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Wisconsin Supreme Court Strikes Down Co-Worker Non-Solicitation Clause

By Peter A. Steinmeyer & Erica R. McKinney on February 12, 2018

POSTED IN NON-COMPETE AGREEMENTS

Of the various types of post-employment restrictions imposed on employees, a restriction on the recruitment of former co-workers (sometimes referred to as a "no-poach" or "anti-raiding" clause) is the type most likely to be enforced by a court. As a result, this is one type of post-employment restriction that is frequently drafted without the careful thought generally put in to traditional non-competes and client non-solicitation clauses. But in

what could be a foreshadowing of closer judicial scrutiny of co-worker non-solicitation clauses nationwide, the Wisconsin Supreme Court recently held that the Wisconsin non-compete statute applies to such clauses, and that the particular clause in question was unenforceable because it was not "reasonably necessary for the protection of the employer."

Specifically, in ***Manitowoc Company v. Lanning***, 2018 WI 6 (Jan. 19, 2018), the Wisconsin Supreme Court ruled that Wisconsin's non-compete statute, Wis. Stat. § 103.465, broadly applies to restrictions on competition, including post-employment restrictions on the ability to solicit former co-workers. In *Lanning*, the defendant, an engineer and former employee of the plaintiff, resigned and immediately began working for the plaintiff's direct competitor. Defendant did not have a non-compete agreement but he did sign an employment agreement that included a non-solicitation clause that prohibited him from soliciting or inducing any employees from the plaintiff's company to join a competitor within the two-year period following his resignation. After joining the competitor, defendant allegedly began to recruit employees to join the competitor company. Plaintiff argued that the defendant's actions violated the non-solicit provision and sued him. The Wisconsin Supreme Court held that the non-solicitation provision was an unreasonable restraint on trade which failed to meet the statutory requirement that the restriction "be reasonably necessary for the protection of the employer."

Wis. Stat. § 103.465 sets forth five requirements that must be met for a restrictive covenant to be enforceable. The restraint must: "(1) be necessary for the protection of the employer, that is, the employer must have a protectable interest justifying the restriction imposed on the activity of the employee; (2) provide a reasonable time limit; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive as to the employee; and (5) not be contrary to public policy."

Here, the court looked to several factors when determining that the non-solicit provision was an unreasonable restriction on trade, including the fact that the provision contained no limitation based on the employee's position, no limitation based on the employee's "familiarity with or influence over a particular employee," and no geographical limitation. The company argued that the provision was written to protect the company's "investment of time and capital involved in recruiting, training and developing its employee base from 'poaching' by a 'former employee who has full awareness of the talent and skill set of said

employee base.'" The Court rejected this claim, instead determining that the provision was overbroad and restricted competitors' access to the labor pool.

This case sends a message to employers that all types of post-employment restrictions on employees, even those which are not traditional non-compete agreements, should be drafted narrowly to protect legitimate business interests of the company, and should be no broader than necessary.
