Association Restrictions May Carry a High Cost

By Donald C. Collins

Associations can be sorely tempted to bar both current and former members from working for other associations. Whatever the reasons, associations would be wise to steer clear of restricting members even when doing so is perfectly legal.

The law distinguishes current members from former members (see siderail item about restricting former members). It's generally easier to restrict current members. However, there are some factors an association must consider before restricting anybody.

The first factor associations must consider is location. Most states apply a contract theory to restricting current workers. These states allow an employer to bar a worker from working a second job because it's part of the contract. An association should consult with local counsel to see if it's located in one of these states.

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On the other hand, some states simply don't believe in restrictions on current or former workers. These states either believe employers shouldn't be butting into one's non-working life or they believe employers shouldn't be restricting free competition. Associations whose local counsel tells them they're in one of these states simply shouldn't be restricting their members from joining other associations.

The second factor associations must consider is the technical details. If you are in a state that allows an association or employer to restrict workers, you still have to do it right. Some states may require a worker to get something extra if the worker is being restricted. This makes sense since every contract is an exchange of promises; if I don't get any extra pay or some other benefit for the restriction, there's really no contract. It is not clear how these states would handle association bylaws since those are contracts. The issue may boil down to whether the school or the association is writing the official's check.

Also, association members, like all workers, have a duty of loyalty to their current employer. Whether your state allows restrictions or doesn't allow them, a worker can't moonlight on a second job if it's going to hurt the current employer's business. In essence, the duty of loyalty allows the average Burger King worker to take a second job at McDonald's, but would allow Burger King to stop its vice president from moonlighting at McDonald's.

Officials aren't generally going to embarrass association A by working games for competing association B, but there are circumstances where they might. Members should not work for other associations in those circumstances.

Ultimately, an association can restrict its current members from working games for another association as long as they do it right and they're in a state that doesn't ban the practice. Officials may find this a bit troubling because they're generally independent contractors. However, independent contractors are responsible for meeting the terms of their contracts, and association bylaws and assigner contracts are contracts.

One unpopular condition will not generally change a worker's independent contractor status, but an association or school that has too many restrictions could convert their independent contractors to employees. Also, the more a school or association restricts, the more it opens itself up to dissension within the ranks and burdensome employment-related litigation. So it may generally be legal to restrict current members, but the cost of restrictions may be too high.

Donald C. Collins is a longtime basketball official and lawyer. This article is for informational purposes and is not legal advice. □

What About Restricting Former Members?

When it comes to associations restricting members from working for other associations, it can be tougher with former members.

It is done through non-compete agreements, and most states do allow them. However, there are limits. The three big limits are they must protect a legitimate business interest, and be limited in time and scope.

The truth is a list of schools and a list of officials associations are publicly available; they're not trade secrets. Courts won't find a legitimate interest in protecting them, and former members can make full use of them and officiate wherever they want. Even if a court did bar a former member from working for a rival, restrictions don't tend to last more than a year or two. Ultimately, one's former member is going to get to work for rivals or even start a competing association either immediately or pretty darned soon.

It's hard (but not impossible) to use non-competes to restrict former members. But just like restricting current members, the potential cost of the restrictions (in association morale and potential litigation) makes them something most associations will want to avoid.

SOURCE: ATTORNEY DONALD C. COLLINS

Ways to Support Legislative Initiatives

As of mid-2023, there are 22 states that have officiating assault and/or harassment laws (including 20 with criminal laws and two with civil statutes). Officials interested in supporting legislation in their state that protects officials from assaults can find valuable information at naso.org. Recommended steps include:

1. Involve a local association.
2. Circulate a petition.
3. Gather information on incidents in that state.
4. Phone or email legislators and tell them you'd like to meet to present information on the issue.
5. Follow up with thank you letters and keep reminding lawmakers you are following their progress. Offer to speak at committee hearings and invite legislators to come speak at one of your meetings.

Taking these steps helps increase the chances of success.