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Why Art-World Employment Agreements Are under Increasing Scrutiny

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Disputes involving employees and employers are becoming more prevalent in the art community as evidenced by the recent lawsuits filed by Heritage Auctioneers against Christie's, Inc., and the Lehmann Maupin Galleryagainst former employee Hyun-Yi "Bona" Yoo. The competitive and high-stakes nature of the art business—characterized by highly confidential client lists and strategically cultivated business relationships—often manifests in restrictions limiting employee mobility. And these restrictions are increasingly being scrutinized by courts.

Recent art industry employment lawsuits

In the case of *Heritage Auctioneers & Galleries, Inc. v. Christie's, Inc.*, a New York court ruled on the enforceability of clauses restricting employees' ability to compete and solicit fellow employees. Heritage sued Christie's and three former

management-level members of Heritage's luxury accessories and handbags team after Christie's allegedly poached the employees. The former Heritage employees had employment agreements that contained non-compete clauses (restrictions on an employee's ability to work for a competing business for a period of time) and non-solicitation clauses. The court found both clauses to be reasonable, but held that the non-solicitation clause had not been breached. The clause prohibited an employee from soliciting fellow employees *post-employment*; however, all three employees had resigned on the same day, indicating that the solicitation necessarily occurred *before* their departure, not after.

The court held that it could not rule on whether the non-compete provision had been breached and that, instead, it should be decided by a jury. The case settled shortly after the first day of trial. However, the court later allowed the parties to proceed on the issue of non-solicitation after, upon a motion for reconsideration, the court agreed that another provision of the employment agreement clarified that the non-solicitation provision was in fact applicable *during* employment as well.

In November of 2018, the Lehmann Maupin Gallery sued its former director, Bona Yoo. Lehmann Maupin claimed that Yoo moved to Lévy Gorvy after originally giving just one day's notice and surreptitiously copying trade secrets, including valuable client contact information. Yoo had allegedly signed a confidentiality and non-solicitation agreement prohibiting her from, among other things, using the gallery's confidential information. After months of litigating, the case was dismissed in June of 2019, and presumably a settlement was reached.

Laws vary dramatically in different jurisdictions

While many courts—like the court that heard *Heritage v. Christie's*—uphold non-solicitation and non-compete agreements, those restrictions may not fare so well in all jurisdictions.

The most dramatic example is California, notorious for having strong public and legislative policies favoring employees. California law holds any contract void if it restrains an employee "from engaging in a lawful profession, trade, or business of any kind." Interpreting this statute, California courts have long held non-competition provisions to be invalid. Employee non-solicitation provisions—provisions that prohibit the recruitment or solicitation of current and, in some instances, former employees—at least until now, were viewed as a plausible alternative to protect employers' interests. Recent California court decisions, however, have put the fate of non-solicitation provisions in significant, if not complete, doubt as well. In the past year, three different California courts have found employment agreements prohibiting the solicitation of employees to be void as a restraint on employees practicing their professions.

Those art employers who have their operations in New York, however, are likely to fare slightly better in enforcing non-compete and non-solicitation restrictions. Although not looked at with great favor, New York courts will generally enforce those restrictions if they protect the legitimate business of the employer (rather than being purely anti-competitive), are reasonable (including limited in geographic and temporal scope, and do not preclude employees from working in other capacities), and tailored to achieving goals such as protecting confidential information, good-will and business relationships,

or where the employee's services are extraordinary. These goals are, however, balanced with the employee's ability to earn a living and the public's interest in a competitive and free market. Non-solicitation and non-competition provisions in New York, unlike in California, are thus still enforceable provided they are reasonable and can be used to protect the delicate relationships that abound in the art industry.

Tips for employers and employees

For art employers, given the ever-changing nature of the laws surrounding restrictive covenants, it is vital to review employment agreements in the various states in which they have employees and operations to ensure compliance. This diligence is especially important if art employers have a connection to California as the laws have recently changed and a review process could avoid future litigations with employees. Likewise, employers should review other options available to protect their business interests, such as ensuring that confidential information is tightly protected. Trends indicate that employers will be less able to rely on restrictive covenants to protect their interests as the courts are increasingly favoring mobility in a much more global society; thus creative solutions will only become increasingly important.

Art employees should also be aware of their rights in the states in which they work. For example, entering into an employment agreement in California or governed by California law will give one greater flexibility and career mobility. All employees should take precautions and make careful decisions when leaving positions. Using the Lehmann Maupin lawsuit as a lesson, the employment relationship should be handled with care and compliance (such as providing notice as required by your agreement), and engaging a lawyer if you are considering taking any of your employer's documentation or information with you as you leave.

Clarification: An earlier version of this article, when examining Heritage Auctioneers & Galleries, Inc. v. Christie's, Inc., *did not include facts related to a subsequent motion for reconsideration that was filed in connection with the case. The article has been updated to include that information.*

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