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Employment Notes

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"An employer can gain some protection from attack of its customers by means of a carefully worded covenant with its employees."

CAN AN EMPLOYER PROTECT ITS CUSTOMER BASE FROM ATTACK BY EX-EMPLOYEES?

D. Barry Prentice

I am certain that most employers believe that they own the relationship with their customers such that they can prevent an ex-employee from soliciting those clients post employment. Given that the goodwill generated by the employee with the customer during his employment was at the employer's expense, namely, payment of the employee's wages and, perhaps, his expenses in entertaining the customer, it is considered unfair for the employee to immediately start attacking this customer base following resignation without giving the employer a reasonable period of time in order to encourage the customer to maintain its allegiance with the employer.

An employer can gain some protection from attack of its customers by means of a carefully worded covenant with its employees. Provided it is reasonable in terms of duration, geography and scope (i.e. restricted to those customers with whom the employee had a level of control) such a covenant has a chance of being enforced by our courts. The fact is, however, that it may be difficult to get existing employees to sign such a covenant and, even if they do, in order to make it enforceable there must be valuable consideration from the employer in return for such a covenant.

The Starting Point

In 1978 the Supreme Court of Canada ruled that a restrictive covenant will only be enforceable if it is reasonable between the parties and with reference to the public interest. This dictum has been interpreted to mean that in order to overcome the bias that covenants which restrain trade are contrary to the public interest, the employer must show that it has a proprietary interest entitled to protection.

How the Recent Cases have dealt with these principles

In *Jordan v Pacific Sign Group*, Jordan was president and director. He resigned and went to a competitor. As part of a refinancing a few years earlier, Jordan had signed a restrictive covenant in which he agreed that he would not, for a period of one year post employment, solicit clients with whom he had dealt in the course of his business with the company, nor carry on any business which directly competes with that of the company. When he left, Pacific sought to enjoin each of these restrictions. Notwithstanding the fact that Jordan was clearly a key employee, and undoubtedly a fiduciary, the B.C. Supreme Court held that the covenants were unenforceable. Its analysis is informative.

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"Where the employee is sufficiently key or a true fiduciary our courts have often held that he will be precluded from exploiting the particular vulnerability that flows from the unique relationship between himself and his employer for his own business interests."

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Firstly, the Court held that the nature of the sign business did not involve trade secrets. As such, Pacific had no legitimate interest in prohibiting Jordan from competing in the sign business.

The Court also held that the covenant which prohibited Jordan from soliciting any customers with whom he had dealt in the course of his employment was beyond what was reasonable and fair because it would preclude him from soliciting those with whom he had only minimal contact. The Court so ruled notwithstanding the fact that Jordan essentially drove the sales team while at Pacific. Also important to the decision was the fact that the nature of the sign business was such that a significant portion of Pacific's business was from "one-off projects". The covenant did not distinguish between these different types of customers. Although the Court intimated that it would have been appropriate to restrict solicitation of customers over which he had come to exercise some special influence, for example, those whose business be brought to Pacific, it refused to re-write the covenant so as to be enforceable. Although the Court held that Pacific had a legitimate interest in maintaining the loyalty of its customer base, the restriction went beyond what was reasonable in the circumstances.

This case is unusual in the sense that a very senior employee and director was not prohibited from soliciting customers. It emphasizes the importance of tailoring the covenant to meet a legitimate business interest of the employer which is worthy of protection.

Interestingly, the Court did not consider the implication of Jordan's fiduciary duties which presumably exist over and above the written covenants. Where the employee is sufficiently key or a true fiduciary our courts have often held that he will be precluded from exploiting the particular vulnerability that flows from the unique relationship between himself and his employer for his own business interests. Some cases have gone further to hold that the key employee must act in his ex-employer's best interests following employment.

As an example, in the case of *Toscana Valve Services v Anderson*, Toscana's sole sales representative who was responsible for all sales activities and who exercised some control regarding personnel matters and was privy to financial matters was held to be a key employee and thus a fiduciary although he was not a director. When he left Toscana, he immediately started a competitive business and solicited Toscana's customers. This was held to be a breach of Anderson's fiduciary duties. It is difficult to rationalize this conclusion with that reached in the *Jordan* case. Anderson was also held to have breached his fiduciary obligations when, during the course of his employment, he actively solicited another Toscana employee to join his new venture, having specific knowledge of that other individual's capabilities.

