The Future of Confidentiality and Employee Mobility in Canada

Beyond the Non-Compete

Canadian workplaces are in the middle of a quiet revolution.

For decades, employers relied on restrictive covenants — non-compete, non-solicitation, and confidentiality clauses — to protect their business interests when employees moved on. These were the invisible fences of employment law, meant to keep company secrets safe and competitors at bay. But in today's world of hybrid work, open talent markets, and mobile careers, those fences are coming down fast.

In 2021, Ontario became the first province in Canada to ban most non-compete clauses outright. Other jurisdictions haven't gone that far, but courts across the country are making it increasingly difficult to enforce broad restrictions on employee movement. At the same time, the digital workplace has made protecting confidential information more complicated than ever. Data now lives on personal laptops, cloud accounts, and mobile phones — far outside the walls that once defined a secure workplace.

For HR professionals, this shift presents a new balancing act. On one hand, organizations need to safeguard intellectual property, client relationships, and competitive advantage. On the other, they must respect employees' right to pursue new opportunities and avoid overreaching with clauses that won't hold up in court.

This article explores how Canadian HR managers can navigate that balance — rethinking restrictive covenants for a workforce that values flexibility, transparency, and fairness. From the Ontario non-compete ban to the rise of remote work and cross-border hiring, we'll look at what's changing, what still works, and how to protect your organization without standing in the way of your people's careers.

Because in the new world of work, loyalty isn't enforced through paperwork — it's earned through trust.

The End of the Non-Compete Era

For years, non-compete clauses were standard practice in Canadian employment contracts. Many HR templates included them automatically, often without much thought. The rationale was simple: if an employee leaves, they shouldn't immediately join a

competitor or start their own rival business using what they've learned.

But in recent years, courts — and now lawmakers — have started asking whether those restrictions are really fair or necessary. The turning point came in Ontario's Working for Workers Act, 2021, which amended the Employment Standards Act (ESA) to prohibit non-compete agreements for nearly all employees. The law makes these clauses void unless the employee is part of the C-suite — a CEO, president, CFO, COO, or equivalent — or the restriction is part of the sale of a business.

That means if a company in Ontario tries to include a non-compete in an employment contract for a sales manager, marketing director, or software engineer, it's automatically unenforceable — even if the employee signs it willingly.

The Ontario government justified the change by arguing that non-competes limit worker mobility, suppress wages, and stifle innovation. Research supported that view: the Competition Bureau of Canada found that banning non-competes could boost job mobility by up to 15 percent and lead to more competitive wages in high-skill sectors.

While other provinces haven't gone as far as Ontario, the message from the courts is clear — non-competes are a last resort, not a default. They will only be upheld if they are narrowly tailored to protect legitimate business interests and if a less restrictive clause, like a non-solicitation agreement, would not suffice.

In Alberta, for example, the Court of Appeal has repeatedly struck down non-compete clauses that were "overly broad in time, geography, or scope." In one 2023 case involving a technology company, the court ruled that a 12-month restriction preventing a software developer from working "in any capacity in the tech industry" was unreasonable and void.

The takeaway for HR professionals is simple but profound: if your employment agreements still include broad non-compete language, it's time for a rewrite. Focus instead on confidentiality and non-solicitation, which are both more enforceable and more aligned with modern employment law.

The Rise of the Non-Solicitation Clause

As non-competes fade into history, non-solicitation clauses have become the go-to tool for employers trying to protect client relationships and staff stability.

Unlike non-competes, non-solicitation clauses don't stop an employee from working for a competitor. Instead, they prohibit the departing employee from actively soliciting the company's clients, vendors, or employees for a certain period after leaving.

Canadian courts view this type of clause far more favourably because it strikes a balance between protecting business interests and allowing employees to continue their careers. But that doesn't mean HR can copy and paste generic language and expect it to hold up.

Courts demand **precision**. In *MEDIchair LP v. DME Medequip Inc.* (2016), the Ontario Court of Appeal struck down a non-solicitation clause because it was too vague. The employer had tried to prohibit solicitation of "any clients," but hadn't specified which clients or for how long. The court ruled that employees must be able to clearly understand who they can and can't approach after leaving.

