

You Raise the Issue

GREGORY SIM

Question: *We would like to protect our business by negotiating employment agreements with non-competition and non-solicitation clauses but have heard that these types of clauses are sometimes unenforceable. How do we make sure our employment agreements will stand up?*



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Of all the terms and conditions in an employment contract, none are more likely to land you in Court than non-competition clauses (which prohibit departing employees or independent contractors from competing with the employer's business) and non-solicitation clauses (which prohibit departing employees or independent contractors from contacting the employer's clients or other employees in order to persuade them to leave the employer).

Restrictive covenants are hotly contested in Court cases. The Supreme Court of Canada recently ruled on restrictive covenants in *KRG Insurance Brokers (Western) Inc. v. Shafron*. KRG Insurance Brokers employed an insurance agent under an employment contract with a non-competition clause. The Court did not uphold a clause that prohibited the insurance agent from being employed by, or being involved with, any other insurance agency within the metropolitan city of Vancouver.

The Courts will closely scrutinize restrictive covenants in employment agreements in order to balance the competing interests at stake. On the one hand, the Courts recognize that people and businesses should be free to enter into whatever contracts they choose, and those agreements should be enforceable in accordance with the parties' intentions. On the other hand, restrictive covenants limit employees' and independent contractors' abilities to work and these clauses therefore restrain trade.

Where then do Courts draw the line between the freedom to contract and the discouragement of restraint of trade? Courts will enforce a restrictive covenant when it is reasonable, such that it meets the following requirements:

1. **It is necessary to protect the employer's business interests:** The employer must have business interests deserving of protection, such as a loyal client base that sustains the business.
2. **It must not be too broad geographically:** Where a business has virtually no customers from outside a region, a prohibition on competing with the employer or soliciting customers anywhere outside of that region is probably unreasonable.
3. **It must not be too long in duration:** If customers usually patronize your business on a monthly basis, then it will only take a few months for those customers to be introduced to a new contact if their usual contact leaves. A restrictive covenant for a much longer time is probably unreasonable.
4. **It doesn't restrict more activity than necessary:** Prohibiting departing employees or contractors from engaging in directly competitive business is likely reasonable. An attempt to prohibit departing employees or contractors from working in areas of business that the employer may be contemplating, but has not yet started, is probably unreasonable.

2000, 10235 - 101 STREET
EDMONTON, AB T5J 3G1
PH: 780.423.3003

400 THE LOUGHEED BUILDING
604 1 STREET SW
CALGARY, AB T2P 1M7
PH: 403.260.8500

201, 5120 - 49TH STREET
YELLOWKNIFE, NT X1A 1P8
PH: 867.920.4542

www.fieldlaw.com

It is important to negotiate restrictive covenants carefully to ensure the best chance that they will hold up in litigation if necessary. Consider the following tips:

- Before using a restrictive covenant, consider what you are trying to protect. Where do you find the majority of your customers? How often do they use your business?
- Consider whether you need to prohibit departing employees or contractors from competing with you. Would your business be adequately protected if those employees were simply prohibited from soliciting your clients and other employees? Courts are generally more willing to enforce non-solicitation clauses than non-competition clauses.
- Seek to impose the narrowest geographical and time parameters that will adequately protect your business. If you choose too broad an area or too long a period of time, the Courts might declare your restrictive covenant unenforceable.
- Make sure the language in your contract is clear and understandable. In the *KRG* case, the Supreme Court of Canada ultimately declared the non-competition clause unenforceable because it was unclear what the parties meant by “metropolitan city of Vancouver”.
- Finally, consult a lawyer experienced in the area to help you prepare or refine your contracts.

Taking the time to consider these issues and to negotiate the least restrictive covenant that will still adequately protect your business benefits everyone. It will go a long way towards ensuring that the contract will be enforceable in accordance with what the parties intend. ▲

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The Labour and Employment Group
Edmonton 780-423-3003
Calgary 403-260-8500

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