



THE LEGAL INSIDER

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LABOUR LAW

Strategic Aspects of the Employment Contract

Human resources constitute part of a business' capital and are an important element of its success. For a business, the training of its employees is an investment for the future. Whenever an employee leaves the business, not only is it the loss of that investment, but this employee can also harm the business by making use of his training on behalf of a competitor.

An excellent protection for the business resides in the elaboration of a employment contract. Mainly, four types of protective clauses allow the business to protect its legitimate interests: the **non-competition clause**, the **non-solicitation clause**, the **confidentiality clause**, and the **intellectual property reserve clause**.

Using these clauses should not be automatic; the employer must analyse the critical elements and legitimate interests that must be protected, while keeping in mind the employee's right to earn a living. It falls on the business to determinate which clauses and adaptations thereof are pertinent and justified. Indeed, overly restrictive clauses could be deemed unreasonable by a tribunal and simply invalidated, leaving the business unprotected. The use of so-called "armour-clad" clauses must thus be avoided

In this issue of the *Legal Insider*, the authors study in further details the ins and ends of the four types of protective clause.

The Non-Competition Clause

The aim of the non-competition clause is to prevent an ex-employee from working for the business' competitors. However, this clause must not, by its wording, prevent the employee from earning a living. Striking an equitable balance is thus required. Moreover, it must only be used as necessary. As an example, it would be needless for a printing company to impose a non-competition clause on its press operator, so that he could not work for a competing printer. It would be otherwise with regard to the printing company's sales representative. Indeed, the non-competition clause would not prevent him from earning a living, as he could take advantage of his sales expertise in any field other than the printing industry.

The restrictions imposed by a non-competition clause include three dimensions: time (a precise duration), place (a definite territory), and category of work. Thus, a non-competition clause must define the field or category of work prohibited, the territory over which this prohibition will apply, and the duration of that restriction.

Article 2089 of the Civil Code of Québec and Québec jurisprudence recognise that a non-competition clause, to remain valid, must be reasonable, i.e. "limited to whatever is necessary for the protection of the legitimate interests of the employer". In practice, this criterion is appreciated in function of the proportionality of the restriction imposed on the worker in relation to his knowledge of the business, to his hierarchical position, and to the nature of the position occupied. If the court decides that a non-competition clause is not reasonable, it

cannot reduce it: the only sanction provided by the law is the cancellation pure and simple of the clause in question.

The utilisation of a non-competition clause should not be automatic. The employer's objective must be the *effective* protection of his interests, while keeping in account the employee's right to freely earn a living. Indeed, not only may the validity of an overly restrictive clause be questioned, but that clause further risks to dissatisfy the employee and thus lead to an unwholesome work environment.

The Non-Solicitation Clause

Article 2088 of the Civil Code of Québec provides for the employee an obligation of loyalty toward his employer. This notably implies that he may not leave his job with the clients list and systematically solicit them on behalf of a third party. This obligation continues for a "reasonable time" following the employment's cessation. However, this "legal" non-solicitation obligation may not grant sufficient protection to the employer. Indeed, jurisprudence recognises specifically that the systematic solicitation of an ex-employer's clients constitutes an infraction to the obligation of loyalty. On the other hand, the issue is not clear as to whether the solicitation of certain clients of the ex-employer, within the scope of an at-large solicitation of the market, would be prohibited.

As a result, it is preferable to provide for an explicit non-solicitation clause. Notably, the employer would be able to fix the duration of the employee's obligation. The contract could also include an non-solicitation obligation of a larger scope than provided by the Civil Code. As an example, a contractual non-solicitation clause could not only prohibit the direct solicitation of the ex-employer's clients, but also prevent the employee from serving these clients or entering into a business relationship with them, even if it is on the clients' own initiative.

The use of a non-solicitation clause is highly useful when a non-competition clause is not justified by the employee's situation. In other cases, the non-solicitation clause can be easier to accept for the employee than the more onerous non-competition clause. Notably, when the employer must draft a limited non-competition clause so as to preserve its validity, the concurrent use of a wide-range non-solicitation clause allows the business to protect its interests.

