Know what you are signing
The world of restrictive covenants in employment

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Let's consider a situation we see all too often in our law office. An employee, a woman in this case, accepts a position with a new employer and signs an employment agreement. When the employee is terminated two years later, she realizes she has signed a document that gives her only two weeks notice of termination, but precludes her from competing with the employer for a six-month period. Where will she work? What will she do? Is this legal?

In today's competitive market place, more and more employers are asking employees to execute sophisticated employment contracts as a condition of employment. Dental hygienists who choose to work independently are also becoming employers and hiring employees. What's in your employment contract? How are you protecting your business?

Restrictive covenants are often utilized by employers to govern the employee's conduct and activities during—and after—employment. These provisions are designed to protect the employer from damage imposed by employees engaging in competitive business activities. It is important to understand that, while you are protecting the employers' practice, these provisions are often detrimentally affecting your ability to find alternative employment either while you are employed or after your employment ends.

The law on restrictive covenants

There is a range of restrictive covenants commonly in use for this purpose.

First, non-competition covenants are generally used to limit the employee's ability to compete in the same industry either during the course of employment or post termination.

During the course of employment, these are often instituted through "full-time and attention clauses," which require the employee to work exclusively with the employer, even if it's part-time. After termination, these provisions usually preclude the employee from working in competition with the employer for a length of time within a geographical region.

Second, non-solicitation covenants are intended to prevent the former employee from approaching the employer's customers or employees.

What all employees should know is that restrictive covenants can be seen as unenforceable based on a first impression. That being said, restrictive covenants can be held enforceable if they are “reasonable.” In determining “reasonableness,” courts consider the following:

1. Geographic area of restraint
2. Duration of restraint
3. Type of restraint

The unenforceable case

The leading case on this issue is *Lyons v. Multari* decided by the Court of Appeal of Ontario. In this case, the plaintiff and the defendant were both oral surgeons. The plaintiff had practised in the same city for almost 25 years and was looking for a new associate. He and the defendant agreed to work together. They signed a short handwritten contract, which contained a non-competition clause. The entirety of the clause was: "Protective covenant. 3 yrs. — 5 mi."

The defendant worked for the plaintiff for about 17 months. As he was required to do under the employment agreement, he gave six months' notice that he was leaving the employ of the plaintiff. Six months after he left, he and another dentist opened an oral surgery practice in the same city as the plaintiff. This practice contravened the three-year/five-mile restriction in the non-competition clause. The plaintiff brought an action against the defendant for damages for breach of contract.

It was held that, generally speaking, the courts would not enforce a non-competition clause if a non-solicitation clause would adequately protect an employer's interests. The court held that based on the facts of this case, this was not an exceptional situation. The plaintiff could have protected his business interests with a non-solicitation clause, as it was really the plaintiff’s customers that the plaintiff needed to protect. The non-competition clause was found to be unenforceable.

The enforceable case

The inconsistent application of these principles can be seen in *Moffatt (c.o.b. Rising Sun Martial Arts) v. Sanchez* (2004 – Ontario Superior Court). In this case, Mr. Moffat ran a martial arts studio and Mr. Sanchez was hired as an instructor.

When Mr. Sanchez was hired, he entered into a non-competition agreement which provided that, upon termination of employment, Mr. Sanchez was prohibited from teaching at, owning or operating a martial arts school within a 10-mile radius of the Rising Sun for a period of one year.

Less than three years later, Mr. Sanchez resigned and set up a tae kwon do club a half block away from the Rising Sun. In this case, the court held the provision to be

enforceable because of the employer's experience with other former employees competing after leaving the employer's employ.

To sign or not to sign

These two cases cost both the employer and employee tens of thousands of dollars in legal fees to resolve. This is because a decision on the "reasonableness" of these provisions is made on a fact-by-fact basis.

The end result is that most employees are forced to abide by restrictive covenants they have signed even if they appear to be unreasonable, because the risk of being sued for violating the terms is too high. They simply cannot afford the legal fees to fight these battles.

The best way for the employees in the above cases to have avoided these scenarios was to avoid agreeing to the restrictive covenant in the first place—particularly with respect to restrictions occurring during the course of your employment. Courts will be vigilant in enforcing these restrictions because the employer is compensating you during this period.

On the other hand, if you cannot completely avoid signing a restrictive covenant, you must really ask yourself whether you can live with its terms. If you can't, you must decide whether the job being offered is really worth it. Can you live with a contract that provides only part-time hours, but precludes you from working with other dentists? If you are unable to, it may be time to walk away.

If you are contemplating entering into a restrictive covenant, or if you have signed a restrictive covenant and are looking to breach its terms, you should seriously consider seeking legal advice. Remember, your employer has sought legal advice to draft the contract – can you afford not to have legal advice to fully understand what you are agreeing to?