

# Appellate Division Clarifies Guidelines For Enforceability And Blue-Pencilling Of Employment Related Restrictive Covenants

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In an instructive case for New Jersey employers and employees, the Appellate Division in the matter of ADP, LLC v. Kusins, A-664-16T1, recently clarified the standards regarding the use of Restrictive Covenants in employer and employee relationships. The Appellate Division ultimately found that while the restrictive covenants in question were enforceable, they were required to be modified or “blue-penciled” as overly broad.

## Background on ADP’s Two-Tiered Restrictive Covenant Agreements

The case in Kusins, was a consolidated matter involving six separate former employees of the human resources services company ADP. Each of the employees were top-performing sales representatives who had participated in a stock award incentive program that was conditioned on their acceptance and execution of Restrictive Covenant Agreements (“RCA”). The RCAs in question included non-solicitation and non-compete provisions that prevented the employees from soliciting ADP clients, or competing against ADP after leaving the company. ADP utilized a two-tier system, which not only provided restrictions for all employees in general, but added additional restrictions for higher level employees who were eligible to participate in the stock award incentive program. The first level of RCAs had been narrowly tailored by only precluding an employee from soliciting clients whom he or she had contact, and limited the non-compete provisions to geographical territory that the employee had actually worked while at ADP. However, second level RCAs were more restrictive by preventing solicitations of any actual or prospective ADP client, and permitting ADP to recoup attorney’s fees and costs incurred in enforcement.

Each of the employees in question eventually left the company, and joined employment with a competitor of ADP, thus prompting ADP to file suit against these former employees. As to each of the employees, ADP sought to enforce the provisions of restrictive covenant agreements (“RCA”) that had been executed by the employees during their employment with ADP. After the trial courts in these matters came to differing conclusions regarding the reasonableness of the RCAs as applied to the six employees, the Appellate Division consolidated these matters for consideration.

## The Appellate Court’s Findings in the Restrictive Covenant Case

In considering these cases, the Appellate Division found that although ADP could assert legitimate business interests to support the restrictions in the RCA, the covenant contained restrictions that were overly broad and required blue-penciling in order to reasonably guard ADP’s interests in protecting relationships. The Court reiterated long standing principles in New Jersey, stating that while an employer may have legitimate interests in an RCA including protection of trade secrets, proprietary information, or customer relationships, nevertheless an employer does not have a legitimate interest in simply preventing competition. The Court reiterated the principle that the restrictions in an RCA enforced only to the extent reasonably necessary to protect legitimate business interests, and would otherwise be blue-penciled, or given enforcement to the extent reasonable.

In doing so, the Court first approved enforcement of the two-tier system of RCAs finding that such was appropriate based on the increased investment, training, and access provided to higher level employees. The Court further found that language as to the non-solicitation of clients was unreasonable to the extent that ADP had 620,000 existing clients, and that any single ADP employee could not possibly know all of these actual clients. Instead the Court found that a more reasonable standard to apply would be that an employee could be preventing from soliciting only those clients to which the employee had actual knowledge of, or was actively involved with. As to prospective clients, the Court also found that such was overly broad as any clients ADP might even approach could be a potential prospective client, and must therefore be limited to potential clients that an employee gained knowledge of while at ADP. As to non-compete language, the Court sided with ADP, and ruled out any additional narrowing that had been included by the trial courts further limiting the scope of the RCAs by adding a market segment limitation, finding that the geographic limitation was sufficient and

reasonable for purposes of non-competition.

## Takeaways for Employers Using Restrictive Covenant Agreements

The Kusins case reinforces that while restrictive covenants can continue to be relied upon by employers, employers must be mindful in drafting carefully considered restrictions that can be supported by actual legitimate business needs. Any language must be drafted in a manner that is reasonable and proportional to the interests to be protected, rather than to act as a punitive or anti-competitive measure against former employees. To the extent that employers over reach, litigation may result in courts striking out language that is found to be unnecessary.