

EMPLOYMENT MATTERS

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THE NON-SOLICITATION CLAUSE, AN IMPORTANT WEAPON IN YOUR ARSENAL

The Issue

Employment lawyers are often asked to draft “ironclad” non-competition clauses. Unfortunately, enforceable non-competition clauses are few and far between, as they are considered by the Courts to be in restraint of trade and against public policy. Having said that, employers are not left without a viable option, namely, the non-solicitation clause. Non-solicitation clauses are an important weapon in your arsenal and should be used more often to protect your legitimate business interests.

What is a Non-Solicitation Clause?

The purpose of a non-solicitation clause is generally to prohibit a departing employee from soliciting his former customers and former colleagues. The departing employee can still work for the competition, but cannot do so by soliciting business from his former customers and by “poaching” his former colleagues. The benefit of the non-solicitation clause is that, if it is reasonable, it will be enforced by the Courts in this province.

Recent Case Where Enforced

In [*Smilecorp Inc. v. Pesin*](#), the Ontario Court of Appeal considered a non-solicitation clause contained within a management agreement entered into between a dentist and the manager of a dental centre. The clause stipulated that the dentist could not, for a period of 24 months after leaving the employ of Smilecorp Inc., solicit patients from that practice. More specifically, the clause said:

“upon expiry or termination of this Agreement or any renewal thereof, for a period of 24 months thereafter, the dentist covenants: (1) not to solicit, contact, invite or encourage either directly or indirectly, in any manner whatsoever, any patients of the Dental Practice to seek dental treatment...at any location other than at the Premises (2) not to send any announcement, advertising flyer, notice or any communication directly or indirectly to his patients announcing the change in location of the Dental Practice to another location...”

The dentist resigned from Smilecorp Inc. and opened up his own dental practice approximately 5 kilometers away. When he left, he took with him a list of patients with the intention of informing them of the fact and location of his new practice. Smilecorp Inc. went to the Court and asked for an injunction prohibiting the dentist from soliciting in this manner on the basis that his conduct constituted a breach of the non-solicitation clause in the management agreement. The Court granted the injunction, and the Court of Appeal upheld the decision. A 3-judge panel agreed that the clause was enforceable.

Importance to Employers

When your organization hires employees, particularly those in sales positions and those with significant client contact, make sure your hiring paperwork includes a reasonable non-solicitation clause. A reasonable non-solicitation clause will afford your organization the protection it needs when that relationship comes to an end. If you opt for the more drastic weapon in your arsenal (the non-competition clause), your chances of enforceability drop significantly. If you require any assistance with your non-solicitation clauses, feel free to contact me and I would be happy to assist.



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