SEPTEMBER 05, 2017

WISCONSIN SUPREME COURT TO DECIDE LIMITS ON NON-SOLICITATION OF EMPLOYEE CLAUSES

Most employers are familiar with the scrutiny afforded non-compete agreements. However, many don't realize that there are other forms of restrictive covenants potentially subject to that same scrutiny. Today, September 5, 2017, the Wisconsin Supreme Court will be asked to decide whether the state's law that limits the enforceability of non-compete agreements applies to the non-solicitation of a company's personnel by former employees.

In Wisconsin, the legislature and the courts have traditionally taken a very negative view of restrictive covenants, requiring that the entire agreement be "reasonably necessary for the protection of the employer." If any element of the covenant is overbroad, the entire agreement is unenforceable. But, the focus has been on non-compete agreements, rather than non-solicitation clauses.

Non-solicitation provisions are common in employment agreements and are generally seen as an effective tool for preventing competitors from taking advantage of the confidential information and goodwill that an employee has when he or she walks away from the company.

In *Manitowoc Co. v. Lanning* (Appeal No. 15AP1530), the Wisconsin Supreme Court will decide whether John Lanning, a former employee of the Manitowoc Company ("Manitowoc") who accepted a position with a competitor, violated a non-solicitation of employees ("NSE") agreement that he had signed while still employed by Manitowoc. The NSE agreement at issue would prohibit Lanning from directly or indirectly soliciting, inducing or encouraging any Manitowoc employee to terminate his or her employment with Manitowoc or to accept employment with any competitor, supplier or customer of Manitowoc. This restriction would be in effect for a period of two years following the termination of Lanning's employment.

Manitowoc initially filed suit based upon its belief that Lanning had convinced several Manitowoc employees to leave and take employment with Lanning's new employer, which it argues is a violation of the NSE agreement. Lanning argues that the agreement is unenforceable because it is broader than is necessary to protect Manitowoc's interests (e.g., it prohibits Lanning from soliciting a janitor). The lower court sided with Lanning, finding the non-compete statute applicable and the MSE invalid as overly broad.

The outcome of the case is likely to hinge on whether the State's Supreme Court agrees that non-solicitation agreements fit within the scope of Wis. Stat. § 103.465:

> A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this section, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

Manitowoc may prevail if it can successfully distinguish an agreement not to compete from an agreement not to convince others to compete (i.e., a non-solicitation agreement). However, if the Court believes that non-solicitation agreements fit within the scope of the statute referenced above, then it will be difficult for Manitowoc to overcome Wisconsin's strong public policy against trade restraints, and current non-solicitation policies and provisions (in employment agreement and separation agreements, for example) will likely need to be revised if they are to be enforceable in Wisconsin.

For more information on restrictive covenants generally, non-solicitations specifically or other labor and employment issues, please contact:

- Robin Sheridan at (414) 721-0469 or rsheridan@hallrender.com;
- James Junger at (414) 721-0922 or jjunger@hallrender.com; or
- Your regular Hall Render attorney.

THIS IS AN ADVERTISEMENT
© 2002-2024. Hall, Render, Killian, Heath & Lyman, P.C. All Rights Reserved.