A well-crafted clause should define:

- The time period of restriction (usually six to twelve months for most roles).

- The scope of solicitation, such as clients with whom the employee had material dealings during the last year of employment.
- Whether it applies to employees, clients, or both.

Importantly, HR must ensure the clause doesn’t attempt to control “passive” contact. For instance, if a client reaches out to a former employee on their own initiative, that’s not necessarily solicitation.

In practice, many organizations are also using non-solicitation of employees to prevent departing managers from poaching their teams. Courts are more flexible with these clauses since they protect internal stability rather than restricting free competition.

For HR managers, the key is proportionality. The more senior or client-facing the role, the stronger the justification for a non-solicitation clause. A one-size-fits-all restriction that applies to every employee, from executive to receptionist, is both unnecessary and risky.

Confidentiality in the Age of Hybrid Work

If non-competes are disappearing and non-solicitation clauses are narrowing, confidentiality agreements have become the backbone of modern employment protection.

They’re also the most misunderstood.

Confidentiality clauses (often embedded as non-disclosure agreements, or NDAs) are designed to protect trade secrets, client lists, pricing models, source code, product roadmaps, and any proprietary business information. Unlike non-competes or non-solicits, they are generally enforceable as long as they’re clear and reasonable.

But the rise of hybrid and remote work has made enforcement exponentially harder. Employees now access company data through personal devices, home Wi-Fi networks, and shared family computers. Sensitive information may live in multiple places at once — a laptop, a personal cloud drive, a smartphone.

That means a confidentiality clause is only as strong as the company’s data governance. If HR doesn’t ensure secure systems, employee training, and clear offboarding protocols, legal protection may come too late.

Consider what happened to a Toronto fintech company in 2023. When a software developer left to join a competitor, the company discovered he had synced sensitive code to his personal Google Drive account. The company sued for breach of confidentiality, but the court dismissed the claim because management had never clearly communicated what data was confidential or prohibited personal storage. The absence of consistent policy undermined their case.

For HR professionals, this is where policy and contract intersect. Every confidentiality clause should be backed by a clear data security policy and regular training. Employees should understand what constitutes confidential information, how to handle it remotely, and what happens when they leave.

And don’t forget the offboarding process. HR should always coordinate with IT to ensure access is revoked immediately, company devices are returned, and employees confirm deletion of any digital copies. A single missed account can become a million-dollar leak.

The Digital Dilemma: Social Media and Solicitation in the Online Age

Restrictive covenants were written in an era of fax machines and Rolodexes. In today's world of LinkedIn, WhatsApp, and Slack, the lines between professional and personal contact are blurry.

When a departing employee posts on LinkedIn to announce their new job, are they "soliciting" clients? What if they message a former coworker to catch up — or if a client messages them first?

Courts are now wrestling with these digital grey zones. In *SNC-Lavalin Inc. v. Arsenault* (2019), a Québec court ruled that a former employee did not breach their non-solicitation clause by announcing a new position on social media. However, the same court held that direct outreach to former clients inviting them to transfer business would violate the clause.

Similarly, in *MD Physician Services Inc. v. Wisniewski* (2018), an Ontario court found that simply connecting with former clients on LinkedIn was not solicitation — unless the messages specifically referenced business or invited clients to follow them to a competitor.

For HR managers, these cases highlight the need to update employment agreements and policies to reflect digital realities. Clauses should now explicitly cover:

- Electronic communications, including social media, instant messaging, and email.
- What constitutes "solicitation" in digital spaces.
- Prohibitions on taking or copying client contact lists or using AI/CRM exports after departure.

This also ties into employee education. During onboarding and exit interviews, HR should clearly explain post-employment obligations — not in legal jargon, but in everyday language.

It's not enough to rely on a clause buried at the end of a contract. Employees need to understand what's acceptable — and what isn't — in a world where professional relationships live online forever.

Fairness and Overreach: Why Reasonableness Still Reigns

Every Canadian court assessing a restrictive covenant begins with the same question: Is it reasonable?

