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Restrictive Covenants: You Showed Me The Door, And Now You Want My Fidelity?

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Restrictive covenants, such as non-competition agreements, are a common way for employers to try to protect their interests against former employees. Unfortunately, on occasion the covenants provide less protection than the paper they are written on.

It must be remembered that restrictive covenants are presumed to be unenforceable. This is because one of the core tenets of our legal system, is that there should be no unreasonable restraints on trade. In order for the clause to be enforceable, the person or entity seeking to enforce the clause (usually the employer) must show that the clause is reasonably necessary to protect its legitimate business interests.

Earlier this year, the Ontario Court of Appeal was asked to consider the enforceability of a non-competition covenant. In *Mason v. Chem-Trend Limited Partnership*, the former employee, Mr. Mason, brought an application before the Court to determine whether and to what extent he was free to compete with his former employer. The non-competition clause at issue was for a period of one year following the end of Mr. Mason's employment and prevented him from engaging in "…any business or activity in competition with the Company by providing services or products to, or soliciting business from, any business entity which was a customer of the Company during the period in which [Mr. Mason] was an employee…"

The application judge found that the clause was reasonable and enforceable. Mr. Mason appealed. On appeal, the Court of Appeal found that there were other less restrictive ways in which the employer could (and in fact did) seek to protect itself. For example, the employment agreement included terms which restricted Mr. Mason's use of confidential information and which prevented him from soliciting customers of the Company. The Court of Appeal also found that the clause was not reasonable for a number of reasons including:

- its global scope was too broad notwithstanding that the Company operated globally;
- it was not restricted to preventing Mr. Mason from providing services or products to customers to whom Mr. Mason had knowledge of, but rather prevented him from providing services to any customers of the Company whether or not Mr. Mason knew that these entities were customers;
- Mr. Mason did not hold a senior position with the Company.

In the end, the Court of Appeal found that the clause was not reasonable and therefore was unenforceable. Clearly, this was a very unsatisfactory result for the Company. The result was even more painful to the Company as the clause at issue also contained the non-solicitation restriction. Since the clause was found to be unenforceable, the Company lost the protection of the non-solicitation clause as well as the non-competition clause.

This case is not unusual or remarkable. However, it is a very good reminder that restrictive covenants, such as non-competition and non-solicitation agreements must be drafted with care. These covenants should not be treated as boilerplate. They must be designed with regard to the interests the employer seeks to protect and the profile of the employee (things like the seniority of the position and the employee's access to confidential information or clients).

Practical Tips

Here are a few practical tips which should be considered when drafting restrictive covenants:

- make sure that the clause is reasonable and unambiguous as to the activities it restricts and its temporal and geographic scope. Keep in mind that the seniority of the position will have an impact upon the extent of the temporal and geographic limits. For example, courts are likely to enforce longer restrictive periods against senior employees, such as the CEO and other senior executives, as compared to less senior employees;

- make sure that the clause clearly identifies the clients with whom the employee is prevented from dealing. For example, rather than saying the employee is prohibited from soliciting or providing services to all clients of the company, limit it to clients with whom the employee has had contact during the last 12 months of employment;

- do not deal with non-competition restrictions and non-solicitation restrictions within the same clause. Separating the restrictions into different clauses will improve the chances that one restriction will survive if the other is found to be unenforceable;

- do not put restrictive covenants in the employment agreement or offer of employment. Attach them as schedules to the employment agreement or offer of employment. This makes it easier to amend the restrictive covenants in the future without affecting the balance of the terms of employment;

- review restrictive covenants every few years to make sure they are still enforceable. The law on this topic is not static and changes in the common law may make your existing agreements unenforceable;

- do not try to implement non-competition clauses if a non-solicitation clause and/or confidentiality clause is sufficient to protect the company's interests. Courts do not like it when companies try to over-reach in the restrictions imposed on departing employees.

If you have any questions about putting restrictive covenants in place or the enforceability of existing covenants, please contact us. ■