Kennerly, Montgomery & Finley, P.C.

KM Newsletter

December 13, 2016

Articles in this edition:

Looking at Covenants Not to Compete and Input from the White House

By Jack M. Tallent, II

About every two or three weeks I get a call with questions about non-compete agreements, also called covenants not to compete. These calls come from employers who have decided they want their employees to sign non-compete agreements and additionally from employees who have already signed non-compete agreements and are questioning enforceability. Non-compete agreements have become commonplace in almost every profession and business, with the notable exception being the legal profession. Physicians routinely sign non-compete agreements, along with sales representatives in virtually every industry, stockbrokers, and business executives who may be exposed to proprietary information or confidential information. Increasingly, covenants not to compete have been required by employers of employees at lower levels of management and business operations. While Tennessee trial and appellate courts uniformly seem to disfavor the idea of covenants not to compete, they generally will enforce reasonable covenants not to compete. Generally speaking, the employer must have a protectable interest and the time frame and geographic boundary of the covenant must be reasonable. In *Hasty v. Rent A Driver, Inc.*, 671 S.W.2d 471, the Tennessee Supreme Court held a covenant not to compete void as to a truck driver who had no confidential information or influence on clients' selection of a moving company.

In 2005, the Tennessee Supreme Court attempted to end covenants not to compete in the case of physicians by holding such non-compete agreements void as to physicians as being against public policy of the state. *Murfreesboro Medical Clinic, P.A. v. David Udom*, 166 S.W.3d 674. In reaction to this ruling by the Tennessee Supreme Court, the Tennessee legislature adopted specific laws generally authorizing otherwise valid covenants not to compete as relates to physicians.

Locally, litigation of non-competes has slowed in recent years. This, I suspect, is based upon the relatively high percentage of appellate cases where the courts have enforced a reasonable covenant not to compete and additionally, the fact that most covenants not to compete typically contain an attorney's fees provision which requires the employee to pay the attorney's fees of the employer if the employer prevails in litigation to enforce the covenant not to compete. This can be a significant deterrent to an individual facing a court battle with a former employer. Many employees who have signed a covenant not to compete are unwilling to risk loss of a job and the potential of paying the employer's attorney's fees.

Recently, the White House released a white paper entitled *Non-Compete Agreements: An Analysis of the Usage, Potential Issues And State Responses*. Citing research that approximately 37% of American workers report having worked under a non-compete agreement in some time in their career, the white paper advances the proposition that although non-compete agreements can be beneficial if used in an appropriate way, the data suggests that non-compete agreements lead to lower

550 MAIN STREET, FOURTH FLOOR | P.O. BOX 442 | KNOXVILLE, TN 37901
PH (865) 546-7311 | FX (865) 524-1773 | WWW.KMFPC.COM

wages, limited mobility of workers in the workplace and negatively impacts innovation, entrepreneurship and regional economic growth. The white paper goes on to point out several areas demonstrating how workers are negatively impacted by non-competes and how some state courts and legislatures have addressed these areas of negative impact. It is pointed out that some courts have taken the approach of rewriting non-compete agreements to conform to State law, while others have implemented the "blue pencil" approach striking offensive clauses from non-compete agreements and others have taken what is called the "red pencil" approach of refusing to enforce a non-compete contract that contains any unenforceable provision. The white paper states that only three states, Nebraska, Virginia and Wisconsin use the red pencil approach. Tennessee uses a rule of reasonableness approach where the Court will modify covenants not to compete to make them reasonable if the employer with a legitimate protectable business interest has not acted in bad faith.(See *Money & Tax Help, Inc. v. Moody*, 180 S.W.3d 561). The paper concludes with a statement that there is more work to be done in this area and that the Administration will identify best approaches for reform. The paper also points out that most of the reform must be in the hands of each of the State legislatures to institute reforms that balance the business interest of enforcement of non-competes against the protection of workers. The full article may be found at the link below.

