

To sign or not to sign?

Many employers require employees to sign restrictive agreements. But both often ignore the legal ramifications -- and that's a big mistake, experts tell KEVIN MARRON

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When Lynda Vanderwal started work as a Web designer for a Vancouver high-tech firm two years ago, she had no idea she would end up getting snared in a web of legal entanglements because of the terms of the employment contract she signed.

The agreement stipulated that, if she quit or was fired, she could not work as a Web designer in direct competition with her employer within a 300-mile radius for two years.

Then, last September, 18 months after she joined the firm, her boss asked her and other employees to sign a new agreement -- even more restrictive than the first. The new agreement specified that she would not work in competition with the company anywhere in North America for two years, she says.

"That was forbidding me from making a living," Ms. Vanderwal says. "I said to my boss, 'I don't mind signing a thing saying I promise not to steal your clients or your information and use it elsewhere. But this is getting ridiculous.' "

So ridiculous in her mind that she refused to sign the new agreement. She says her boss led her to believe that, without signing, she would lose her job - and that would mean she'd be prevented under the earlier agreement she did sign from working in competition anywhere within 300 miles of her Surrey, B.C., home.

Ms. Vanderwal says, after seeking legal advice, she was able to negotiate a termination agreement that included a severance package and reduced to nine the number of competitors she was not allowed to work for. Now she is slowly finding employment on a freelance basis -- including work her employer passed her way as part of the termination agreement.

Ms. Vanderwal's experience provides sober warning about a situation faced by many people as they consider a new job: to sign or not to sign a non-compete

agreement?

Many employers today, particularly in highly competitive fields such as technology, finance and telecommunications, require the signing of agreements restricting for who and where employees can work after they leave their jobs. Many eager job seekers sign on the dotted line without worrying about the implications of the small print in the contract.

This is a big mistake, according to Toronto employment lawyer Ken Krupat, who maintains that employers and employees alike often ignore the legal ramifications of restrictive agreements.

In fact, recent court decisions have put strict limits on non-competition clauses, he says -- something that both employers and employees may not be aware of.

Elisa Scali, an Ottawa-based associate for Gowling Lafleur Henderson LLP, notes that a non-competition clause is, by definition, a restraint on trade.

"And so, they are *prima facie* unenforceable, unless the employer doesn't go any further than absolutely necessary to protect its legitimate business interests."

In fact, there are several kinds of agreements. Non-solicitation clauses protect an employer's client base, while confidentiality clauses protect trade secrets and other business information. More sweeping non-competition agreements prevent former employees from working or conducting business in their industry, she adds.

And, she says, courts are more likely to enforce a non-solicitation clause or a confidentiality clause than non-competition agreements.

In some cases, employers have mandated a non-competition agreement but the court decided that a non-solicitation agreement would have sufficed. Courts have also deemed that agreements must be reasonable in terms of the geographic area covered and length of time they're in effect.

In fact, the current trend in employment contracts is to move away from the kind of blanket non-competition clause that Ms. Vanderwal was asked to sign and toward more limited non-solicitation clauses, according to lawyer Stephen Shamie, who teaches executive education courses in human resource legal issues at Queen's University's School of Business.

Nevertheless, restrictive agreements are still heavily used, particularly where companies are anxious to protect their intellectual property and prevent rivals from raiding customers and staff, says Mr. Shamie, managing partner with Hicks Morley Hamilton Stewart Storie LLP in Toronto.

To get around the limitations courts are placing on restrictive agreements, companies are getting more sophisticated and creative, particularly with senior-level employees, in designing contracts that include bonuses and other incentives in exchange for non-competition provisions, Mr. Shamie says.

But there are also employers who are either unaware of the current legal trends or choose to ignore them, Mr. Krupat says.

"Some will take their chances and include an agreement that is overreaching, hoping to later use it as a lever against the departing employee at the tail end of employment, knowing that it may not be enforceable if it comes down to getting a decision from a court."

And employers often get away with this, he says, because they can cause ex-employees or their new employers trouble and expense just by launching a law suit or seeking an injunction -- even if they have no hope of winning.

Mr. Krupat advises employees to review contracts carefully before signing, seek legal advice and negotiate, if possible, with the company.

For instance, he suggests telling a prospective employer, "This is not enforceable at law and I'm not going to sign this, but I will sign something more reasonable and likely to be enforced."

While negotiation is often a viable option for senior-level employees, more junior job seekers may not have enough clout, he says.

"For mid- and low-level employees, you should have an agreement reviewed and then have to make a choice. You may have to decide whether to take your chances and worry about it at the back end or go elsewhere, if you have an opportunity," he says.

Brad Barclay, a former IBM Canada Ltd. employee now working as an independent software developer, says he regrets not getting legal advice before signing a standard IBM employment contract governing intellectual property rights.

Before joining IBM Canada in 1999, he had invented a piece of software for synchronizing data between handheld computers and corporate systems. While working, he continued to develop the product in his spare time, but the terms of his contract stipulated IBM owned the rights to any improvements he made during this period.

