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The Solution Starts Here.

The Importance of Regularly Reviewing and Updating Your Company's Restrictive Covenant Agreements

Restrictive covenants restrain what would otherwise be lawful competition by current and/or former employees. They serve to protect, among other legitimate business interests, a company's trade secrets, confidential and/or proprietary information and documents, customers and the goodwill the company has developed with said customers, and employees and the intellectual capital they possess. If a company's restrictive covenants are not fully compliant with current law, however, the company is exposing its business to harmful competition and loss of vital information, documents, employees, and customers that could have been avoided and/or properly remedied in the event of a breach. And, because restrictive covenant law has mostly been developed through case law, what is and is not compliant can significantly change overnight.

Thus, whether your company is thinking about implementing a restrictive covenant agreement for your workforce for the first time and/or you already have such an agreement in place, regular review of your non-compete, non-solicitation, and/or non-disclosure provisions for legal compliance is vital to the protection of your business and to maintain enforceability in the face of a former employee who violates these important restrictions.

Consistent and regular review of your company's restrictive covenants is particularly important given the fast-changing face of the law in this area, as highlighted by the Wisconsin Supreme Court's landmark decision on January 19, 2018 in *The Manitowoc Company, Inc. v. John M. Lanning*, 2018 WI 6, 379 Wis. 2d 189, 906 N.W.2d 130, which completely turned employee non-solicitation law on its head.

By way of background, the only statute related to restrictive covenants in Wisconsin is Wis. Stat. §103.465. Section 103.465 states as follows:

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.

Given the explicit language of the statute, Section 103.465 was arguably only intended to govern traditional non-compete clauses, in which a company prohibits an employee from engaging in direct competition with the company during or after the employee's employment ends, by working for a competitor and/or setting up a competitive enterprise. However, since Wis. Stat.

§103.465 was implemented, case law has provided guidance on how to interpret its prohibitions and, over time, the reach of Section 103.465 has been extended to similarly govern non-disclosure and customer non-solicitation clauses because of their inherent relatedness to competition. In general, case law dictates these types of restrictive covenants must:

- **Be reasonably necessary for the protection of the employer.** The employer must be able to show the prohibition on the employee's conduct is reasonably necessary and narrowly tailored to protect a legitimate business interest of the employer, beyond the type of ordinary competition that a stranger could give.
- **Contain a reasonable temporal restriction.** Although each restrictive covenant is analyzed on a case-by-case basis, Wisconsin courts have generally found a two-year restriction to be reasonable.
- **Contain a reasonable geographic limitation.** Although analysis of each restrictive covenant is very fact- and case-specific, Wisconsin courts have typically found a geographic restriction reasonable if it reflects the area actually served by the employee during his/her employment. Wisconsin courts have also deemed certain fluid geographic restrictions reasonable, as well as provisions that restrict an employee from working for a specific set of competitors.
- **Not be harsh or oppressive to the employee.** Although there is not much case law interpreting this element, Wisconsin courts will generally look at the extent to which the restraint on competition actually inhibits the employee's ability to pursue a livelihood in his/her chosen field, as well as the particular skills, abilities, and experience of the employee sought to be restrained.
- **Not be contrary to public policy.** Although there is not much case law interpreting this element, and this is typically not a major part of a court's analysis, Wisconsin courts have generally noted that a clause is not unreasonable as to the general public where it does not create a shortage of employees or of the relevant type of service, kill competition, or create a monopoly.

As mentioned above, Wisconsin courts have made clear the foregoing elements and analysis will be conducted on a case-by-case basis and, thus, what may be reasonable in one set of circumstances may be unreasonable in another set. It is therefore important to tailor restrictive covenants to your specific business needs to provide you with the greatest protections.

Although case law expanded the purview of Wis. Stat. § 103.465 beyond just the traditional non-compete clause and clarified how non-compete, customer non-solicitation, and non-disclosure clauses were to be analyzed thereunder, employee non-solicitation clauses were never the subject of Section 103.465's reach. This was only logical given employee non-solicitation clauses do not have the purpose or effect of restricting a current or former employee from competing with the company. Rather, employee non-solicitation clauses merely protect an employer from having its valuable employee base, in which the company has a vested interest, raided by someone with knowledge of the best talent, resulting in the loss of intellectual capital and requiring additional investment of time and effort in finding and training replacement employees.

Given the foregoing, most companies who implemented employee non-solicitation clauses drafted them to simply protect against loss of their employee base. Most employee non-solicitation clauses therefore were not concerned with which employee was being solicited (e.g., what position the employee held and/or whether the former employee knew this individual)

and/or where the solicited employee would land (i.e., a competitor versus non-competitor), but rather, the harm of losing the solicited employee itself and the effect it would have on the company. That is, until the novel 2-3-2 *Lanning* decision was handed down by the Wisconsin Supreme Court last January.

In a very split decision, the Wisconsin Supreme Court held for the first time ever in Wisconsin that employee non-solicitation clauses are governed by Wis. Stat. § 103.465. Using the analysis previously reserved for non-compete clauses as set forth above, the Wisconsin Supreme Court then struck down the employee non-solicitation clause at issue in *Lanning* as overly broad and unreasonable. In so doing, the Court reasoned as follows:

- The clause restricted the employee from soliciting "any" of the employer's employees to terminate employment with the employer. It did not contain any limitations based upon the nature of the employee's position within the employer and/or based upon the employee's personal familiarity with or influence over a particular employee. There was also no limit based upon the geographical location in which the employee worked.
- The clause aimed to protect the employer's interest in maintaining its entire workforce. It was not limited to an interest in retaining top-level employees, employees who had special skills or special knowledge important to the employer's business, or employees who had skills that were difficult to replace.

Despite providing the foregoing general guidelines for what an employee non-solicitation clause could not do, the Wisconsin Supreme Court did not provide companies in Wisconsin with guidelines for what they could do going forward. Thus, companies in Wisconsin have had to quickly overhaul their employee non-solicitation clauses to comply with the Court's guidance as best as possible. It remains to be seen what further guidance we will receive from Wisconsin courts subsequent to the *Lanning* decision. As with *Lanning's* significant and sudden effect on employee non-solicitation clauses, however, further guidance could come at any time and could further change the course of employee non-solicitation clauses in this state. The same swift and sweeping changes in the landscape of non-compete, customer non-solicitation, and/or non-disclosure clauses are also always possible.

Therefore, whether your company desires to implement a restrictive covenant agreement for the first time, or you already have such an agreement in place, given the ever-changing law in this area, it is vital to have your attorneys regularly review and update your restrictive covenants, to ensure you are protecting your business to the greatest extent possible.

If you have any questions about restrictive covenant agreements, please contact Brian Waterman at bwaterman@buelowvetter.com or 262-364-0257, or your Buelow Vetter attorney.