The last word from the Tennessee legislature was to enact employer favored law to allow enforcement of covenants not to compete in the case of physicians. For the time being it will be up to the Tennessee courts to decide the enforceability of covenants not to compete on a case-by-case basis, however, this push from the White House may initiate new challenges to the enforceability of covenants not to compete.

https://www.whitehouse.gov/sites/default/files/non-competes_report_final2.pdf

Jack M. Tallent practices in the areas of Civil Litigation, Construction Law, and Nonprofit & Tax-Exempt Organizations. Mr. Tallent concentrates his practice in civil litigation in State and Federal courts and assists clients with corporate and commercial transactions. If you have questions or for more information, please call Jack Tallent at (865)-546-7311 or email jtallent@kmfpc.com.

1916 KM 2016
100 YEARS

2016 marks our 100th year of the practice of law in Knoxville

Our firm origins go back to 1916 to the days of Donelson and Montgomery. The firm and its name evolved since then, and since 1985 has been Kennerly, Montgomery and Finley, P.C. Three of our current shareholders have been practicing with the firm since that time. During these many years we've been fortunate to have many great lawyers practice in the firm and many repeat clients. Our involvement in Knoxville and East Tennessee has been long-standing and varied. Since the early days our firm has been known for handling litigation matters in state and federal courts and also has been involved in representation of clients in virtually all aspects of the practice of law. Warren Kennerly helped create the Knoxville Utilities Board in 1939, and was its long-time general counsel until his retirement. Through the years the firm has continued representation of governmental clients and been involved in significant undertakings in Knoxville, including assisting clients involved in businesses operating at the 1982 World's Fair, development of major downtown office buildings, Knoxville's first waterfront restaurant, the Knoxville Convention Center, and downtown redevelopment. In addition, through the years we have represented lenders and financial institutions, governmental bodies and utility companies, private and publicly held businesses, and numerous individuals in their legal matters be it simple or complex. As we mark our hundred years of practice in Knoxville, we express our gratitude for the clients we serve and those lawyers who have come before us and the proud legacy they have left us.

Are Employer Health Plans Required to Offer Gender Transition Coverage?

By Ashley N. Trotto, Esq.

Many employer-sponsored health plans have historically contained blanket exclusions for gender transition-related treatment. That practice may now be unlawful.

Final regulations, effective July 18, 2016, specifically prohibit certain health plans, and other covered entities, from having or implementing a categorical coverage exclusion or limitation for all health services related to gender transition or from otherwise denying or limiting coverage or imposing additional cost sharing or other limitations or restrictions on coverage, for health services related to gender transition if such denial, limitation, or restriction results in discrimination against a transgender individual.

The preamble provides that an across-the-board categorization of all transition-related treatment, for example as experimental, is "outdated and not based on current standards of care."

More specifically, it provides that an explicit, categorical (or automatic) exclusion or limitation of coverage for all health services related to gender transition is unlawful on its face because it singles out the entire category of gender transition services, systematically denying services and treatments for transgender individuals.

In evaluating whether a health plan's denial of a claim for coverage for transition-related care is the product of discrimination, basic nondiscrimination principles will apply. Thus, the inquiry starts with whether and to what extent coverage is available when the same service is not related to gender transition. The preamble provides the following example: "if a health plan denies a claim for coverage for a hysterectomy that a patient's provider says is medically necessary to treat gender dysphoria, OCR will evaluate the extent of the covered entity's coverage policy for hysterectomies under other circumstances." The preamble goes on to provide that OCR will carefully scrutinize whether the covered entity's explanation for the denial or limitation of coverage for transition-related care is legitimate and not a pretext for discrimination.

These rules do not affirmatively require health plans to cover any particular procedure or treatment for transition-related care; nor do they preclude a covered entity from applying neutral standards that govern the circumstances in which it will offer coverage to all enrollees in a nondiscriminatory manner. The rule does require that a health plan apply the same neutral, nondiscriminatory criteria that it uses for other conditions when the coverage determination is related to gender transition.

