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# "You Compete Me" – Will the Courts Love Your Company's Restrictive Covenants for Employees as Much as you do?

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An area of law where both employers and employees often struggle to find clarity is the area of restrictive covenants, specifically non-competition and non-solicitation clauses for employees. Part of the reason for frequent confusion is that this area of law – and specifically whether and how a non-competition or non-solicitation clause is enforceable – tends to be very fact-specific. While these types of clauses will tend to have some standard elements, the factual scenarios in which they typically unfold in litigation tend to be somewhat unique from one another. It can therefore be challenging to predict precisely when these clauses will be enforced by the courts. That said, there are some basic aspects of this area of law that merit review, because it is important that employers be mindful of them and consider whether the clauses they are using should be reviewed or updated.

Restrictive covenants protect an employer's interests and relations with its clients, customers, suppliers and employees from being exploited by current or former employees. They generally take two forms: (1) non-competition clauses, which restrict the former employee from going into business that competes against the former employer for a period of time; and (2) non-solicitation clauses, which prohibit the former employee from actively soliciting business from former clients or customers, or soliciting the employer's other employees to join them in new employment.

The general common law rule is that all restrictive covenants are contrary to public policy and void because they are a restraint of trade. However, over time the courts have relaxed this rule. A restrictive covenant will generally be enforced if it is reasonable as between the parties and in accordance with the public interest, considering the: (1) scope of activity, (2) geography, and (3) duration of the prohibition. Non-competition or non-solicitation clauses that are too broad in one or more of those three areas will be considered unreasonable and unenforceable.

We often see employers taking a "one size fits all" approach when they draft their restrictive covenants – for example, using the same scope of activity, geography and duration for an entry level position in one area of the business as they do for a higher level management position in a different area. This can be one of the pitfalls of using standard form employment contracts without duly considering the individual circumstances of each situation and whether the "form" actually "fits". While it may be perfectly justifiable in the circumstances to restrict a high-level manager for, say, 18 months in a broad scope of activity, it may not be justifiable to do the same with an employee on the shop floor or other such positions in the same way. As a general rule, less sophisticated employment positions will only bear shorter and narrower restrictions. Similarly, imposing the same work area or geographic restrictions on two employees who each do very different things in different parts of the country or Province will typically raise problems of unreasonableness and unenforceability. Ultimately, if you have some doubt whether your standard-form restrictive covenant is reasonable and enforceable in the circumstances, chances are that it merits some review and possible revision. While there is no magic language that will make every clause enforceable, they can typically be honed to have the best possible chance of enforceability in the circumstances.

The law dealing with restrictive covenants generally continues to evolve away from use of non-competition clauses, in favour of the typically less restrictive non-solicitation clause. Many employers make the mistake of thinking that they have a proprietary interest in an employee not competing with them, as distinct from simply having a proprietary interest in their customers, business partners, confidential information, and employees and in ensuring that those are not exploited. If a blanket restriction on competition is not reasonably necessary to protect the employer's interests, then a non-competition clause is unlikely to be enforced. As a general rule, instead of trying to apply a non-competition clause that aims only to keep somebody out of the business, it is often wiser to focus on drafting a clear, unambiguous and enforceable non-solicitation clause that prevents a departing employee from taking away customers and employees. The latter method allows the employee to be employed in the industry generally, but prevents them from doing so

through exploitation of the information, connections and relationships that were developed with customers and employees their former role.

Notwithstanding the above, there remain several appropriate circumstances for blanket non-competition clauses. Higher level employees, who have been around the company and the industry for a longer duration, who have broad and deep connections with the clients (particularly in niche areas or industries), and/or who have stayed on with a company after having sold their interest to the current owner/employer, will more typically have well-drafted non-competition clauses enforced against them. In particular in the context of a sale of a business, where the owner/operator of the business is being paid for their interest and is staying on afterward as an employee, it is very important to ensure that they are bound by a proper non-competition clause, which is much easier to enforce in such a context than in the standard employment context.

Many employers and employees also do not realize that, while a well written restrictive covenant is ideal, it may not be necessary in order for the employee to be restrained from certain activity post-employment. Employers need not necessarily be resigned to the fate of a high-level employee departing and exploiting customer relationships and confidential information in immediate competition with the former employer simply because there was no written contract in place preventing such behaviour. The reality is that in some such situations, including where the former employee was a key employee having fiduciary obligations to the employer, the common law may nonetheless require that employee to refrain from exploiting information or relationships that are derived from their former role or status for a reasonable period of time following departure, regardless of the lack of a written contract to that effect. The circumstances of such a situation must be examined carefully in order to determine whether the behaviour can be stopped, but it often can be.

Finally, employers can sometimes forget that in order to enforce a restrictive covenant against an employee, the employer must not itself be in breach of the express or implied terms of the employment contract. Where this issue often arises is where the employer has wrongfully terminated the employee's employment, dismissing them without just cause and without either the express or implied requisite pay-in-lieu of notice. In such circumstances, where the employer has effectively fundamentally repudiated the contract and the employee has accepted such repudiation, the law in Alberta is fairly clear that the employer may not then enforce a restrictive covenant against the employee. As such, if an employer intends to terminate an employee without cause but intends to rely on a restrictive covenant thereafter, it is advisable to seek legal guidance in how to properly handle the termination.

In summary, employers need to strike a balance in their approach in this area. On the one hand, you do not want to be endlessly updating your restrictive covenants and foregoing the convenience of using one or more standard forms in this regard. On the other hand, because the law, your workplace, and employees' circumstances are always evolving, and because a more diligent crafting of restrictive covenants is more important now than it has ever been, it is worthwhile to periodically review your existing materials, or alternatively to consider whether you wish to start implementing such clauses into your contracts if you have not already done so. Field Law's Labour and Employment Group can assist with drafting and refining such contractual language, developing strategy that best suits your business, and protecting your interests when enforcement or litigation issues arise in this area.