

So Your Contract Contains A Restrictive Covenant

We are frequently engaged by individuals who have left an employment relationship – and are looking at new employment elsewhere – but are concerned about the impact of restrictive covenants they accepted as part of that prior employment. The question we are asked is, “Am I bound by this?”

What Are Restrictive Covenants?

There are three common types of post-employment restrictive covenants which routinely appear in employment agreements.

1. Non-competition (you can't compete with them, at all, for business)
2. Non-solicitation of clients (you can't seek business from their clients)
3. Non-solicitation of employees (you can't entice their employees away)

Presumption of Unenforceability

Generally speaking, in the employment context, post-employment restrictions on an individual's conduct are presumed by the courts to be unenforceable. That is the result of the fact that “free labour mobility” is a matter of public policy.

In practice, that means that (with some limitations) individuals can move on to ply their trade wherever, and with whomever, they choose. That includes doing so with a competitor of the former employer.

Businesses Have Their Own Interests

Businesses, on the other hand, have a private interest in limiting competition and some seek to bind their employees by way of various restrictive covenants (as noted above). This interest in eliminating competition can drive employers to impose covenants, some of which are unreasonable in the circumstances and will not be upheld by a court.

The enforceability of these covenants is frequently debated before the Canadian courts. And, almost universally, the *less* restrictive a covenant is on the employee's post-employment activities, the *more* receptive the courts will be to its enforcement.

Non-competition covenants are generally considered to be the *most* restrictive of the individual's post-employment activities (and thus are generally the *least* acceptable), non-solicitation of clients covenants are seen as being somewhat less restrictive, and non-solicitation of employees covenants are the least restrictive.

Start Here: You Signed It, You're Bound By It

While the courts' initial presumption is that restrictive covenants are unenforceable, if your starting position is that you signed a contract containing a restrictive covenant, you should presume you are bound by it and must live with it.

Presuming anything else places you (and your prospective employer, more on this below) in the position of potentially being sued for breach of contract by your former employer. This is an outcome to be avoided at all costs.

It's Not Just All About You

While your immediate concern is whether your former employer could pursue you for damages for breach of contract, the reality is that your new employer is exposed, too. That's due to the doctrine of vicarious liability – Canadian courts have held the new employer equally liable on many, many occasions.

So, if you're considering new employment which could even *conceivably* contravene the restrictive covenants in your contract, you should disclose their existence to the new employer. The new employer needs to have the opportunity to consider whether you are worth the risk of potentially being sued.

Most importantly, the new employer needs to have the opportunity to seek independent legal advice about that risk.

Some Simple Advice

Given that you signed a contract containing a restrictive covenant, you should presume that it will be enforceable. No lawyer can completely eliminate your risk of being sued and of losing that legal battle – as I've said many, many times, "In a fight to the death it isn't always the other person who ends up dying"!

If it's possible for you to abide by the terms of the restrictive covenant you signed, then that's precisely what you should do. Stay "on the sidelines" for the prescribed period of time and, after the expiry of the restrictive covenant(s), you can get on with your life free of the (real) fear and risk of being sued.

Only take the risk of being sued for breach of your old employment contract if you are:

- a. willing to fight that battle (with all its attendant costs, distractions, and risks); and
- b. willing to lose.

This item is provided for general information purposes only and is not intended to be relied upon as legal advice. Informed legal advice should always be obtained about your specific circumstances.

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