That principle, first articulated in the Supreme Court of Canada's *Elsley v. J.G. Collins Insurance Agencies Ltd.* (1978), remains the cornerstone of enforceability. Employers can only restrict employees as much as is necessary to protect a legitimate business interest. Anything beyond that is void.

Legitimate interests include protecting trade secrets, confidential information, and client relationships. What's not legitimate is simply trying to limit competition or control an employee's career.

This means HR must design restrictive covenants surgically, not systemically. It's tempting to include the same clause in every contract "just in case," but courts view that as overreach. A blanket non-compete for all employees, including administrative

staff, signals that the employer didn't consider the individual circumstances — and that can invalidate the entire agreement.

The Alberta Court of Appeal reaffirmed this in *Globex Foreign Exchange Corp. v. Kelcher* (2011), finding that a company's broad non-solicitation and confidentiality clauses were unenforceable because they lacked evidence of real harm. The court reminded employers that restrictive covenants must address actual, not hypothetical risks.

The message for HR is clear: less is more. Restrictive clauses should be as narrow as possible while still protecting the organization's legitimate interests. Overbroad language doesn't provide more protection — it provides none.

The Offboarding Challenge: Enforcement in Practice

Even the best-drafted restrictive covenants mean little if they're never enforced — or if they're enforced inconsistently.

When an employee resigns or is terminated, HR is often focused on logistics: final pay, benefits continuation, and exit interviews. But offboarding is also the critical moment to reinforce post-employment obligations.

Best practice is to provide a clear, written summary of the employee's continuing obligations under the contract, including confidentiality and non-solicitation. This summary should be handed to the employee at the exit meeting, not buried in an old onboarding folder.

Many employers now require departing employees to sign a short acknowledgment form confirming they understand and will comply with ongoing restrictions. This not only reinforces the agreement but also strengthens the company's position if enforcement becomes necessary.

However, HR must tread carefully. Overly aggressive enforcement — threatening lawsuits or injunctions without solid evidence — can damage reputation and morale. Before taking legal action, consult counsel to assess whether the restriction is truly enforceable and proportionate to the risk.

And remember: consistency is key. If you overlook violations in some cases but pursue them in others, courts may view your enforcement as arbitrary or bad faith.

Building Modern, Defensible Agreements

As Canada's legal landscape evolves, HR managers need to think strategically about how restrictive covenants fit into the broader employment relationship. Here's what that means in practice:

1. **Start with confidentiality, not competition.** Make clear what information the company truly needs to protect. Define it, limit it, and communicate it.
2. **Use non-solicitation clauses strategically.** Apply them to roles where client relationships or team cohesion matter most, and keep them time-limited.
3. **Eliminate outdated non-competes.** Replace them with modern clauses that align with current law — especially in Ontario, where most are void.
4. **Train and communicate.** Ensure managers, recruiters, and employees understand what these clauses mean, why they exist, and how they're enforced.
5. **Review and refresh regularly.** Laws, technology, and work models change. Contracts should too.

Ultimately, a well-drafted agreement is one that would stand up in both a courtroom and a job interview. It protects the company without undermining its reputation as a fair and modern employer.

Trust Over Control: The New HR Mindset

If there’s a theme running through every recent legal decision on restrictive covenants, it’s this: trust beats control.

The employers who win in court are those who can show they acted reasonably, proportionately, and in good faith — not those who tried to control every possible outcome. The same principle applies in HR. Overly restrictive contracts may seem protective, but they send a message that the company doesn’t trust its people. And trust, once lost, is far harder to regain than a client list or sales lead.

As workplaces become more flexible, HR’s role isn’t just to enforce boundaries; it’s to design systems of mutual respect. Clear contracts, transparent communication, and thoughtful data practices protect both sides.

The future of confidentiality and competition in Canada won’t be defined by who has the toughest contract. It will be defined by which organizations can protect their secrets while still empowering their people to grow.

Because in the modern workplace, protection and freedom are no longer opposites — they’re partners in sustainability.

Key Takeaway

For Canadian HR managers, the message is clear: restrictive covenants are no longer about restricting. They’re about redefining protection in a world where information is fluid, employees are mobile, and trust is the new currency of work.

The challenge — and the opportunity — is to make your contracts as progressive as your culture.