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Change in Ohio Law Regarding Aiding and Abetting Tortious Conduct

In late August 2012 the Ohio Supreme court ruled that Ohio does not recognize a cause of action for aiding and abetting tortious conduct. *See DeVries Dairy, LLC v. White Eagle Coop. Ass'n.*, 132 Ohio St. 3d 516, 2012-Ohio-3282 (Ohio 2012). The question was certified to the Ohio Supreme Court from the District Court for the Northern District of Ohio. This was a departure from existing Ohio common law—as noted in the lone dissent. Prior to this ruling, both state and federal courts in Ohio recognized that aiding and abetting tortious conduct was also a separate tort, in and of itself. But following the Supreme Court's ruling in *DeVries*, several courts—both state and federal—have dismissed aiding and abetting claims under the new interpretation of Ohio law.

This change in Ohio tort law has serious ramifications regarding the extent of liability for improper conduct in recruiting a competitor's employees or obtaining confidential business information. *DeVries* makes it much easier, and reduces the risk for a competitor, to assist in breaches of fiduciary and other common law duties while avoiding liability. While conspiracy is always an available alternative, it is a much more difficult cause of action to prove and has a much higher standard (actual agreement to injure another party by means of an underlying tort and, in Ohio, a "malicious" state of mind) than aiding and abetting (merely providing substantial assistance or encouragement for another party engaging in tortious conduct).

This change in aiding and abetting law also has ramifications regarding tortious interference with economic advantage (or business relations). Tortious interference with business relations requires an underlying tort by the purported interfering party. Until now, aiding and abetting tortious conduct could serve as the predicate for tortious interference, but no longer. Therefore, as the law currently stands, absent a conspiracy, a competitor may be able induce, assist, and even participate in breaches of fiduciary duty/duty of loyalty without any fear of liability. *See, e.g., Sacksteder v. Senney*, Montgomery App. No. 24993, 2012-Ohio-4452, ¶¶74-76 (Sept. 28, 2012) (holding that, pursuant to *DeVries*, "persons 'participating' in the direct actor's breach of fiduciary duty are not liable.").

There are strategies that employers can use to safeguard against the aggressive competitive conduct that may result from the *DeVries* ruling in order to maintain the fidelity of their workforces and customer relationships. These strategies, however, need to be carefully considered and analyzed as they may have unintended consequences themselves.

For more information, please contact your Hahn Loeser attorney or call 1-877-HAHN-LAW for more details.

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