Post-Employment Legal Obligations

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Introduction

As with most relationships, employment relationships end. This may be by mutual parting, the employee quitting, or the employee being dismissed. The end of a relationship can mean that a few legal obligations continue. In this article, we briefly discuss the three principal post-employment obligations of workers.

1. Confidentiality Agreements

Employees often come into contact with confidential information, such as business and manufacturing processes, customer lists, and proprietary formulations that are strategic, if not essential, to business operations. Employers try to protect these interests and may take legal action against ex-employees to prevent them from sharing this information with their new employers or taking advantage of it in other ways. This is typically done by signing a Confidentiality Agreement when the employment starts.

The general rule was set out in *Tree Savers International Ltd. v. Savoy* [1991 CanLII 3952 (AB QB).

> An employee has a basic common law obligation to render faithful and loyal service to his employer during his employment. As a general rule, an employee may leave his employment and lawfully compete against his former employer, taking with him knowledge gained in his former employment, but he may not take or use against his employer any of his employer's trade secrets, confidential information or customer lists, whether during or after his employment. If he was top or senior management or a key employee, he owes a fiduciary duty to his employer, which not only encompasses the

> ordinary duties of an employee but is an enlarged, more exacting duty which endures after termination.

Violations of employment confidentiality agreements typically result in damages awarded to the employer for loss of profit to the date of trial and the value of future loss of business, goodwill and reputation.

What if the employee does not physically remove any confidential information from the employer's premises? Confidential information does not necessarily need to be physically removed by the terminated employee – the rules apply to commercially-valuable knowledge learned or memorized just as well. The employer should obtain a signed written Confidentiality Agreement from the employee before termination to ensure the strongest claim of restraint against the employee. The best time to get the confidentiality agreement signed is at the beginning of the employment in order to satisfy the common law contract requirement of consideration.

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2. Non-competition Agreements

In appropriate cases, employers will require employees to sign a Non-Competition Agreement which prevents the employee from directly competing with the former employer after the employment has terminated. The employer's legal remedy is an injunction, although free competition is widely valued and a convincing case must be made to exclude former employees from competing:

> … if a plaintiff seeks injunctive relief on the basis of a restrictive covenant so as to inhibit the ability of a person to make a livelihood, he or she must establish a strong *prima facie* case (*Ipsos S.A. et al v. Angus Reid et al*).

Courts recognize that non-competition restrictions distort market freedoms and they ought not to be enforced unless there is strong evidence that such competition would threaten the essential survival of the employer's business. Moreover, restrictions must not be unreasonable and overly broad. In *J.G. Collins Insurance Agencies Ltd. v. Elsley Estate* [1978 CanLII 7 (SCC), [1978] 2 S.C.R. 916], the Supreme Court of Canada said employers must establish that the restrictive covenant is reasonable and in the public interest. The 1998 British Columbia decision of *Aurum Ceramic Dental Laboratories v. Wang* [1998] B.C.J. No. 190 (SC)] set out the requirements to render restrictive covenants enforceable:

(a) it protects a legitimate proprietary interest of the employer;
(b) the restraint is reasonable between the parties in terms of:
  (i) length of time;
  (ii) geographical area covered;
  (iii) nature of activities prohibited; and
  (iv) overall fairness;
(c) the terms of the restraint are clear, certain and not vague; and

(d) the restraint is reasonable in terms of the public interest with the onus on the party seeking to strike out the restraint.

The length and geographical area of the restriction are dependent on the industry. A typical restriction on time is 6 to 24 months and the area can be as small as a local neighbourhood or as expansive as province-wide.

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3. Non-solicitation Agreements

Employees often naturally wish to maintain relationships with their former co-workers or customers, often without any speculative interests. Is it legal to ask an ex-colleague to join the new employer? Is it legal to ask the customers that ex-employees perhaps acquired for the previous employer to follow them to a new employer?

This type of solicitation of former co-workers and customers is not legally acceptable for senior employees who have departed an employer. In the case of *Anderson, Smyth & Kelly Customs Brokers Ltd. v. World Wide Customs Brokers Ltd.* [1996 ABCA 169], the Alberta Court of Appeal stated, "Direct solicitation of the former employer's clients by the departing or departed employee is not acceptable where the employee is a fiduciary of the employer."

Non-senior, non-fiduciary employees are more free to solicit from the former workplace unless there is a specific, written non-solicitation agreement in place.

Conclusion

Most employees should have few concerns about ongoing legal obligations to their employers after they end their employment. More restraint and discretion will be expected of departing senior, key workers (called "fiduciaries").

Employers should be aware that courts try to balance the individual employee's right to move on and earn a living with the former employer's need for protection of its legitimate proprietary business interests. Employers should consider whether they need, and can enforce, any post-termination restraints on employees. If so, they should approach restraint by considering the least intrusive to the most intrusive; namely from non-solicitation to confidentiality to non-competition. These post-termination obligations should always be justifiable, reasonable and contained in a written contract, preferably the original contract of employment.

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