In the recent case of *RBC Dominion Securities v Merrill Lynch*, virtually all of the investment advisors and assistants at a B.C. branch of RBC were induced by the manager of the competing Merrill Lynch office to quit and join his branch. Prior to leaving without notice, they secretly

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removed or copied client records and sent them to Merrill Lynch. As in *Toscana*, none of the employees had a restrictive covenant. In its claim against its former employees RBC relied on the purported legal premise that as ex-employees they had a duty not to compete unfairly. Although such a proposition had previously been quoted many times in the cases, the B.C. Court of Appeal rejected this as a general proposition of law. This is an important change to the jurisprudence. The Court also concluded as follows:

1. Given the nature of the brokerage business, the clients did not belong to RBC. The Court sought to strike a balance between the rights of the brokerage to the goodwill in its clientele and the rights of the investment advisors to take those clients with them when they leave. In coming to this conclusion, the Court considered it important that the advisors were required to hold licenses, that it was typical in the industry for the clients, known as the broker's "book of business", to follow the advisor when he/she left to go to another firm because a relationship of confidence had developed between them, the advisors were compensated solely on commissions and it was important that there be no break in the service available to the client from his/her advisor.

2. Although the advisors were precluded from taking RBC's physical lists setting out client particulars, they were not precluded from copying that information onto their own paper and taking that with them. This, again, is a significant change in the law.

3. Although it was not proper to start soliciting while still employed by RBC, the advisors were not precluded from contacting the clients immediately following departure in order to solicit business on behalf of Merrill Lynch.

4. There was no obligation on the departing employees to advise RBC that they had received a competing offer of employment.

5. The advisors did have a duty to provide reasonable notice of resignation, in which duty they failed.

What are the implications of these cases?
Given the reasoning in *Jordan* and *RBC*, it would be imprudent to believe that a court would be convinced to grant the type of protection provided in the *Toscana* case without the benefit of a valid restrictive covenant. As of now, the type of fact situation in which such relief will be granted without a covenant is probably quite rare. Accordingly, any employer concerned about protecting itself from competition by former employees is well advised to develop and implement carefully drafted employment agreements with those employees from whom it is vulnerable from competition. As is evident from the *Jordan* case, care must be taken in describing the prohibitions as well as the duration and geographic scope of the covenant. In addition, if it is an existing employee who is being asked to sign such an agreement, the employer will need to provide compensation appropriate to the circumstances in order to make the covenant binding. ■

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"The new Regulatory Modernization Act, 2007... may also create more uncertainty for employers when dealing with the provincial government and greater consequences for lapses in compliance."

William Anderson is a partner within the firm's Labour and Employment practice group. Bill's practice includes labour board litigation, negotiating large-ticket severance and wrongful dismissal packages on behalf of executives and other employees. He is particularly active in issues relating to the construction and health care industries.

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NEW REGULATORY ENFORCEMENT IN ONTARIO

William Anderson

On January 17, 2008, a new regime will be introduced in Ontario, whereby Government inspectors will be empowered to enforce regulations outside of their "home" legislation. For example, the next time a Ministry of Labour inspector under the *Occupational Health and Safety Act* attends at your premises you may subsequently receive a complaint in respect of an environmental concern or an overtime violation under the *Employment Standards Act, 2000*.

The new *Regulatory Modernization Act, 2007* (the "*Act* ") is clearly intended to create cost savings and more thorough enforcement of Ontario regulatory law and licensing. However, it may also create more uncertainty for employers when dealing with the provincial government and greater consequences for lapses in compliance.

As this new legislation was an initiative of the Ministry of Labour (the "MOL"), employers should expect the MOL to aggressively use the *Act* wherever possible to undertake a broader review and accumulate a shared database regarding employers who violate MOL legislation and contravene its regulations.

One of the most striking aspects about the legislation is the ability of the respective Ministries when enforcing their legislation to make publicly available information acquired during an investigation. While there are certain legislative prerequisites before the information can and will be made available, it is certainly not beyond the realm of possibility for employers who face frequent complaints, such as human rights concerns, to see their organization being publicly used as an example on a Ministry website as part of a statistical analysis. This could spur other potential complainants for whatever reasons, legitimate or otherwise, and create a snowball effect. The *Act* also provides for more information sharing between Ministries for enforcement purposes, which will likely cause subsequent rounds of related investigations. Contraventions or violations of certain regulatory provisions may also now be used in respect of prosecutions under different Acts as part of sentencing.

