the original employer and not to any successors or assigns.

The non-compete agreements at issue were entered into by four employees between 1993 and 2000. Each agreement was entered into with Acordia of Ohio, Inc. ("Acordia, Inc.") or one of its predecessors, and the language in each agreement indicated that the agreement applied to the employee and the company that originally entered into the agreement. In other words, the agreements did not expressly extend to the original company's successors or assigns. Acordia, Inc. ceased to exist in December 2001 when the company merged with Acordia of Ohio, LLC ("the LLC"). After the merger, the four employees continued working for the successor entity, the LLC; however, in August 2005, they began working for a competitor. The LLC sought to enforce the employees' non-compete agreements but was unsuccessful at both the trial and appellate levels.

On appeal, the Ohio Supreme Court held that although the non-compete agreements transferred to the successor entity as a matter of law, the ability to enforce such agreements was not automatic, but rather enforceability was determined by the specific language of the agreement in question. Because the agreements in question did not have any language regarding successors or assigns, the parties to the agreements only intended the agreements to operate between themselves—the employee and the original employer.

In reaching this determination, the court emphasized that its decision would not leave the successor entity's newly acquired assets, goodwill and proprietary information unprotected. Instead of relying on the efforts of its predecessor, the successor entity could take affirmative steps to protect its newly acquired interests, including requiring

employees to enter new non-compete agreements as a condition of their continued employment.

Applying the specific terms of each non-compete agreement, the court determined that the severance of each employment agreement occurred when the employer that was the party to the agreement was merged out of existence. For example, one of the employees had entered into a non-compete agreement with Acordia, Inc.; however, in December 2001, Acordia, Inc. merged with the LLC. As a result of the merger, Acordia, Inc., the party to the non-compete agreement, ceased to exist, and the two-year non-compete period began to run. The non-compete period expired in December 2003. The other three defendants had similar non-compete agreements with Acordia, Inc.'s predecessors, who like Acordia, Inc. had ceased to exist. Therefore, by the time the employees began competing in 2005, all of the non-compete periods had expired. This left the LLC without a legal right to enforce the agreements against the employees.

Prospectively, this decision establishes two important practice tips for employers. First, employers entering into non-compete agreements need to include specific language in their agreements that make the agreement enforceable by the original employer, as well as any successors and assigns. Second, any surviving entity after a merger or any buyers of businesses must take steps to protect their acquired interests. To achieve this, the surviving entity should review the language of all non-compete agreements to ensure that each agreement contains specific language making the agreement enforceable by successors or assigns. If such language is not present, the surviving entity needs to take additional steps to protect its acquired interests, including requiring employees to enter into new non-compete agreements.

For more information regarding this decision's applicability to you or for information regarding any other employment-related issue, please contact your Vorys attorney or a member of the [Vorys Labor and Employment Group](#) by calling 614.464.6400.

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