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Soliciting trouble with restrictive covenants

Departing employees and the employers they leave need to be clear on solicitation; New employers can also get in trouble for breaching non-solicitation agreements

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BACKGROUND

IN A 2017 DECISION, the Ontario Superior Court of Justice (upheld on appeal) found two former employees and their new employer liable for breach of a non-solicitation agreement the employees had with their former employer. The non-solicitation clause prevented the two employees from soliciting clients from their former employer for a period of two years following the end of their employment.

An Ontario employer must share liability with two new employees for breaching the employees' non-solicitation clause with their previous employer for encouraging them to contact former clients, the Ontario Superior Court of Justice has ruled.

The employees left their jobs and joined a new employer — a competitor of the former employer — and immediately began to call their former clients, ostensibly to "notify" those clients of the employees' new place of employment. The court found these calls amounted to solicitation, in breach of non-solicitation agreements.

The decision — *MD Physician Services Inc. v. Wisniewski* — is significant for two reasons. First, the court found the non-solicitation clause enforceable despite admittedly vague language defining its geographical scope. Second, the court found the actions of the employees in contacting former clients amounted to "solicitation" and not merely "notification."

The decision demonstrates the benefit of a well-drafted non-solicitation agreement and also highlights the potential risk to a former employee and the new employer when they do not comply with a non-solicitation agreement.

What is a restrictive covenant?
Generally, there are two types of restrictive covenants: those that restrict competition and those that restrict solicitation of clients. The former restricts a departing employee from conducting business with former clients and customers generally, while the latter limits a departing employee from soliciting their business specifically. Canadian courts are more reluctant to enforce a non-competition covenant because it can create a significant barrier to re-employment. By contrast, a non-solicitation clause that is: "suitably restrained in temporal and spatial terms — is more likely to represent a reasonable balance of the competing interests than is a non-competition clause. An appropriately limited non-solicitation clause offers protection for an employer without unduly compromising a person's ability to work in his or her chosen field. A non-competition clause, on the other hand, is enforceable only in exceptional circumstances," said the Ontario Court of Appeal in its 2008 decision of *H.L. Staebler Co. v. Allan*.

Accordingly, when considering the enforceability of a restrictive covenant, courts have traditionally asked the following questions:

- Does the employer have a proprietary interest entitled to protection?
- Is the covenant reasonable in terms of the public interest?
- Is the restrictive covenant clear and unambiguous with respect to:
  - length of time
  - geographical scope
  - scope of the restricted activity?

It is important to note in Canada (unlike in the United States, for example), a court will not edit or amend a restrictive covenant otherwise non-compliant with the law, unless the focus of the edit is a trivial matter, not going to the heart of the restriction. This is to encourage Canadian employers to draft covenants that are minimally intrusive and not overly broad.

What happened in this case?
The non-solicitation clause at issue read as follows:

"'**solicit**' means: to solicit, or attempt to solicit, the business of any client, or prospective client, of the Employer who was serviced or solicited by the Employee during his/her employment with the Employer . . .

4.1: **Non-Solicitation.** The Employee agrees that the Employee shall not solicit during the Employee's employment with the Employer and for the period ending two (2) years after the termination of his/her employment, regardless of how that termination should occur, within the geographic area within which s/he provided services to the Employer...

4.2 **Geographic and Time Limitations.** The Employee acknowledges that the time and geographic limitations in Article 4.1 are reasonable and necessary for the adequate protection of the Employer's business and property. In the event that the time or geographic limitation is found to be unreasonable by a court, then the Employee agrees to be bound to such reduced time or geographic limitation as said court deems to be reasonable."

There was no evidence the departing employees took with them any client information belonging to the former employer. However, the day following their departure, the employees created a list, from memory, of former clients and prospective clients, and began to call them by phone. Several clients ultimately moved to the new employer.

The departing employees argued they had not "solicited" any clients. Rather, they testified, the purpose of their calls was to "notify" former clients of their new employment. The court did not accept this evidence and found the "telephone contacts made by (the departing employees) during their early days at (their new employer), although made in the guise of simply informing their clients of their new place of employment, was meant to be, and became, solicitation."

The court based this ruling on the following:

- The phone calls were made on the first day at the new job and as quickly as possible.
- Rather than send an email or leave a voicemail, the calls had to result in direct contact with an individual.
- At the direction of the new employer, the calls followed a predetermined formula whereby the former employee advised of their new employment and paused in

the hopes the client would request their business be transferred. The new employer described the instructions given to the departing employees as follows: "We tell our folks let the client know where you have gone…what role you will be doing…and then stop so…the door has been opened. If the client then chooses to walk through that door by asking for other information...the new (investment advisor) is in our view allowed to… continue that conversation."

- In a few instances, the former employees actually requested the clients move their business.

In terms of the temporal length of the covenant, the court canvassed a variety of decisions and held that two years was neither ambiguous nor unreasonable.

In terms of the geographical scope, the court held that even if the language could be considered vague, this aspect of the covenant had no meaningful impact and, for that reason, could be "blue pencilled" or severed from the agreement. This is because the covenant was intended to preclude solicitation of former clients and prospective clients. Geographical scope is therefore irrelevant, particularly in a world of electronic communication.

As for the meaning of "solicit," the court held this was very clear on its plain meaning and had also been defined in the agreement.

The new employer was found vicariously liable for whatever damages the former employer suffered because the new employer had instructed the departing employers to contact their former clients and in the manner in which to do so.

Lessons learned for employers

A restrictive covenant can be a double-edged sword. On the one hand, if an organization has a proprietary interest to protect, a covenant may be appropriate. On the other hand, if an organization is hiring an employee subject to a restrictive covenant, the promise of riches may be short-lived, or at least delayed until the covenant has run its course. Either way, an employer should consider the following:

- **If you are considering the utility of a non-solicitation agreement, ask yourself, do you *need* it?** To be enforceable you must have a proprietary interest in what you are seeking to protect.
- **If a non-solicitation agreement is appropriate, be as specific and clear as possible**. Define what constitutes "solicitation" and the time period within which the covenant will apply.
- **Do not over-play your hand.** When drafting a non-solicitation clause, aim for a reasonable timeframe and reasonable restricted activity. The purpose of a non-solicitation clause is not to forever forbid a former employee from soliciting your clients. It is to give your organization enough time to replace the departing employee and shore up the client base.
- **When hiring a new employee, ask whether he or she may be subject to a restrictive covenant and, if so, review the covenant.** Remember, the impact of a covenant can cut both ways; not only restricting the actions of a departing employee, but also of a new employer in reaping the anticipated rewards of that employee. Furthermore, as in the case discussed above, where circumstances merit, the new employer can be held vicariously liable for the departing employees' unlawful solicitation.

For more information see:

- *MD Physician Services Inc. v. Wisniewski,* 2017 CarswellOnt 11447 (Ont. S.C.J.).
- *H.L. Staebler Co. v. Allan,* 2008 CarswellOnt 4650 (Ont. C.A.).