What this all means to employers is that it is probably a good time to do a compliance audit of the company's policies and procedures. Further, regulatory inspections should, as always, be treated seriously but now you must also keep in mind that there may be collateral consequences to any inspector's stated purpose.

Lastly, because complaints, violations and convictions are now going to be compiled, saved, shared and analyzed between government Ministries, it is more important than ever to try to ensure that any potential problem with a Ministry be dealt with and resolved without any admission or finding of liability in order to avoid residual effects in subsequent related or unrelated investigations. ■

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"Section 2 of the Employment Standards Act, 2000... requires employers covered under the ESA to post a copy of the Ministry of Labour's poster entitled 'What You Should Know About the Ontario Employment Standards Act' in a conspicuous location in the workplace."

POSTING REQUIREMENTS UNDER ONTARIO AND FEDERAL LEGISLATION

Goli Garakani

This article will highlight the key posting obligations of employers under various employment-related statutes and regulations.

Employment Standards Act, 2000

Section 2 of the *Employment Standards Act, 2000*, c.41 (the "*ESA*") requires employers covered under the *ESA* to post a copy of the Ministry of Labour's poster entitled "What You Should Know About the Ontario Employment Standards Act" in a conspicuous location in the workplace. In some cases, employers will be required to post the poster in languages other than English and French.

If an employer applies to the Director of Employment Standards (the "Director") for an approval to have some or all of its employees work more than 48 hours per week, the employer must post a copy of the application on the application date (s.17.1). A copy of any approval must also be posted and remain posted until the approval expires or is revoked. If the application has been refused, the employer must similarly post and keep posted a copy of that notice for 60 days.

An approval regarding the averaging of hours of work for the purpose of determining an employee's entitlement to overtime pay, if any, must also be posted until the approval expires or is revoked (s.22.1).

If an employer terminates the employment of 50 or more employees within a four week period, the employer must give notice of termination on the first day of the notice period, and must post in its establishment the prescribed information set out in O.Reg. 288/01 (s.58).

An employment standards officer may require an employer to post any notice relating to the administration or enforcement of the *ESA* or its regulations and a copy of a report with the results of an investigation or inspection (s.93). In a review by the Ontario Labour Relations Board, the Board may require a person to post and to keep posted, any notice that the Board considers appropriate (s.119).

Occupational Health and Safety Act

Section 25 of the *Occupational Health and Safety Act,* R.S.O. 1990, c. O.1 (the "*OHSA*") provides that an employer must post a copy of the *OHSA* and any explanatory material prepared by the Ministry, in English and the majority language of the workplace. An employer must also post a written occupational health and safety policy.

An employer that is required to establish a joint health and safety committee (required at workplaces where 20 or more workers are regularly employed) must post the names and the work locations of the committee members (s.9).

Any annual summary of data relating to employers that must contribute to the insurance fund under *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c.16, (the "*WSIA*") received from the Workplace Safety and Insurance Board

"...under the WSIA... a first aid station must contain a notice board displaying: WSIB's poster entitled 'In Case of Injury at Work', the valid first aid certificates of qualification of trained workers, and an inspection card recording the date of the most recent inspection of the first aid box."

(the "WSIB") must be posted (s.12). An employer must also post accurate records of the levels of biological, chemical or physical agents in the workplace (s.26). Any order issued by the Director in respect of the use of a biological, chemical, or physical agent, or combination of agents must be posted (s.33). Furthermore, prominent notices identifying and warning of hazardous physical agents must be similarly posted (s.41).

Where an inspector finds a contravention of a provision of the *OHSA* or the regulations, he/she may post a copy of an order for compliance (s.57). Furthermore, an order or report issued by an officer must also be posted. When the employer submits a notice of compliance to the Ministry, a copy of the notice and the order issued must be posted for a period of 14 days following its submission to the Ministry (s.59). If an inspector's order is appealed, the Board has the discretion to post any notice it considers necessary to bring the appeal to the attention of persons having an interest.

