

## Are No-Hire Provisions Now Void and Unenforceable Under Pennsylvania Law?



**ALERT** | January 25, 2019

**A. Christopher Young** | [youngac@pepperlaw.com](mailto:youngac@pepperlaw.com)  
**Robyn R. English-Mezzino** | [englishr@pepperlaw.com](mailto:englishr@pepperlaw.com)

On January 11, an *en banc* panel of the Superior Court of Pennsylvania affirmed a trial court's decision declaring that a no-hire provision in a commercial contract between two businesses was void and unenforceable under Pennsylvania law. Over the past 18 months, no-poach and no-hire provisions have received nationwide attention for their effects on employees' wages and mobility. They have been attacked by antitrust authorities, politicians and the plaintiffs' bar as illegal agreements under state and federal antitrust laws. But the Superior Court's analysis of the no-hire provision under common law — not antitrust law — may have more far-reaching ramifications for commercial contracting in Pennsylvania, as it could make all no-hire provisions unenforceable. In its opinion, the Superior Court departed from other authority holding that ancillary no-hire provisions

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between commercial parties are generally enforceable so long as they protect a party's legitimate interest and are reasonable in scope and duration. This case is worth watching to see if it is appealed and, if so, whether the Pennsylvania Supreme Court allows the decision to stand.

## **Background**

In *Pittsburgh Logistics Systems Inc. v. BeeMac Trucking LLC*, No. 134 WDA, Pittsburgh Logistics Company (PLS) sought a preliminary injunction against certain shipping companies with whom PLS did business — Beemac Trucking, LLC and Beemac Logistics, LLC (Beemac) — to enforce, among other things, a contractual no-hire provision. The no-hire provision was found in a motor carriage services contract between Beemac, a common carrier, and its customer, third-party logistics provider PLS. The no-hire provision prevented Beemac, during the term of the contract and two years after its termination, from “hir[ing], solicit[ing] for employment, induc[ing] or attempt[ing] to induce any employees of PLS to leave their employment with PLS.” When four PLS employees went to work for Beemac, PLS sued to enjoin Beemac from employing them. The trial court determined that the no-hire provision was an unenforceable restraint on trade and was void as a matter of public policy, and denied the injunction motion. PLS appealed. The appellate court affirmed, but PLS petitioned and was granted an *en banc* hearing.

## **Superior Court's Opinion**

The majority affirmed the trial court's decision and found that the no-hire provision was void as a matter of public policy. The majority noted that there was no Pennsylvania law addressing whether no-hire provisions between competing businesses were unenforceable restraints on trade. Considering this blank legal canvas, the court first turned to contract principles to support its decision. The majority focused on the impact of the provision on PLS's employees and concluded that the no-hire provision violated public policy because it enabled PLS to restrain its employees without providing its employees with consideration.

The majority also relied on out-of-state decisions in finding that the no-hire provision was unenforceable. Specifically, Texas and Wisconsin courts have concluded that no-hire provisions are unenforceable restraints on trade, stating “[i]t is one thing to uphold the restriction on an employee's freedom where it results from an agreement entered into by the employee. But where the restriction on an employee's freedom results from the employer's agreement with another [], the employee is deprived of his or her freedom without acquiescence and with no resulting benefit.” *Texas Shop Towel v. Haire*, 246 S.W.2d 482, 484 (Tex. Civ. App. 1952); *Heyde Cos. v. Dove Healthcare, LLC*, 249 Wis. 2d 32, 39 (Wis. 2001), *aff'd*, 258 Wis. 2d 28 (Wis. 2002) (quoting *Haire*, 246 S.W.2d at 484).

The dissent questioned whether the majority utilized the correct analytical framework in reaching its decision. The dissent pointed out that the clause at issue was “a no-hire provision that binds BeeMac, not a non-compete clause binding PLS’s employees.” The dissent criticized the majority’s conflation of the two concepts and its treating the no-hire clause as equivalent to an employee restrictive covenant. Properly analyzed as a restraint of trade under Pennsylvania common law, the dissent argued the no-hire clause is enforceable. Pennsylvania courts have upheld restraints on trade when they are ancillary to different types of sales agreements. Specifically, a number of courts have enforced noncompetes when ancillary to a sales agreement. See *Piercing Pagoda, Inc. v. Hoffner*, 465 Pa. 500 (Pa. 1976) (enforcing noncompete restriction in franchise agreement ancillary to sale); *Ala Binder & Chem. Corp. v. PICOO*, 410 Pa.214 (Pa. 1963) (enforcing noncompete when it was made “in conjunction with a buy-sell agreement” because “court below had apparently reasonable grounds for its action”); *Worldwide Auditing Servs. Inc. v. Richter*, 402 Pa. Super. 584 (Pa. Super. Ct. 1991) (enforcing noncompete ancillary to sale of stock but modifying its geographic scope to a single state).

In *GeoDecisions v. Data Transfer Solutions, LLC*, No. 1:10-CV-2180, 2010 U.S. Dist. LEXIS 128283 (M.D. Pa. Dec. 3, 2010), the district court stated that no-hire provisions in commercial contracts would be enforced when they are (1) ancillary to the main purpose of a lawful transaction, (2) necessary to protect a party’s legitimate interests, (3) supported by adequate consideration, and (4) reasonable in both time and territory.

The *Pittsburgh Logistics Systems* dissent argued that the no-hire provision in the PLS/Beemac contract met all four elements and should have been enforced. The dissent noted that (1) the provision was ancillary to a lawful collaboration between businesses, (2) PLS had a legitimate interest in not being an “involuntary and unpaid employment agency for competitors” with whom it did business, (3) there was consideration for the restraint, and (4) the duration and scope of the restraint agreed to by PLS and Beemac, which were sophisticated parties, was reasonable and not overbroad. Lastly, the dissent criticized the majority’s finding that the restraint violated public policy. It noted that the Supreme Court has cautioned against finding a contract violates public policy unless that violation is clear.

## **Takeaways**

The majority decision could make no-hire provisions unenforceable under Pennsylvania law. But there is a procedural peculiarity and a substantive factual distinction that could minimize the opinion’s future precedential authority. For one, the majority affirmed the tri-

al court's denial of a preliminary injunction using a "highly deferential" standard of review. In that procedural light, the majority opinion merely held that the trial court had "apparently reasonable grounds" to determine that PLS was unlikely to prevail on enforcing the no-hire provision. The dissent, sensing a broader pronouncement by the majority, argued that the Superior Court's review of the enforceability of a contract should have been *de novo* and based its argument accordingly. Would the outcome of this case have been different if the *en banc* Superior Court panel reviewed the enforceability of the no-hire clause *de novo*? The dissent seemed to think so.

Further, the majority's opinion was influenced by a separate no-solicitation provision in the PLS/Beemac contract, and separate employment agreements PLS had with the affected employees that another court had found to be overbroad and unenforceable. These facts allowed the trial court and the majority to find the no-hire clause was superfluous (due to PLS's commercial interest being protected by the no-solicitation provision), and that the no-hire clause was a "back door restrictive covenant," enabling PLS to accomplish what another court had already held it could not do through the overly broad noncompete provisions in the employment agreements.

Because the enforceability of no-hire provisions is a matter of first impression and there was a vigorous dissenting opinion, the *Pittsburgh Logistics Systems* decision may be ripe for review by the Supreme Court in order to clarify the enforceability of no-hire agreements under Pennsylvania common law. If not, uncertainty may prevail, and that is not good for business.