

## My Right to Compete

Did you know your employees can leave your employ today and work with your competitor tomorrow? The law generally recognizes the right of employees to compete with their former employer following notice of their resignation or termination of their employment, unless the employee has signed a restrictive covenant preventing them from doing so. The question becomes one of how companies can protect themselves from watching their clients and business walk away with the departing employee.

The courts impose a “duty of good faith” upon all employees as a term of the employment relationship. That duty requires employees to act in the interest of his employer during the term of the employment relationship, to not solicit or compete with the employer while employed and to not make improper use of confidential information during or after his employment. Any employee who fails to comply with the “duty of good faith” will be liable to the employer for damages incurred by it. Employees are expected to give “reasonable notice” of their intention to resign, which will vary depending on the position and responsibilities of the resigning employee. The greater the role played, the longer the notice of resignation required.

Companies can protect themselves by including non-compete and non-solicitation clauses as terms of the employment agreement. Be forewarned these restrictive covenants must be reasonably limited in geography, market and time length; otherwise they will be worth nothing more than single-ply toilet paper and will not be enforced by the courts. Employers should also expect to be responsible for the former employee’s income during the period covered by the restrictive covenants, if the employee is otherwise prevented from earning a living. Short of “just cause” for termination, the courts will not allow a former employer to stronghold an employee from competing if they are not receiving any meaningful income to prevent her from doing so.

Regardless of whether the employment agreement contains restrictive covenants, the courts will impose residual duties owed to former employers by “fiduciary” or “key” employees. Where the employee holds a key position in the company, is actively involved in upper management and business decision-making, has access to financial statements and confidential information, plays a significant role in dealing with clients and/or vendors, and the company has a dependency upon or vulnerability arising from the loss of the employee, the courts will consider her to be a “fiduciary” or “key” employee. As such, the employee cannot directly and actively solicit the former employer’s customers for a “reasonable period” of time after the termination of her employment.

The restriction of a “reasonable period” to solicit and compete against the former employer again depends on the position held by the employee. It is not necessarily the same as the “reasonable notice” a resigning employee should give to his employer nor is it the same as the “reasonable notice” to be given by an employer when terminating an employee. The duty not to solicit and compete exists for a “reasonable period”, which would enable the former employer to contact its clients and attempt to retain their loyalty. The higher the level of trust and confidence entrusted to the departing employee and the greater her role in interacting with clients, the longer the “reasonable period” because of the employer’s increased vulnerability in retaining the loyalty of its clients.

The lesson to be learned? Employees who are indispensable to your company should likely have an employment agreement that reasonably limits their ability to walk away with your business upon resignation or termination. If you didn’t get a signed non-compete or non-solicitation, you may still be able to enforce a duty upon the departing employee based on the role he played in the company. In which case, the employee may be liable for any damages the company incurs from the loss of clients and business. If you are concerned you might be using singly-ply toilet paper or otherwise have nothing covering your butt, contact [moira@wallacelaw.ca](mailto:moira@wallacelaw.ca) to close the employee loophole.