Workplace Safety and Insurance Act

O. Reg 175/98 under the *WSIA* provides that all Schedule I and Schedule II employers post any card, pamphlet or other information supplied to the employer by the WSIB. *First Aid Requirements,* R.R.O. 1990, Reg. 1101 provides that a first aid station must contain a notice board displaying: WSIB's poster entitled "In Case of Injury at Work", the valid first aid certificates of qualification of trained workers, and an inspection card recording the date of the most recent inspection of the first aid box. The WSIB or the Appeals Tribunal also has the power to require a person to post a notice if the Board or tribunal considers it necessary (s.132).

Pay Equity Act

The *Pay Equity Act,* R.S.O. 1990, c. P.7 (the "*PEA*") provides that any document that is required to be posted must be posted in a conspicuous place. Further, the posting obligations as set out in the *PEA* apply to all employers in the public sector and the private sector that employ 100 or more employees as of January 1, 1988 (s.11). Every employer that is directed by the Pay Equity Office must post a notice setting out the employer's obligation to establish and maintain compensation practices that provide for pay equity and the manner in which an employee may file a complaint or objection under the *PEA* (s.7.1). The notice must be in English and any majority language.

A copy of any pay equity plan agreed to by an employer and a bargaining agent must be posted (s.14). Furthermore, a pay equity plan for that part of the employer's establishment that is outside any bargaining unit must also be posted (s.15). A copy of any amended plan must also be posted with the amendments clearly indicated.

After a review officer effects a settlement or makes an order regarding a pay equity plan, the employer must post in the workplace a copy of the pay equity plan that reflects the settlement or order (s.16). A decision of Hearing Tribunal must be posted (s.17).

A Hearing Tribunal or a review officer may also require an employer to post a notice relating to the *PEA* (s.32). If a Hearings Tribunal or a

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review officer requires that a notice be given by the employer, the posting of such notice will be deemed to be sufficient notice to all employees. Lastly, if the Hearing Tribunal is satisfied that a notice has not been posted, the Tribunal may order a review officer to enter the workplace and post the notice.

Canada Labour Code

"Post" is defined in the *Canada Labour Standards Regulations* (the "Regulations") as to post in readily accessible places where the document is likely to be seen by the employees to whom it applies. Employers must post the notices found in Schedule II to the Regulations, which advises employees that Part III of the *Canada Labour Code,* R.S.C. 1985, c. L-2 (the "*Code*") contains provisions establishing minimum labour standards in the federal jurisdiction, including standards for hours of work, general holidays, sick leave, work-related illness and injury, and the payment of wages. Section 25 of the Regulation also provides that every employer must also post copies of its policy statement concerning sexual harassment.

The *Code* provides that where an employer terminates 50 or more employees within a four-week period, it must provide notice directly to each employee, or post the notice in the workplace. When such notice is given, the employer must establish a joint planning committee, and the names of the committee's members must be posted as well (ss. 212 and 218). An arbitrator also has discretion to require an employer to post notices (s.224).

Sections 170 and 172 of the *Code* set out the posting requirements with respect to the establishment, modification or cancellation of work schedules. Applications for approval to exceed the limit of 48 hours of work per week must be posted for at least 30 days before its proposed effective date (s.176). A copy of the approved application must also be posted (s.25). An employer of non-unionized employees may substitute any other holiday for a general holiday if the substitution has been approved by at least 70 per cent of affected employees. Where any other holiday is to be substituted, the employer must post a notice of the substitution for at least 30 days before the substitution takes effect (s.195). This notice must remain posted for the duration of the substitution (s.15 of the Regulation).

Before averaging hours of work or changing the number of weeks in the averaging period, the employer is required to post a notice of intention at least 30 days before the change takes effect (s.6 of the Regulation) and for as long as the averaging agreement is in effect.

An employer must post a copy of the occupational health and safety provisions of the *Code*, a statement of the employer's general policy concerning the health and safety, and any other related printed material (s. 125). Where 20 or more employees are normally employed, an employer must establish a workplace health and safety committee (s.135), and the names, workplace, phone numbers and work locations of the members must be posted. A request to be exempt from establishing a workplace health and safety committee must be posted until the employees are informed of the Minister's decision. Furthermore, the minutes of every health

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Blaney McMurtry LLP is pleased to announce

Goli Garakani, LL.B., J.D. has joined the firm's Labour and Employment Group following her call to the Bar of Ontario.

