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INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

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Enforceability of Non-Competes for Terminated Employees in New York is Dependent on Location Within the State

A recent case from the Appellate Division, First Department – *King v. Marsh & McLennan Agency, LLC*, 2021 N.Y. Slip. Op. 00909 (1st Dept. Feb. 11, 2021) – serves as a reminder that, depending on where your business is located ***within the state of New York***, a different rule applies for the enforceability of your employee non-competition and non-solicitation covenants in the event of a termination without cause.

Specifically, in *King*, the First Department again recognized the governing rule for courts (and companies and employees) located within the First and Second Departments (*i.e.*, New York City and downstate counties) that a non-competition or non-solicitation covenant is unenforceable as a matter of law where the employee is terminated without cause. *Id.* at * 323; *see also, Kolchins v. Evolution Mkts., Inc.* 182 A.D.3d 408, 409 (1st Dept. 2020) and *Borne Chemical Co. v. Dictrow*, 85 A.D.2d 646, 649 (2d Dept. 1981).

However, the opposite rule exists for courts (and companies and employees) which are located within the Fourth Department (*i.e.*, all of Western New York and parts of the Southern Tier and Finger Lakes region, including all of Buffalo, Rochester and Syracuse). There, as recently held in the case of *Frank v. Metalico Rochester, Inc.*, 174 A.D.3d 1407, 1412 (4th Dept. 2019), the termination of an employee without cause does "not render the restrictive covenants in the agreement unenforceable." *See also, Brown & Brown, Inc. v. Johnson*, 115 A.D.3d 162, 170 (4th Dept. 2014) (holding that a termination without cause does "not render the restrictive covenants … unenforceable").

The divergent conclusions[1] on this issue find their genesis in the Court of Appeals case of *Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 N.Y.2d 84, 88 (1979), where New York's highest court held, in the context of the "employee choice" doctrine (*i.e.*, where the employee agrees that he/she will return a significant benefit in the event that he/she chooses to violate the terms of a non-competition covenant), that the covenant cannot be enforced "where the termination of employment is involuntary and without cause." While the First and Second Departments have extended this holding to apply to ***all*** non-competition covenants, the Fourth Department has refused to do so and has applied the rule only to certain "employee choice" or "forfeiture for competition" provisions.

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1 The Appellate Division, Third Department (i.e., the Capital Region, Upstate New York and parts of the Southern Tier) has not weighed in on this issue, though there is some authority from the trial court level which following the First and Second Department rules and holds that a termination without cause renders a non-compete unenforceable where the termination is without cause. E.g., Davis v. Zeh, 112 N.Y.S.3d 438 (Del. Co. Sup. Ct. 2018). It is unclear how the Third Department will ultimately rule on this question.

Ultimately, the Court of Appeals will need to resolve this conflict between the Appellate Divisions in New York State. However, until that occurs, a different rule will continue to exist for companies and employees, depending on where those companies and employees are located within the State, as to whether a non-competition or non-solicitation covenant can be enforced in the event of a termination without cause.

If you have any questions about the information presented in this memo, please contact Bradley A. Hoppe or any attorney in Bond's Labor and Employment practice.

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