



## Non-Competition and Non-Solicitation Clauses

New businesses face a number of challenges, one of which is to develop a good relationship with employees whereby there is a shared understanding of the terms and conditions of the employment relationship. One way to ensure there is shared understanding about the employment relationship, is for employers to negotiate written employment agreements with their employees.

Written employment agreements have a number of advantages. First, well-drafted employment agreements provide clear statements about the nature and scope of the parties' expectations and obligations. Employment agreements help to reduce uncertainty as they provide clear records of the nature of the agreements reached (or any changes to them) between parties. These agreements act as forms of corporate memory that survive changes in personnel.

Well-drafted employment contracts are also useful as they specify the rights and obligations of the parties on the termination of the employment. Good contracts not only outline the circumstances under which the employer may terminate the relationship, but will also specify the costs associated with each of the options. Clearly drafted contracts also specify employees' obligations on termination of their employment, which may include promises not to compete against their former companies and or the promise not to solicit their former employers' clients or employees.

Well drafted, clear employment contracts are more likely to be upheld by courts, which may assist to limit liability and provide incentive on both sides for the early resolution of disputes. Thus, it is important when drafting employment agreements to avoid an approach where one size fits all. Contracts must be drafted to respond to the particular circumstances of each situation and modified accordingly. Thought must be given to the kinds of protections that are being sought and given both during and after the employment relationship.

### Restrictive Covenants

Much has been written about ways to protect parties through the use of employment contracts. This section deals with specific clauses in an employment contract to restrict employees' activities at the end of the employment relationship. These clauses are often referred to as restrictive covenants and take the form of non-solicitation or non-competition clauses.

The use of restrictive covenants has become commonplace in many employment contracts as employers seek to protect themselves against the risks of having employees, who have had access to critical information about the employers' products' and clients, leave the business and compete against their former employers. These clauses are also used to prevent employees from "poaching" or luring away employees and/or from soliciting business from the employers' clients.

Understandably employers who have invested considerable time and resources in their employees want to be sure that if these employees leave their employment they cannot take unfair advantage of the knowledge obtained and use this to the detriment of their former employers.

One way to protect against unfair competition is through the use of non-competition and non-solicitation clauses in employment agreements. These clauses are most often found in contracts for key employees,

executives or employees whose knowledge of the business and their customers or clients would make employers' vulnerable in the event that competitors hire these employees.

## **Non-Competition Clauses**

Courts are often reluctant to enforce non-competition clauses in contracts, as they are often concerned about the potentially negative effects of overly restricting employees' abilities to find new work after the termination of their employment relationships. As a result, at common law, restrictive covenants are, *prima facie*, presumed to be invalid. In order to found to be valid and enforceable the restraint being sought by the employer must be reasonable. In assessing whether the restraint is reasonable, the employer must have a legitimate interest deserving of protection, the restraint must go no further than protecting the employer's legitimate interest and it must be in the public interest to permit this form of protection. Thus, employers must examine carefully the circumstances of each particular situation and seek advice on whether non-competition clauses are desirable and if so ensure that they are fair, reasonable and able to pass scrutiny by the courts.

Each case is different and the issue of whether a court will uphold non-competition clauses in contracts depends on the facts of each case. There is no golden rule, and courts will look very carefully at factors such as the purpose of the clause, its duration, the territory it covers and the nature of the prohibited activity in determining whether to enforce its terms. More often than not, courts find that such clauses fail the reasonableness test and overreach the mark, which is of little use to an employer trying to protect its interests. Thus, getting legal advice early regarding if, when and how to use such clauses in employment contracts can save a lot of unnecessary grief and cost if things do go wrong at the end of the employment relationship.

## **Non-Solicitation Clauses**

It is not all bad news. Although the courts are hard on non-competition clauses, they have taken a different approach to non-solicitation clauses and tend to interpret these less strictly than non-competition clauses. Non-solicitation clauses may apply to the employers' clients or employees. In the former the protection being sought is against the loss of clients, in the latter it is against the loss of talented employees.

This is not to say that the courts do not carefully scrutinize non-solicitation clauses. They do and these clauses will only be upheld if they are reasonable. Typically, courts will examine the nature of the employee's functions and his or her work with company or its clients in order to assess the reasonableness of the limits being sought by the non-solicitation clause. Courts will look at the facts of the situation and will consider whether the contacts made by the employee with customers and suppliers are such that the employee could influence these customers, suppliers to employees to switch loyalties. The courts may uphold non-solicitation clauses that do not overreach the mark and employers should seek to protect themselves through the use of these clauses rather than non-competition clauses wherever reasonably possible.

## **Conclusion**

Employment contracts can be a very useful tool for employers if used properly and restrictive covenants can provide a critical part of the contract. However, in order to be of any use to employers, restrictive covenants must be enforceable, which means they must be reasonable. Fairness and balance are the keys to reasonableness and well-drafted clauses that do not overreach the mark can be a useful tool to protect employers' interests.

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