When he left IBM, he wanted to continue to develop his product. To do that, he had to abandon all improvements he'd made during the two years he was at IBM, he says.

It is common practice at IBM for all newly hired employees to sign a confidential information, copyright and invention agreement, according to IBM Canada spokesperson Jennifer Ballantyne.

She says this type of agreement is standard in the industry and is intended to protect the interests of IBM, the employee and others, such as the employee's previous employer. Under the document, the employee agrees not only to safeguard IBM's confidential information and material but also not to disclose to IBM any other company's confidential information that may have been learned on a previous job.

The agreement also stipulates that any works created by the employee while employed by IBM belongs to the company, but there is also the opportunity for the employee to identify any work completed prior to his or her work at IBM, which may be exempt from this agreement, she adds.

All IBM employees must also agree to a code of conduct that covers conflicts of interest, responsibility for protecting IBM assets and personal conduct with other people, Ms. Ballantyne says.

People hired into more senior and sales positions in the company also sign non-solicitation agreements and/or non-competition agreements, she says. "These employees are entrusted with confidential information, are placed in key business and customer relationships and are privy to highly confidential IBM business strategies. Non-solicitation and non-competition agreements are an industry standard practice and are designed to protect IBM's intellectual property, fiduciary relationships and the employee base," Ms. Ballantyne says.

"The bottom line is we work in a very competitive industry and we've got to protect our assets and our people," she says.

Mr. Barclay says he is not sure that he would have done anything differently, if he had sought legal advice at the time of signing his contract, since he was a recent graduate and probably didn't have enough clout to negotiate another agreement.

Still, he says, he would have liked the opportunity to "learn more about my options and rights under law."

On the other hand, he says, "What I did do correctly was to identify to IBM when I started my employment the technologies I had developed prior to working with them, and to ensure that I had sufficient information and documentation to prove this."

Ms. Scali points out that there is a strange legal wrinkle whereby restrictive agreements are more likely to be enforced if the employee who signs them has had legal advice, since it is then reasonable to suppose that they knew what they

were getting into.

So, should you just go ahead and sign the agreement anyway, assuming that it will not be enforceable? "I don't think a lawyer would advise that," says Mr. Shamie, "But certainly that may be a view that is out there."

What is more common, he says, is for job seekers to ignore or discount the risks involved in signing an overly restrictive employment agreement. "They really want the job and the tendency is to say, 'Oh, well, I'm not thinking about what will happen to me after I'm terminated, so it's not important. But, of course, it does become important," he warns.

Ms. Vanderwal says she wishes someone had warned her about the risks of restrictive agreements. "I took a Web designer course at a community college. They did not mention anything about non-compete contracts. I didn't even have a clue that they existed when I applied for this job," she says.

Nevertheless, Ms. Vanderwal says she has no regrets about refusing to sign a restrictive agreement that she thought was unfair.

"I know that people say, 'You may as well sign it because it's not enforceable. It's just words on paper.' But, to me, it's a matter of principle. Let's be fair on this and make it reasonable."

How to handle job agreements

Restrictive agreements can pose a huge dilemma for anyone starting a new job.

Here are some tips from legal experts on how to handle them:

Read the small print, understand what the provisions of the agreement are and what they mean, urges Toronto employment lawyer Ken Krupat.

Understand the difference between non-competition clauses, which could restrict you from working in a particular field; non-solicitation, which just stops you from going after your present employer's clients; and confidentiality, which stops you from using the firm's proprietary information, Mr. Krupat advises.

Consider what restrictions the agreement imposes -- for instance, for how long it binds you, what geographical area it covers and whether it stops you working with all competitors or clients, or is more specific, advises Elisa Scali, an Ottawa-based associate in the law firm Gowling Lafleur Henderson LLP.

Remember that courts will be more likely to enforce non-solicitation than non-competition agreements, and favour terms that are limited to protecting legitimate business interests, rather than preventing people from plying their trade, both

lawyers say.

Get independent legal advice, urges Toronto lawyer Stephen Shamie, a Queen's University Business School professor.

Challenging an agreement could be a quick way of talking yourself out of your new job, but you can always use your knowledge and any legal advice you obtain to negotiate to make an agreement less restrictive, Ms. Scali says.

For example, the employer may be willing to scrap a blanket non-compete clause -- which probably wouldn't be legally enforceable anyway -- for one that restricts an ex-employee only from working for specific competitors or with certain clients.

If you have to sign on the dotted line, you may be able to get a deal in which you will receive a bonus or a bigger severance package in exchange for putting your signature to a non-competition clause, Mr. Krupat says.

If you've already signed a restrictive agreement and are worried it might limit your next career move, Mr. Krupat suggests weighing the risks of your employer taking you to court.

Consider whether the new job you take is likely to have a significant impact on your old employer's business.

If it will, the company may want to try to recover its losses with a law suit. If not, they probably won't bother, he says.

If you are worried about a potential lawsuit over a restrictive agreement, talk to your new employers about it to see if they will help defend you and cover your costs in court, Mr. Krupat adds.

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