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WL UPDATE

WHITTEN & LUBLIN
Employment Lawyers

NON-SOLICITATION PROVISIONS: GOOD LUCK ENFORCING THEM!

Canadian courts have clearly spoken out against post employment restrictions, leaving many employers scratching their heads: they will only enforce non-solicitation and non-competition provisions in employment agreements under very limited circumstances. Indeed, courts have stated repeatedly that they will not even consider a non-competition provision, if a reasonably drafted non-solicitation provision is sufficient protection for an employer. This past summer, the Ontario Court of Appeal considered one such provision in Mason v. Chem-Trend Limited Partnership and has raised the bar yet again for employers trying to impose post-employment obligations.

Mr. Mason was employed for 17 years with Chem-Trend before he was terminated, allegedly for cause. When he was hired, he signed an agreement which stated that for a period of one year following the conclusion of his employment he would not "engage 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" while he was employed with Chem-Trend. When his employment was terminated, Mr. Mason was responsible for sales throughout Canada as well as certain mid-Atlantic US states. The court recognized that in this role he had intimate knowledge of Chem-Trend's products, customers and marketing strategies.

Although the court found that one year was a reasonable period of time to impose such a restriction, it ultimately refused to enforce it because it would prevent Mr. Mason from soliciting former customers of the company going back 17 years. This was considered unreasonable and inconsistent with a one-year restriction on competition which suggested that after one year whatever information Mr. Mason had about a particular customer would be stale. Further, the court did not accept that it was reasonable to prevent Mr. Mason from dealing with Chem-Trend's customers, even if they approached him, as he was a technical salesperson, not a senior executive.

By the time the court was done with it, Chem-Trend's non-solicitation provision was not worth the paper it was written on, so how does an employer protect itself from a departing employee competing against it? We recommend the following:

- Don't rely upon template non-solicitation/non-competition provisions, have one carefully drafted to ensure that it is suitable for your industry and does not overreach.
- Differentiate between non-solicitation and non-competition generally. Previous cases have found that non-competition agreements "posing" as non-solicitation clauses are invalid.
- Resist the urge to have the provision cover all customers, instead focus on customers that the employee dealt with.
- Make sure the clause is not too long, in most cases it should be no more than six months to a year.
- Make sure the provision is properly implemented, ideally this is done at the outset of the employment relationship as opposed to midstream.

Whitten & Lublin is a team of legal experts who provide practical advice and advocacy for workplace issues.

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