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An Expansive View Of Noncompetes At Wis. High Court

By **Robert Duda Jr. and Terry Smith** (February 1, 2018, 10:04 AM EST)

The Wisconsin Supreme Court's recent decision in Manitowoc Company v. Lanning, 2018 WI 6 (Jan. 19, 2018), continues a noteworthy trend of broadly applying Wisconsin's strict statute governing noncompete agreements, Wis. Stat. § 103.465, to all manner of competition restrictions between employers and employees. In the latest case, Wisconsin's highest court held that an employee nonsolicitation clause, or employee "nonpoach" provision, constituted a noncompete agreement subject to Wisconsin's notoriously demanding restrictive covenant statute. More specifically, the court held that the nonsolicitation of employees clause prevented the plaintiff's former employee from competing fully with the plaintiff upon joining a competitor, was overbroad on its face and was not necessary for the protection of the employer, where it prohibited the departing employee from soliciting every one of the employer's 13,000 employees worldwide.

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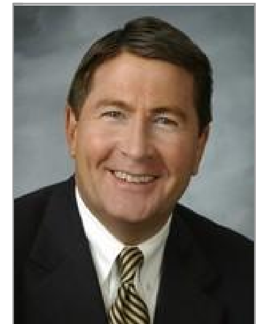

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Wisconsin's Noncompete Statute

Wis. Stat. § 103.465 governs covenants "not to compete" and subjects such competition restrictions between employers and employees to exacting scrutiny. That is, such restrictions must: (1) be necessary for the protection of the employer; (2) provide a reasonable time limitation; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive to the employee; and (5) not be contrary to public policy. Significantly, restrictions subject to the Wisconsin statute must meet all of these requirements on their face and cannot be "blue penciled," i.e., modified or rewritten by the court, to obtain compliance.

The case resolved an open question as to whether employee nonsolicitation provisions are subject to the Wisconsin statute and treated the same as a noncompete agreement. Previous decisions by Wisconsin courts have held the statute applicable to not only traditional noncompetes, but also nonsolicitation of customer provisions, nondisclosure agreements and no-hire provisions between competitors. However, there remained doubt about whether an employee nonsolicitation provision fell within the scope of the statute.

Wisconsin Supreme Court Ruling

The departing employee in the Manitowoc Company v. Lanning case was a long-time engineering employee with the plaintiff's crane division. He was not subject to a traditional noncompete and following his resignation, he joined a direct competitor as its director of engineering. Almost immediately upon joining the competitor, the departing employee

allegedly recruited and was involved in the solicitation of at least a dozen employees of the plaintiff in an attempt to induce them to join the competitor. The plaintiff asserted such efforts violated the employee nonsolicitation provision in the former employee's employment agreement, which prohibited him for a two-year period following his termination from soliciting or inducing any employee to terminate his or her employment with the plaintiff or accept employment with a competitor.

Application of Wisconsin Noncompete Statute to Employee Nonsolicitation Agreement

The court first determined that an agreement prohibiting the departing employee from soliciting employees of his former employer is a restraint of trade and subject to Wisconsin's noncompete statute, because it limits a competitor's access to the labor pool. The court stated that the effect of the nonsolicitation restriction was to prevent the former employee and his new employer from competing fully in the marketplace for qualified employees by soliciting the plaintiff's employees. Finally, the court noted the mobility of employees is hindered by the restriction because employees are prevented from having complete information regarding employment opportunities elsewhere.

The court rejected the employer's proffered argument that a nonsolicitation restriction is less onerous than a traditional noncompete restriction, and therefore, should be held to a less exacting standard under a "sliding scale" theory, finding such argument had no basis under the Wisconsin statute or law.

In applying the statute's strict requirements, the court held the nonsolicitation of employees' provision was unenforceable given the employer's lack of a protectable interest justifying the restriction. First, the court rejected the employer's position that it had a protectable interest in maintaining its entire workforce, finding such position contradicts the general principle in Wisconsin that an employer is permitted to solicit and hire away its competitor's employees (assuming no improper means are used or improper purpose exists). Next, the court found that the provision was overbroad on its face because it did not specify a territory or class of employees that could not be solicited. Instead, the restriction applied to all 13,000 employees of the plaintiff located anywhere in the world, without regard to whether the departing employee had any specialized knowledge about the employees, had worked with them during his employment, or was even employed in the same division of the company. More specifically, the plaintiff failed to establish that it had a protectable interest in prohibiting its former employee from encouraging any employee to leave the plaintiff's employ for any reason or take any job with any competitor.

Finally, the court rejected the employer's argument that the court could enforce the restriction in a narrower way than the broad language of the restriction dictated. The court held that such an attempt to more narrowly enforce an overbroad restriction is an impermissible blue penciling, or modification of the restriction, and prohibited by the Wisconsin noncompete statute.

Lessons for Employers

In holding that employee nonsolicitation agreements are subject to the strict scrutiny of the Wisconsin noncompete statute, the Wisconsin Supreme Court has delivered a clear message to employers that all manner of competition restrictions may be subject to close scrutiny and analyzed the same as a traditional noncompete. This marks a stark contrast to courts in many other states which tend to view nonsolicitation and nondisclosure agreements more favorably than strict noncompetes which prohibit outright employment with a competitor. In addition, employers should note the following implications of this recent decision:

- Labels do not matter in assessing whether a competition restriction is subject to Wisconsin's noncompete statute. The court provided the following guidance on whether the statute applies: Whether an agreement is a restraint of trade depends on the "effect of the agreement on employees and competition" — not on the label affixed to the agreement.

- Employers with employees in multiple states may have to consider using separate and more narrowly tailored agreements for their employees in Wisconsin. Courts in other states, such as neighboring Illinois, have on occasion questioned such overly broad employee nonsolicitation restrictions that apply globally to an employer's entire workforce. However, employers in other jurisdictions may have the fallback position of asking the court to modify an overly broad restriction depending on the specific facts and circumstances of the case. Such option is not available under Wisconsin law.

- Employers in Wisconsin, and elsewhere, should consider reviewing their employee nonsolicitation agreements to ensure they are reasonably drafted and, depending on the specific facts and circumstances, appropriately limited to: (1) employees at the departing employee's location; (2) employees supervised by the departing employee or with whom the departing employee had material contact or interaction; (3) employees in a specific department or position that gives rise to a protectable interest; and/or (4) employees with special skills or knowledge about the company's business, customers or confidential information to justify a protectable interest.

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