Goli graduated Cum Laude from University of Detroit Mercy School of Law, obtaining her Doctor of Jurisprudence degree. She also obtained an LL.B. from University of Windsor Ontario. Prior to attending law school, Goli received her Honours Bachelor of Arts degree in Political Science from the University of Western Ontario.

In 2006 Goli was elected to "Who's Who Among Students in American Universities and Colleges" in recognition of outstanding merit and accomplishment as a student at University of Detroit Mercy. For two consecutive years she was the recipient of the J.D./LL.B. Scholarship. She was also the Chair of the Peer Mentoring Committee for incoming law students.

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and safety committee meeting must be posted for one month, and the Chairman of the safety and health committee must keep it posted for two months (ss.9 and 10 of SOR/86-305.

If a health and safety officer is of the opinion that the use or operation of a machine or thing, a condition, or the performance of an activity constitutes a danger, a direction may be issued, which must be posted to or near the place, machine or thing in respect of which the direction is issued (s.145). This notice cannot be removed unless authorized to do so. If an appeal is brought, and the appeals officer issues a direction, the employer must post the direction and it cannot be removed unless authorized by the appeals officer (s.146).

The *Canada Occupational Health and Safety Regulations,* SOR/86-304, provide that an employer must post the telephone number of a contact person to whom indoor air quality concerns in the workplace can be directed (s.2.26). This regulation also provides for posting obligations which may arise with respect to noise level or the type of material produced by the employer. Furthermore, an employer must disclose product information if it produces a controlled product or brings a controlled product into a workplace. An employer must also post the product identifier in certain cases (s. 10.38). The existence and generic name of hazardous waste must also be disclosed and a notice posted in respect of same (s. 10.43). ■

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Special Insert

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Violence in The Workplace: A New Ministry Initiative?

"This new Ministry initiative demonstrates the growing concern about violence in the workplace, and the responsibility employers have to take all reasonable steps to prevent it."

Bill Anderson's article in this issue of the newsletter outlines the provisions of the new *Regulatory Modernization Act, 2000*. It is our understanding that the Ministry of Labour has hired a number of new officers who may well have been cross appointed under the new legislation described in Bill's article. There are now, or will be shortly, more individuals authorized to enforce the *Ontario Occupational Health and Safety Act* (the Act).

Background

Recently we have receive a number of reports from clients and others concerning spot safety audits being conducted pursuant to the Act. Apparently officers are now requesting employers to provide their **Violence in the Workplace** policies. While the Act does not specifically require such policies, it does require every employer to take "every precaution reasonable in the circumstances for the protection of a worker". Ministry officials are now not only advising employers to have such policies, they are asking for copies. If an employee is injured on the job because of a violent incident, an appropriate policy could be of great assistance in demonstrating that you have taken every reasonable precaution to protect your workers. In our view, employers are now well advised to review such policies if they have them or to institute such policies if they do not.

The Importance of Policies

The importance of safety policies that are well publicized and enforced by employers has become increasingly important. Proper policies can and do reduce or eliminate accidents. They also provide significant protection to employers if an accident occurs. To defend charges under the Act, the employer must demonstrate that they took all steps, reasonable in the circumstances, to protect employees, in addition to showing that all specific regulations were followed (such as guarding on machinery, erection of proper barriers etc.). This is known as the 'due diligence' defence, and is an essential part of any response to charges under the Act.

This new Ministry initiative demonstrates the growing concern about violence in the workplace, and the responsibility employers have to take all reasonable steps to prevent it.

Violence in the workplace is not just about fights or assaults. It also involves threatening behaviour, verbal or written threats, verbal abuse, or even activity away from work, if it is in some way related to the workplace. The policy needs to take into account the nature of the work, the employees who work there and their possible interaction with others, as well as relevant factors about the work place itself. The Ministry has identified some industries, such as healthcare, transportation, retail, police – as well as others – has being at more risk. They have also identified some jobs such as handling cash, working alone or at night, transporting people and goods – and others – as having a greater risk of violence. Your policy needs to assess the risk in your work place and put programs in place, including appropriate training, to minimize such risk and to deal with threatened or actual violence if it occurs.

We would be pleased to assist in the formation or evaluation of your policies.