Fulcrum Search Science Inc.
Departing Employees

How far can you go to protect your interest in your customer base?

Generally, employment contracts are written to protect employer interests and minimize the employer's legal liability. Accordingly, more and more employers are insisting that new hires sign a written employment contract before commencing employment. Drafted properly, these contracts can override some of the employee's common law rights such as the right to reasonable notice of termination, and the right to change significant job duties without notice.

In addition to terms and conditions that apply during employment, employment contracts can also include post-termination obligations which are imposed on an employee which prevent the employee from, among other things: using or disclosing confidential information; soliciting company customers; attempting to entice employees away from the employer; and/or competing with the employer.

A recent Ontario Court of Appeal case again illustrates that the courts are reluctant to enforce non-competition clauses when a less restrictive non-solicitation clause could have been used to protect an employer's proprietary interests.

In 1993 Dr. Lyons, a dental surgeon who operated a dental practice in Windsor, Ontario hired Dr. Multari as an associate. They entered into a short handwritten employment contract of less than one page, which provided, among other things: "Protective Covenant. 3 yrs. - 5 mi."

About 1½ years later, Dr. Multari gave six months' notice that he was leaving Dr. Lyons employ. About 6 months after his resignation, Dr. Multari opened his own practice with another dentist about 3.7 miles from Dr. Lyons office.

Dr. Lyon commenced a breach of contract action against Dr. Multari. The trial judge upheld the restrictive covenant and fixed damages at $ 70,431.60.

The Court of Appeal overturned the trial judge's decision and refused to enforce the non-compete clause. In coming to this conclusion, the court stated that:

1. Employers in the professions have a proprietary interest in their client base;
2. The five-mile/three-year covenant was reasonable in terms of its temporal and spatial limitations;
3. Except in exceptional circumstances, the courts will not enforce a non-competition clause if a non-solicitation clause will adequately protect an employer's interests.

The Court of Appeal stated that this was not an exceptional case. In this regard, the non-competition clause was too broad because, in part, it precluded Dr. Multari from accepting referrals from Windsor dentists who had never referred Dr. Lyons patients or from dentists who had stopped referring patients before Dr. Multari started working for Dr. Lyons. Also, Dr. Multari was a junior associate dentist who only handled the patients that Dr. Lyons assigned to him whereas Dr. Lyons continued to be the principal contact with referring dentists throughout Dr. Multari's employment.

This case is a good reminder to employers that it is important to carefully consider the interests that need to be protected when an employee leaves. If a restrictive covenant is too broadly drafted then the courts in many cases will not enforce the covenant and the proprietary interest is left totally unprotected.

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