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Employee Non-Solicitation Agreements Face New Hurdles

The Wisconsin Court of Appeals issued a decision on August 17, 2016, that will make the enforcement of restrictions on the solicitation of employees significantly more difficult for Wisconsin employers. In a groundbreaking decision, the Court held for the first time in *Manitowoc Company v. Lanning*, 2015 AP 1530 (August 17, 2016), that non-solicitation of employee ("NSE") provisions in agreements between employers and employees are subject to the same rigorous enforceability requirements as agreements restricting competition by former employees (non-compete agreements).

Many employers seek to prevent former employees from "poaching" other employees to work with the former employee at his or her new place of employment. The Court of Appeals concluded that such restrictions should be evaluated for enforceability purposes just like provisions that restrict a former employee from working for a competitor.

The enforceability of non-competes in Wisconsin has long been subject to disfavor because non-compete agreements can have the effect of limiting a former employee's ability to gain new employment and earn a living. Wis. Stat. § 103.465, in particular, 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.

Based on the Court's decision, employers will now have to justify which of their employees are off-limits to solicitation, rather than restricting solicitation of all employees. Employers may have to identify a meaningful relationship between a former employee and the group of employees that cannot be solicited, which relationship must create some unfairness by the former employee's solicitation. Employers will also have to be more selective as to the type of employment or activity for which the current employee cannot be solicited, *i.e.*, is prohibiting solicitation of a current employee to work for a non-competitor justified? Satisfying requirements such as these require careful consideration.

The NSE that the Court refused to enforce in *Manitowoc Company v. Lanning* is similar to NSE provisions commonly found in many non-compete agreements. Manitowoc's NSE prohibited the former employee from directly or indirectly soliciting, inducing, or encouraging any employee to terminate their employment or to accept employment with any competitor, supplier or customer of the former employer. As written, this NSE applied to any employee, in any position, regardless of any prior relationship or connection to the former employee, and the solicitation bar was not limited to positions that would necessarily be competitive with the former employer. In other words, while all employers would like to insulate their existing workforce from any and all external solicitations, the Court of Appeals' decision tries to limit the enforceability of NSEs to only those situations where the solicitation would be unfair when involving a former employee. For example, the court opined that an employer cannot prohibit solicitation of a janitor.

NSE provisions are often written as separate from other anti-competitive provisions in non-compete agreements. Recent non-compete case law in Wisconsin has supported the conclusion that separately written provisions can be separately enforced. In other words, an unenforceable NSE may not affect the enforceability of a customer-based non-solicitation provision. Nevertheless, there could be arguments raised that an unenforceable NSE jeopardizes the enforceability of non-compete provisions that would otherwise validly restrict a former employee from working for a direct competitor. Should the Court of Appeals' decision stand, it will have a significant impact on how NSEs are drafted in the future, while also impacting the enforceability of many existing NSEs. Because the Court of Appeals' decision affects such a sea change in the prevailing understanding of the law, it is possible that the Wisconsin Supreme Court would agree to review the case. The Supreme Court has recently been more accepting of non-compete agreements which calls into question whether the Supreme Court would uphold the ruling which struck down the NSE. In particular, the historical justification for grudging enforcement of non-competes is not directly implicated by NSEs, which do not preclude a former employee's new employment.

Employers should make sure that their existing NSEs are reviewed to spotlight potential enforceability issues in light of the *Manitowoc Company v. Lanning* decision. This review may ultimately result in requesting employees to execute new NSEs. Future NSEs, and non-competes in general, should certainly be drafted cognizant of this recent Court decision, while recognizing that the finality of this decision is still subject to potential reversal or modification by the Wisconsin Supreme Court.

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