Why Non-Solicitation Clauses Work Better than Non-Competes

Courts enforce non-competes only in exceptional cases.

That senior manager you hire today could turn out to be your organization's most lethal business rival in a couple of years. In fact, any time you entrust somebody with leadership responsibility and access to proprietary information, you run the risk of the individual's leaving your organization and either starting a rival business, or even worse, hooking up with a competing firm. To protect themselves from these threats, most organizations include non-compete and non-solicitation clauses in their standard employment contracts. It's only after the employee leaves and sets up a competing business that employers learn just how difficult these kinds of clauses, known as "restrictive covenants," are to enforce.

The Law of Restrictive Covenants

Two types of restrictive covenant have become standard clauses in contracts with senior employees:

- **Non-competition clauses** (referred to as "non-competes") purport to ban an employee from opening a competing business, working for a competitor or otherwise competing directly against the employer for a certain period of time after leaving the organization; and
- **Non-solicitation clauses** are narrower and simply ban employees from trying to woo away your clients for a period of time after they leave.

Courts hate restrictive covenants because they constitute a restraint on trade and keep employees from earning a living. At the same time, courts recognize that the clauses protect vital interests of employers and that employers and employees have the freedom to contract. **The compromise:** Courts will enforce non-competes and non-solicitation clauses if the employer seeking to enforce it can them can show they're "reasonable." That may seem like a fair balance. But when applied in actual cases, courts enforce non-competes only "in exceptional cases;" while courts are a bit more open to non-solicitation clauses, employers seeking to enforce those clauses lose far more often than they win.

The 5 Things Employers Must Prove

To be reasonable and not a restraint of trade, a restrictive covenant must be drafted very narrowly and crystal clear. Courts will seize upon even the slightest ambiguity in any part of the clause to strike down the entire provision. Here's the 5-part test courts apply:

1. Employee Received Consideration

Contract Law, 101: Contractual promises and duties are enforceable only if the party that provides them receives "consideration," i.e., something of value from the party benefiting from the promise. Hiring a person is generally enough to be considered consideration when an employer first hires an employee. Accordingly, the consideration issue isn't generally an issue if the restrictive covenant is part of the original contract. The problem arises when you get the agreement from an employee already under contract to you. Unless the employee received something of value in return for accepting the agreement not to compete and/or solicit, you won't be able to enforce it regardless of what the clause actually says.

Bottom Line: Make sure that current employees who sign new non-competes and non-solicitations a boost in pay or benefits or something else of value for accepting the agreement. And be sure to spell out what that consideration is in the agreement.

2. Employer Has Legitimate Proprietary Interest to Protect

To justify its restraint on trade, a person seeking to enforce a restrictive covenant must show that it protects a legitimate, proprietary interest. In the context of non-competes, courts have recognized trade secrets, confidential information and trade connections as legitimate interests. Even if the interest is legitimate, the clause must be no broader than necessary to protect it.

Example: A BC court acknowledged an employer's legitimate interest in keeping an employee from working in insurance property restoration but refused to enforce a non-compete because the clause applied to the entire insurance property restoration generally and the employer was only in a specific niche of the business [*Phoenix Restoration Ltd. v. Brownlee*, [2010] B.C.J No.2455].

Example: Over-broadness also doomed the *Brownlee* non-solicitation clause. It would have been okay to ban the employee from soliciting customers he had dealt with during the course of his employment. But, the court explained, this clause was unenforceable because it banned him from soliciting any of the employer's customers or prospective customers, including the ones he had no business dealings at all during his employment [*Phoenix Restoration Ltd. v. Brownlee*].

3. Clause Is Limited in Duration

In general, the longer the restrictive covenant remains in effect, the harder it is to enforce. Lawyers tell us that the unofficial maximum for a non-compete is 6 months to one year. However, time restrictions vary based on the type of business and the departing employee's position at the organization. According to an Alberta court, "the higher the level of trust and confidence reposed in the employee, with a corresponding vulnerability of the employer, the longer the period the courts will be willing to enforce a non-compete provision"[*Anderson, Smyth & Kelly Customs Brokers Ltd. v. World Wide Customs Brokers Ltd.,* 1996 ABCA 169 (CanLII)].

4. Clause Is Limited in Geographic Scope

Non-Compete: A non-compete clause can't ban the employee from competing or soliciting customers over too broad a geographic area. While scope varies depending on the business, the clause shouldn't cover areas where the employer doesn't do business. Nor should it prevent the employee from working in an entire city or metropolitan area, e.g., within 100 km of the radius of the city of Toronto."

Non-Solicitation: Geographic scope has become irrelevant for non-solicitation clauses thanks to digital technology and social media. In the words of the Supreme Court of Canada, "in the context of the modern economy, and in particular of new technologies, customers are no longer limited geographically, which means that territorial limitations in non-solicitation clauses have generally become obsolete" [*Payette v. Guay inc*., 2013 SCC 45 (CanLII), [2013] 3 SCR 95].

5. No Non-Compete Where a Non-Solicitation Will Suffice

Even where an employer has a compelling case for a non-compete clause, courts won't enforce it if they think that a non-solicitation clause would have been enough to protect the employer's interest. **Example:** A BC court acknowledged a law firm's legitimate interest in protecting its client relationships but ruled that a non-solicitation would have sufficed. A non-compete banning a former lawyer from practicing within a 5-mile radius of the office for 3 years was unreasonable and the court refused to enforce it [*MacMillan Tucker MacKay v. Pyper*, 2009 BCSC 694 (CanLII)].

What To Do: Think Twice About Using Non-Competes

In addition to probably not being able to enforce it, including a non-compete in an employment contract exposes you to a liability risk if the employee later sues for wrongful dismissal. If the court or employment standards tribunal rules that you did, in fact, commit wrongful dismissal, it may consider the existence of the non-compete a reason to extend the employee's termination notice period. **Bottom Line:** Don't just blindly insert boilerplate non-compete clauses into your employment contracts. Reserve this extraordinary remedy for pressing situations and only after you identify the legitimate business interest(s) you must protect and determine if you need a non-compete to protect that interest or whether a non-solicitation clause will suffice. If you do decide to include a restrictive covenant in a new employee's contract:

- Spell out the legitimate interest the restrictive covenant is designed to protect;
- Clearly describe the activity(ies) you're limiting and provide examples of each;
- Be precise about the duration of the restriction, which should be a definite period the length of which is **not** contingent on future events;
- Keep the duration as short as possible;
- Keep non-competes limited in geographic scope based on where you do business and other objective, understandable factors; and
- If possible, lay out the things the employee **can do** leveraging his/her talent, skills and experience during the restriction period without violating the covenant.

Model Language for Non-Solicitation Clause

Although there's no such thing as a boilerplate formula, looking to contract clauses that courts have upheld can help you draft an enforceable non-solicitation clause. This language comes from a BC case upholding a one-year non-solicitation provision in

a brokerage firm's contract with a financial advisor [*Edward Jones v Mirminachi*, 2011 BCCA 493]:

"[Y]ou agree for a period of one year following the termination of your employment, that you will not solicit by mail, phone, electronic communication, personal meeting, or any other means, either directly or indirectly, business from any customer of [Employer] who you served or whose name became known to you during your employment with [Employer]. Your agreement not to solicit means that you will not, during your employment in any capacity, and for a period of one year thereafter, initiate any contact or communication, of any kind whatsoever, for the purpose of inviting, encouraging or requesting any [Employer] customer to transfer from [Employer] to you or to your new employer, to open a new account with you or with your new employer, or to otherwise discontinue its patronage and business relationship with [Employer]."