You Raise the Issue

KRISTAN MCLEOD

Kristan McLeod

Question: *I want my current employees to sign a non-competition agreement - do I have to pay them to get them to sign?*

Employers have much of their overall investment wrapped up inside their employees, including their technical expertise, facility within the industry, and personal contacts built up over years of working in one area. Not surprisingly, many employers seek to limit the damage to themselves when employees leave by using non-competition agreements that restrict how directly former employees can compete against their former bosses, and prevent them from luring both customers and other employees away.

Non-competition agreements are sometimes put into place with existing employees when an employer realizes the damage that can be wrought from labour flight. The tricky issue is always how best to structure the agreements so they are binding and enforceable.

The long-held wisdom has been that any time an employer makes a unilateral amendment to the employment contract, the employer must provide fresh consideration, often provided in the form of an agreement signing bonus. Numerous authorities have held that merely allowing the employees to keep their jobs was insufficient to enforce an agreement that restricts employees' future employment options.

In late 2005, however, the Alberta Court of Appeal accepted in *Globex Foreign Exchange Corp. v. Kelcher*, [2005] A.J. No. 1654 that a non-competition agreement could be binding though the employee received only his continued employment and an implied promise not to be dismissed for some reasonable period of time.

Most courts in recent decades have been reluctant to find that continued employment is adequate, unless the employer expressly cautioned the employee that dismissal would follow if the agreement was not signed. For example, the British Columbia Court of Appeal in *Watson v. Moore Corp.*, [1996] B.C.J. No. 525, rejected continued employment as sufficient consideration for a long-standing employee's agreement not to compete, given that the employer failed to demonstrate an actual intention to dismiss the employee, and could not show that the employee was threatened with dismissal if she did not agree to the new terms. Similarly, in *Hobbs v. TDI Canada Ltd.,* [2004] O.J. No. 4876, the Ontario Court of Appeal held that a promise of continued employment was insufficient consideration without an employer's express intention to discontinue employment if the employee did not sign the agreement.

The Alberta Court of Appeal in *Globex,* however, has accepted that an implicit promise not to dismiss for a reasonable period of time is sufficient when combined with evidence of an actual understanding on the part of the employees that failure to sign the non-competition agreements would result in the loss of their jobs.

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

So, how do employers structure their non-competition agreements so they are enforceable?

1. Make employees aware that their jobs are at stake if the new agreement is not signed.

2. Provide a clear assurance that the employees won't be dismissed without cause for a reasonable period after the new agreement is signed (or after the time period that is already agreed to between the employer and employee).

3. To cover all the bases, give the employees an additional incentive for signing the agreement, such as a signing bonus, a raise, or other benefit. Without new consideration, employers may still run the risk of having an unenforceable non-competition agreement, and they never know until after the damage is done.