As an example, a printing company, whose clientele covers all of the Province of Québec, hires a sales representative for the city of Montréal territory. The employment contract could provide a non-competition clause, restricted to the Montréal territory for 1 year so as to insure its validity. As an additional protection, the contract may also provide a non-solicitation clause for the entirety of the printer's clients for a period of 3 years. Such a employment contract protects the employer, without preventing the sales representative from finding other gainful employment within his field of expertise.

The Confidentiality Clause

In the scope of their work, the employees of a business have access, in function of the position they occupy, to the strategic information of their employer. This strategic information can assume many forms: clients lists, costs & pricing lists, suppliers lists, unique know-how developed by the business, specific expertise & knowledge providing a technological edge in developing in the new products, etc. These elements are often essential to the commercial success of the business and insure its competitiveness in the market.

The confidentiality clause consists in an undertaking, on the part of the employee, not to divulge his employer's strategic information after the end of his employment. The use of this clause is even more essential when the employee has direct access to sensitive information. In order to insure such a clause's efficiency, it is preferable to define and delimit with precision, in the context of the employee's situation, what constitutes confidential information that is not to be divulged.

The Intellectual Property Reserve Clause

In theory, Canadian law provides that an employer owns the creative fruits of his salaried employees' labour, inasmuch as said labour was accomplished *in the scope of their work*. In practice, it is essential for the business to establish its ownership rights in a factual and *certain* manner, considering the intangible nature of intellectual property. Indeed, a material thing is presumed to be owned by the person who possesses it. Yet,

this presumption does not easily apply to intellectual property, placing the business that claims ownership in a position where it must prove its right.

It is to this end that the intellectual property reserve clause goes a long way. Indeed, such a clause constitutes an acknowledgement by the employee that the results of his “intellectual” work, created in exchange of his remuneration, belong to his employer. Not only does the use of this clause create a clear situation vis-à-vis the employee, but it also prevents ambiguity as to the ownership of intellectual property elements. Within the context of an eventual sale of the business, the clause constitutes a reassurance for the third party buyer as to the validity of the business’ ownership rights on the elements of intellectual property.

Indeed, from times to times, claims from ex-employees arise as to the intellectual property they created. The business must in such a case prove that it is the true owner of that intellectual property. Imagine, three years after the sale of a company, the difficulty of making such a proof for the third party buyer! Will he be able to demonstrate that the ex-employee was indeed salaried, rather than an independent contractor? Otherwise, will the third party buyer be able to demonstrate that the worker had ceded his rights to the company?

As a result, in the context of the sale of a business, third party buyers will demand beforehand the proof of the business’ ownership over its intellectual property, as part of their due diligence. The inclusion of a intellectual property reserve clause will constitute such a proof on the part of the seller, as well as establish a certain guarantee for the buyer.

Conclusion

While drafting a given employment contract, the employer must analyse seriously the nature of the employee’s occupied position, the privileged information to which he will have access, the intellectual creation resulting from his work, as well as the legitimate interests with regards to competing activities both during his employment and after it ends. Afterward, the exercise consists in finding the appropriate contractual tools so as to protect the employer’s right, without creating an unwholesome employment relationship with the employee. The latter must not perceive the imposed restrictions as preventing him from earning a living or putting a stop to his career’s advancement.

The drafting of an effective employment contract is thus an exercise in balance. With this in view, the parties can use, in variable configurations, the non-competition clause, the non-solicitation clause, the confidentiality clause, and the intellectual property reserve clause.

Too often, employers instead rely on “armour-clad” contract models. The restrictions imposed to the employee by such contracts are too onerous, easily leading to an unwholesome employment relation. Furthermore, such clauses do not for all that offer a more effective protection to the employer; as a case in point, a non-competition clause too restrictive so that it is deemed unreasonable shall be invalidated, leaving the employer’s rights without protection.

The business must thus draft employment contracts adapted to the situation of each employee, i.e. to the nature of his work, to the duties he assumes, to the hierarchical position he occupies, and to the importance of the strategic information to which he will effectively have access. In order to reduce costs, a business can work hand-in-hand with its legal counsel in order to prepare standard contracts adapted to specific job descriptions. These standard contracts could then be reused when a new employee joins the ranks.

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