Keeping Up With Non-Competes: The State Of Non-Competition Clauses In BC

Non-Competition Clauses

A non-competition clause (or “non-compete”) is a provision, often found in employment contracts, that restricts an employee from engaging in competitive activities against their former employer for a specified period or geographic location after the employment relationship ends. These clauses protect the employer’s business interests, such as trade secrets, confidential information, and client relationships, by preventing former employees from using the knowledge and experience gained during their tenure to benefit a competitor.

Non-competition clauses have long been a source of contention between employers and employees. Employers typically favour them, while employees often oppose them. Courts endeavor to strike a balance between the competing interests by permitting these restrictions on trade, provided that the restrictions are clear and unambiguous, linked to the protection of the employer’s legitimate proprietary interests, and reasonable in terms of geographic scope, duration, and the nature of the activities being restricted.

Other similar clauses employers use to protect their businesses are non-solicitation clauses and non-disclosure clauses. A non-solicitation clause prohibits a former employee from soliciting clients, customers, employees, and any others with whom the employer has had business dealings. A non-disclosure clause or a confidentiality clause prohibits an employee from disclosing the employer’s proprietary information to third parties without proper authorization. These clauses are still enforceable in BC and across Canada.

The Non-Compete Problem

It is common for employers to insert non-competition clauses into employment contracts or for employers to insist that the clauses are non-negotiable. As a result, employees, who often lack the bargaining power to dispute the clauses, agree to them only to later realize the true limitations imposed on their career opportunities. For example, an employee at a fast food restaurant who has no confidential information or systems information may be unable to leave for a different fast food restaurant offering better pay and conditions because that employee unwittingly signed an employment agreement with a non-competition clause. Such an employee would be faced with the following options:

1. stay with their current employer;
2. leave the fast food industry and outwait the time restriction in the non-compete;
3. work for a different fast food restaurant outside of the geographical boundary in the non-compete (assuming they are not in breach of a time restriction); or
4. switch industries and leave behind their industry-specific experience and skills.

With no good options available, some employees are often put in vulnerable positions. Notably, not all employees are negatively affected in this way, but a subsect of employees in specific industries with specific education and experience are made vulnerable.

Some jurisdictions have attempted to resolve this pervasive inequity by banning non-competition clauses. These bans have now been adopted in the United States and Ontario.

United States

On April 24, 2024, the Federal Trade Commission ("**FTC**") in the United States passed a nationwide ban on non-competes in workplaces for jobs and industries that the FTC regulates (the "**Non-Compete Ban**"). Effective August 2024, the ban aims to curb the exploitation of vulnerable workers and increase the lateral mobility of workers.

The Non-Compete Ban defines "non-competes" to include a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (a) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition, or (b) operating a business in the United States after the conclusion of the employment that includes the term or condition.

Two notable exceptions to the blanket ban on non-competes include:

1. non-competes entered into in connection with the sale of a business; and
2. existing non-competes with "senior executives" – that is, either very high-level employees or policy-making officers meeting a prescribed salary threshold.

The carveout for senior executives is because this subsect of workers is not subject to the same vulnerabilities of other workers; they typically have specialized training and education that opens doors for other employment prospects. Moreover, senior executives are the select few workers who do, in fact, have in-depth knowledge about their employers' business and operational methods and have strong relationships with their employers' clients. If a senior executive were to leave and take this information and these clients to a competitor business, the employer's business could be seriously threatened.

Ontario

Like the FTC, Ontario has taken a similar approach to non-competes. Since October 25, 2021, Ontario has prohibited new non-competes between employees and employers. Under subsections 67.2(3) and (4) of the Ontario *Employment Standards Act, 2000, S.O. 2000, c. 41*, the ban does not apply to:

1. A sale of a business or a part of a business and, as a part of the sale, the purchaser and seller enter into an agreement that prohibits the seller from engaging in any business, work, occupation, profession, project, or other activity that is in competition with the purchaser's business after the sale

and, immediately following the sale, the seller becomes an employee of the purchaser.
2. An executive is any person who holds the office of chief executive officer, president, chief administrative officer, chief operating officer, chief financial officer, chief information officer, chief legal officer, chief human resources officer, chief corporate development officer, or any other chief executive position.

British Columbia

Currently, B.C. does not have any legislative restrictions on non-competes. The application and parameters of non-competition clauses in the province are determined by the common law. However, due to the ongoing vulnerability of certain employees, the obstacles to fair competition, and the legal precedents set by Ontario and the United States, British Columbia may likely follow suit and prohibit non-competes in the near future.

Takeaways

Our advice:

- To B.C. employers, limit the use of non-competes in your employment agreements to employees that hold C-suite executive, highly technical, or high-level managerial positions.
- To employees, if you see a non-compete in your employment agreement consider whether your position warrants the restrictions associated with the non-compete.

If it doesn’t, seek out legal advice. With the appropriate legal advice, you may be able to negotiate the removal, or the minimization of the non-competition clause or, in some cases, obtain increased compensation in exchange for signing the non-competition clause.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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