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HR Heads-up

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Employee Poaching Made Easier:

Non-Solicitation of Employee Provisions in Wisconsin are Subject to Strict Requirements for Enforceability

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**PLEASE NOTE: EMPLOYERS SHOULD HAVE THEIR CURRENT NON-SOLICITATION AGREEMENTS REVIEWED FOR LEGAL COMPLIANCE.*

Most employers are aware that in Wisconsin, agreements that restrict an employee's post-employment competition must be narrowly written to be enforced under Wisconsin law. In *Manitowoc Company, Inc. v. Lanning*, 2015 AP 1530, issued on January 19, 2018, the Wisconsin Supreme Court ruled that provisions in agreements that restrict the post-employment solicitation or recruitment of former colleagues are also held subject to the strict requirements of Wisconsin Statute 103.465. The Supreme Court's decision upheld an earlier decision by the Wisconsin Court of Appeals that evaluated the enforceability of non-solicitation of employee provisions using the same enforceability criteria as agreements restricting competition by former employees.

The Supreme Court broadly interpreted Wis. Stat. § 103.465 in the *Lanning* case. That statute imposes restrictions on the enforceability of traditional non-competition agreements. The Court concluded, however, that § 103.465 is not limited to covenants in which an employee agrees not to compete with a former employer. The application of Wis. Stat. §103.465, according to the Court, ultimately depends upon whether the particular terms of an agreement constitute a restraint of trade by restricting competition or imposing an unreasonable restraint on employees.

The Supreme Court, more particularly, held that § 103.465 applies to non-solicitation of employee provisions because they restrict the employee who signed the agreement from competing for talent in the labor pool. Such restrictions also have the effect of limiting the potential mobility of members of the labor pool who are not parties to the non-solicitation agreement.

The restrictions that § 103.465 imposes on the enforceability of agreements are demanding. Wisconsin courts have historically strictly reviewed the enforceability of non-competition agreements because they can have the effect of limiting a former employee's ability to gain new employment and earn a living. With this perspective in mind, § 103.465 requires that a restrictive covenant must: (1) be necessary for the protection of the employer, i.e., 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 to the employee; and, (5) not be contrary to public policy. These requirements have the effect of limiting the enforceability of non-competes, and now non-solicitation of employee agreements also will be subject to similar scrutiny.

The takeaway from the Supreme Court's *Lanning* decision is apparent: employee non-solicitation provisions that are broad and undifferentiating will be struck down if challenged. The non-solicitation provision at issue in *Lanning* forbade the former employee from soliciting, inducing or encouraging "any employee" to terminate their employment with the employer or to accept employment with a competitor. In ruling the non-solicitation provision unenforceable, the Supreme Court expressed concern that it contained no limitations based upon the nature of the solicited employee's position or the former employee's personal familiarity with or influence over a particular colleague or class of employees. Moreover, there was no limit based upon the geographical location in which restricted employees worked, and the company at issue had over 13,000 employees world-wide. The Court also acknowledged as a generally-recognized principle that the law does not usually protect against the raiding of a competitor's employees.

In applying § 103.465 to non-solicitation provisions, the Supreme Court further explained that ordinarily an employer's protectable interest in its workforce is limited to retaining top-level employees; employees who have special skills or special knowledge important to the employer's business; and employees who have skills that are difficult to replace. Considering these criteria, the Court suggested that enforceable employee non-solicitation provisions should be limited to specific employees or classes of employees, employees with sensitive or company-specific information, employees with whom the restricted employee personally worked, or those employees with skill sets with which the former employee was familiar or through his employment.

Employers should now review their existing agreements for possible enforceability issues in light of the Supreme Court's decision in *Lanning.* Sweeping prohibitions that prevent former employees from encouraging *any* employee to leave the employer should be viewed as suspect and likely unenforceable. Employers who determine that their current non-solicitation agreements should be revised can require employees to sign new agreements as a condition of continuing employment.

If an employer's non-competition agreement includes an employee non-solicitation agreement that is unenforceable under *Lanning,* that will not necessarily jeopardize the enforceability of other provisions in the agreement, such as a client non-solicitation provision or a geographically-based non-competition provision. Such provisions may be deemed "severable" and separately enforceable if each provision can be read and enforced without reference or dependence on other provisions in the agreement. However, the law in this area continues to develop, and thus employers should have their agreements assessed to determine whether and how best to revise the agreements.

Employers who have not had their non-competition agreements recently reviewed are strongly urged to have the agreements reviewed and revised if appropriate.