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**THE IMPORTANCE OF THE PRE-HIRE PROCESS:
Recent Guidance for Pennsylvania Employers Seeking to Enforce Restrictive Covenants**

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On June 16, 2020, the Pennsylvania Supreme Court held that restrictive covenants executed *after the first day of employment* must be accompanied by additional consideration, or the parties must have agreed to the essential terms of the restrictive covenant prior to the employee starting work. The Court's recent decision highlights the importance of pre-hire processes and the need for employers to ensure that new hires have completed all necessary paperwork and executed all relevant agreements prior to beginning work, or, at a minimum, that the parties have agreed on the essential terms of any restrictive covenant prior to a new hire beginning work.

Rullex Company, LLC v. Tel-Stream, Inc. and Yuri Karnei involved a former employee's alleged breach of a non-disclosure and non-competition agreement.¹ Rullex Company, LLC ("Rullex") performs work for large telecommunications companies, such as AT&T and Verizon, including the installation, repair, and maintenance of equipment on cellular towers and at cellular base sites.² Rullex often acts as a general contractor and subcontracts its cellular tower work to

smaller entities, such as Tel-Stream, Inc. ("Tel-Stream").³ Tel-Stream's founder, Yuri Karnei ("Karnei"), performed subcontracted work for Rullex from early 2016 to mid-2017.⁴ Approximately two months into his employment with Rullex, Karnei executed a non-disclosure and non-competition agreement stating that he would not (1) disclose confidential information, such as trade secrets, client lists, and training techniques; or (2) compete with Rullex for 24 months.⁵

In early 2018, Karnei began performing the same specialized cellular tower installation, repair, and maintenance services for a competitor, Invertice, Inc. ("Invertice").⁶ Rullex sued Karnei, seeking an injunction. Rullex alleged that Karnei used information about Invertice that he learned while working for Rullex to secure subcontracting work to Rullex's detriment.⁷ The Philadelphia Court of Common Pleas denied the preliminary injunction, finding that Rullex was not likely to succeed on the merits of its claims because Rullex did not submit evidence that it had furnished Karnei with consideration specifically connected with execution of the non-competition

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agreement, which Karnei did not sign at the start of his employment with Rullex.⁸

In Pennsylvania, to be enforceable, a restrictive covenant must be incident to an employment relationship and must be supported by consideration. The PA Superior Court affirmed the lower court, stating “covenants executed after the first day of employment can only be enforced if accompanied by fresh consideration,” and “mere continuation of the employment relationship at the time of entering into the restrictive covenant is insufficient.”⁹

In the Supreme Court, Rullex argued that the Superior Court overlooked the fact that the restrictive covenant in the non-competition agreement was part of the “taking of employment” and was not an afterthought forced on Karnei.¹⁰ However, Rullex failed to provide evidence that the parties agreed to the substantive terms of the restrictive covenants at the outset of Karnei’s employment.¹¹ Notably, Rullex’s own witness confirmed that, although the parties discussed the terms of the non-competition agreement before work commenced, these discussions formed part of an ongoing negotiation and were subject to alteration.¹² The witness indicated that Karnei was told that if he did “not agree with something,” Rullex was “going to change that” before signing.¹³

The Supreme Court’s decision centered on the parties’ contemplation of, and intention to enter into, restrictive covenants incident to the employment relationship, rather than whether the employee physically executed

the restrictive covenant on or before his first day of employment. The Court held that, for a restrictive covenant executed after the first day of employment to be enforceable, absent new consideration, the parties must have agreed to its essential terms at the beginning of the employment relationship.¹⁴ The Court reasoned that, for such an agreement to be enforceable, a “meeting of the minds” on the terms of the restrictions must exist, along with “evidence of mutual assent to the terms of the bargain.”¹⁵ Because Rullex failed to point to evidence indicating that the parties “reached a meeting of the minds or otherwise manifested an intent to be bound by the [restrictive covenant] as it existed when Karnei started work,” the lower courts were correct in denying Rullex’s motion for preliminary injunction, as it had not demonstrated a likelihood of success on the merits.¹⁶ Accordingly, the restrictive covenant was unenforceable and Karnei was permitted to continue performing the specialized cellular tower services for Rullex’s competitors.

Based on the Court’s decision in Rullex, employers should be mindful of when they present restrictive covenants to potential new hires for review and keep track of any negotiations and agreements between the parties prior to the new hire executing the employment agreement or beginning work. Employers in Pennsylvania should diligently pursue fully-executed employment agreements prior to the start of any new hire’s employment to ensure that the restrictive covenants contained therein will be considered enforceable.

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¹ No. 27 EAP 2019, 2020 Pa. Lexis 3294, at *1-2 (Pa. 2020).

² Id. at *1.

³ Id.

⁴ Id. at *3.

⁵ Id. at *2.

⁶ Id. at *3.

⁷ Id.

⁸ Id. at *6.

⁹ Id. at *7-8.

¹⁰ Id. at *11.

¹¹ Id. at *16-17.

¹² Id. at *18-19.

¹³ Id. at *18.

¹⁴ Id. at *15-19.

¹⁵ Id. at *15.

¹⁶ Id. at *19.

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