To avoid costly consequences, employers who are covered entities need to review their health plans to ensure compliance with these new regulations.

Ashley N. Trotto practices in the areas of ERISA law, pension plans, and employee benefits. Ms. Trotto assists both private and governmental clients in the design, implementation, and maintenance of their employee benefit plans and specifically health and welfare benefit plans. Ms. Trotto focuses much of her time on assisting clients with issues related to compliance with the Patient Protection and Affordable Care Act. If you have questions or for more information, please call Ashley Trotto at (865)-546-7311 or email atrotto@kmfpc.com.

Charitable Organizations Lessening the Burdens of Government

By Zack R. Gardner, Esq.

Under Internal Revenue Code ("Code") Section 501(c)(3), organizations qualify for tax-exempt status when they are organized and operated exclusively for "exempt purposes" and none of their earnings inure to the benefit of private shareholders or individuals. "Exempt purposes" include charitable, religious, educational, scientific, literary, and other enumerated purposes.

"Charitable" is a broad term that refers to more than just organizations such as the Salvation Army or the American Red Cross which provide food, aid, and shelter to those in need. It also includes organizations which lessen the burdens of local, state, and federal government. Treas. Reg. Section 1.501(c)(3)-1(d)(2). Traditionally, these are organizations similar to adoption agencies or orphanages, charitable hospitals and mental health organizations, and schools or adult education programs. As time has gone on, a test has developed which captures not only what organizations are traditionally thought to have lessened the burdens of government in a charitable manner, but other organizations that similarly lessen the burdens of government but through different means such as economic development organizations.

Courts and the IRS use a two-part test to determine whether an organization lessens the burdens of government. First: a determination of whether the activities conducted are those that a governmental unit considers to be its burden. Second: a determination of whether such activities *actually* lessen that governmental burden. *See e.g.* *Indiana Crop Improvement Association, Inc. v. Commissioner*, 76 T.C. 394 (1981), acq., 1981-2 C.B. 1; *Rev. Rul.* 85-2.

The first prong of the test can be shown through a number of ways. For example, a state may delegate authority to an organization to conduct activities on behalf of or for the benefit of a governmental unit through statute, *Id.*; a governmental unit may explicitly recognize the activities performed by an organization are its own, *Rev. Rul.* 85-1; or a governmental unit might act jointly with an organization or allow the organization to assume the governmental unit's activities. 1984 EO CPE Text, *L. Instrumentalities – Lessening the Burdens of Government*, available at https://www.irs.gov/pub/irs-tege/eotopicl84.pdf.

The second prong, whether the activities in question *actually* lessen the burdens of government, depends on the relevant facts and circumstances. For example, if a governmental unit must continue its activities without change or reduction in its costs, then it can reasonably be concluded that the burdens of government were not actually lessened. Conversely, if the government does not need to devote additional funds or time, effort, and manpower to an activity it previously did, then it can reasonably be concluded that the activities are lessening the burdens of government.

However, organizations who meet this test must still be diligent to meet all other requirements under Code Section 501(c)(3) including avoiding private inurement issues.

Zack R. Gardner assists nonprofit and tax-exempt entities with forming their organizations, and obtaining and maintaining their nonprofit and tax-exempt statuses. If you have questions about nonprofit issues or for more information, please call Zack Gardner at (865)-546-7311 or email zgardner@kmfpc.com.

Remain Qualified for Government Benefits Using Self-Settled Special Needs Trusts

By Michael R. Crowder, Esq.

Many individuals with disabilities qualify for Supplemental Security Income (SSI) and/or Medicaid benefits. Eligibility for these programs is means-tested, meaning that eligibility is based in part on the individual's financial need. Currently, a single individual must have less than $2,000 in countable assets in order to qualify for SSI and Medicaid. Therefore, if a disabled individual has over $2,000 in countable assets, he/she must find a way to bring those countable assets down to the appropriate level before receiving SSI or Medicaid benefits. Along those same lines, it is possible for an individual to lose such benefits if they receive a large lump sum, for example from a lawsuit settlement, inheritance, or life insurance benefit.

