Wisconsin Court Finds Anti-Poaching Agreements to be Unenforceable

By **Sharon Mollman Elliott** and **Clifford R. Atlas**

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Analyzing an anti-poaching agreement as a non-compete agreement, a Wisconsin Court of Appeals has confirmed that a former employee's agreement not to solicit other employees may be void and unenforceable if it is too broad. *The Manitowoc Company v. Lanning*, No. 2015AP1530 (Wis. Ct. App. Aug. 17, 2016). The decision offers an analysis for determining when an anti-poaching agreement goes beyond protecting the employer's legitimate interests and becomes an unreasonable restraint of trade.

The employer contended its agreement not to "solicit, induce, or encourage" employees to "terminate their employment" or "accept employment with any competitor, supplier, or customer" was not a restriction on competition. The Court roundly rejected that claim, noting the company had spent more than $1 million in legal fees and costs to stop the former employee from "systematically poaching" its employees. "It is not a leap of logic to conclude that a provision aimed at restricting a former employee from 'systematically poaching' the valuable and talented employees of his former employer is a restraint of trade," the Court said.

Such restraints are illegal and unenforceable unless they are reasonably necessary to protect an employer from unfair competition from a former employee. While acknowledging there may be some restraints that are reasonably necessary to prevent a former employee's poaching, the Court concluded the restriction here went far beyond that. The Court said it effectively prohibited the former employee from "encouraging *any* employee to leave [the company] for *any* reason, or to take *any* job with *any* competitor, supplier or customer."

The actual language of the covenant may have seemed innocuous. It merely prohibited the former employee from (directly or indirectly) soliciting, inducing, or encouraging company employees "to terminate their employment" or to "accept employment with any competitor, supplier, or customer." However, the Court explained that this language is so broad that it restricts an employee from encouraging a colleague to retire or change industries, even though such action poses no competitive threat to the company. It also prevents a former employee from encouraging a company employee to work for a customer or supplier in a job that is not in any way competitive with the company — such as accepting a job as a Starbucks barista, when Starbucks is a company customer. The Court said such overbreadth means that the restriction is not reasonably necessary to protect the employer from the type of unfair competition an employee can offer.

There is a dearth of case law on the analysis or enforceability of non-solicitation of

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employees provisions. The Wisconsin Court of Appeals has confirmed such restrictions will be analyzed in the same manner as other post-employment restrictive covenants.

The lesson here is that anti-poaching agreements should be tailored as narrowly and carefully as any other restrictive covenant. This is particularly important in Wisconsin and other states where a restrictive covenant between an employer and employee is "lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer," and where the courts will not blue-pencil or partially enforce overly broad restrictions. State law also may impose additional requirements, such as limiting the restraint to a particular time or territory.

Reviewing and revising restrictive covenants regularly to ensure compliance with changes in the law increases the chance that they will be enforceable in a cost-effective way — and without incurring more than $1 million in legal fees.

Jackson Lewis can assist in updating agreements containing post-employment anti-poaching provisions or other restrictive covenants.

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