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Labor and Employment Alert: Ohio Supreme Court Recognizes “Error,” Allows Successor Entities in a Merger to Enforce Noncompete Agreements

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The Ohio Supreme Court recently held that its decision in *Acordia of Ohio, L.L.C. v. Fishel*, (Ohio June 2012) (*Acordia I*), was "erroneous" to the extent the decision provided that noncompete agreements are only enforceable after a merger if the agreements contain "successors and assigns" language. Click [here](#) for our previous *Labor and Employment Alert* on the *Acordia I* decision.

In *Acordia I*, the Court held that although the noncompete agreement transferred to the successor entity as a matter of law in merger, the ability to enforce such agreements was not automatic. Rather, the enforceability was determined by the specific language of the noncompete agreement in question. Since the agreements in that case did not have any language regarding successors or assigns, the parties to the agreements only intended the agreements to operate between themselves -- the employee and the original employer. The Court required the additional language based on its previous decision in *Morris v. Invest. Life Ins., Co.*, (Ohio 1971), in which the Court stated: "[A] merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former. Of necessity, the absorbed company ceases to exist as a separate business entity." Given that, in *Acordia I*, the absorbed company ceases to exist, and given that the language of the noncompete agreement limited the agreement to the absorbed company, the Court held that the noncompete agreements were not enforceable absent the successor or assigns language.

In *Acordia of Ohio, L.L.C. v. Fishel*, (Ohio Oct. 2012) (*Acordia II*), the Court held that its reading of *Morris* was incomplete. The Court recognized that while *Morris* does state that the absorbed company ceases to exist as a separate business, the opinion does not state that the absorbed company is completely erased from existence. Instead, the absorbed company becomes part of the resulting company following the merger. As such, the court held that the merged company has the ability to enforce noncompete agreements as if the resulting company had stepped into the shoes of the absorbed company, even absent

"successor or assigns" language in the noncompete agreement. Despite the court's clarification in *Acordia II*, it is still recommended as the safest course of action for employers to include in their noncompete agreements language which makes the agreements not only enforceable by the original employer, but also to any successors and assigns. Employers can accomplish this by broadly defining the term "company" in the agreement to include affiliates, successors and assigns. Moreover, any surviving entity after a merger or any buyers of a business must take steps to protect their acquired interests. To achieve this, the surviving entity should review the language of noncompete agreements to ensure that the agreements are reasonable in light of the merger or acquisition, and that each agreement contains specific language making the agreement enforceable by successors or assigns. If such language is not present, the surviving entity should take additional steps to protect its acquired interest, including asking employees to enter into new noncompete agreements. To the extent these steps have not been taken, or that employees will not sign new noncompete agreements, *Acordia II* provides support that the noncompete may still be enforceable by the surviving entity.