However, federal law provides a way for SSI and Medicaid recipients to retain those benefits if they transfer and hold their assets in a "special needs" trust. See 42 USC §1396p(d)(4)(A). If the conditions outlined below are met, the government does not penalize an individual for transfers of their assets to a special needs trust, and the assets held in the special needs trust are not deemed to be countable assets for purposes of SSI and Medicaid. Assets held by the trustee may be used to supplement the benefits to which the beneficiary is eligible.

In order for a trust to qualify as a special needs trust under federal law, the disabled individual whose assets are being used to fund the trust must be under age 65 when the trust is established. Additionally, at the individual's death, Medicaid and other medical assistance providers must be first in line to recover from the trust assets the amount paid for the beneficiary's medical care.

Finally, under current law a disabled individual cannot establish his/her own special needs trust, but instead the trust must be created by the beneficiary's parent, grandparent, legal guardian or a court. If there is no parent or grandparent available to set up the trust, the individual must petition a court for appointment of a legal guardian or for establishment of the trust by the court as creator. However, in September 2016 the Special Needs Trust Fairness Act passed in the House of Representatives by a margin of 383 to 22, and looks promising to pass in the Senate. If passed, this new law would provide substantial additional flexibility to disabled individuals by allowing them to establish special needs trusts for themselves without needing a parent or guardian or the court. This new law would be another great development in providing more freedom and flexibility to disabled individuals and their planning options (also see last quarter's article on ABLE Accounts).

Michael Crowder works primarily in the firm's estate planning, and business & corporate law practices. If you have questions or for more information about Social Security Benefits, please call Michael R. Crowder at (865)-546-7311 or email mcrowder@kmfpc.com.

KENNERLY MONTGOMERY
Attorneys & Counselors Since 1916

The Results Are In!

KM Attorneys received recognition in two recent polls, *City View Magazine Top Attorneys 2016* and *U.S. News Best Lawyers in America 2017*. Our lawyers are humbled and honored to have been recognized for their accomplishments. To learn more about each award and the respective attorney so honored, please see the full details below.

Kennerly Montgomery & Finley, P.C. awarded Best Law Firm designation by U.S. News & World Reports in three practice areas:

Construction Law
Employee Benefits (ERISA) Law
Litigation – Construction

Jack M. Tallent

The Best Lawyers in America 2017
Knoxville Litigation
Construction "Lawyer of the Year"

City View Magazine Top Attorneys 2016
Construction Law

Robert H. Green

The Best Lawyers in America 2017 Knoxville:
Construction Law
Litigation - Construction

Kathy D. Aslinger

City View Magazine Top Attorneys 2016
Employee Benefits/ERISA Defense

William E. Mason

The Best Lawyers in America 2017 Knoxville:
Employee Benefits (ERISA) Law
Litigation – ERISA

City View Magazine Top Attorneys 2016
Employee Benefits/ERISA Defense

Disclaimer: Citview and U.S. News rankings do not imply endorsement of any products or services. The listing in Cityview's Top Attorneys of 2016 is a simple tabulation of the votes submitted by selected members of the Knoxville Bar Association. The 2017 Best Law Firms rankings methodology can be found here. Inclusion in *Best Lawyers* is based entirely on peer-review and the methodology process can be found here.

Kennerly Montgomery is a general practice law firm providing diverse professional services for 100 years both inside and outside the courtroom to a wide variety of individual, corporate and governmental clients. Our attorneys practice in all state and federal trial and appellate courts, as well as before administrative boards and panels and alternative dispute tribunals. We provide assistance in a variety of areas, including business and corporate law, governmental affairs and public utilities, employment law, worker's compensation, construction law and litigation, employee benefits, civil litigation and appeals, insurance defense and coverage litigation, taxation, wills and estate management, real property, healthcare, insurance defense and governance for churches and church-associated entities, technology transfer, and intellectual property.