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Wisconsin Supreme Court Splashes Cold-Water On The Enforceability Of Non-Solicitation Of Employee Covenants

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Wisconsin is one of the states which has a statute regarding the enforceability of restrictive covenants. Under Wisconsin law, such a covenant is enforceable within a specific territory and for a specified time, but only if the restrictions imposed are reasonably necessary for the protection of the employer or principal (Wisconsin Statute § 103.465). Wisconsin courts historically have applied the statute to all forms of employee limitations, including non-disclosure covenants. *See Tatge v. Chambers & Owen, Inc.,* 579 N.W.2d 217 (Wis. 1998). In other words, if an employer wants to enter into an enforceable confidentiality agreement with employees in Wisconsin, it would need to satisfy the requirements of the statute (including the territorial and time restrictions). The Wisconsin Supreme Court recently extended the application of this analysis to covenants regarding the non-solicitation of employees. Employee non-solicit provisions widely are regarded as more enforceable than traditional non-competes since they do not preclude someone from engaging in their trade or profession and simply prevent an employee from stealing away or raiding their former employer's workforce. Accordingly, many jurisdictions that ban non-competes and non-solicitation of customer provisions tend to be more lenient with respect to these provisions. That no longer is true for Wisconsin. In *Manitowoc Company, Inc. v. Lanning* (Case No. 2015AP1530), the Wisconsin Supreme Court was confronted with evaluating whether a non-solicitation of employees covenant in an employment agreement was enforceable under § 103.465. At issue was a fairly typical non-solicitation provision which barred the worker, for two years, from directly or indirectly soliciting, inducing or encouraging employees of the company to terminate their employment or to accept employment with a competitor, supplier or customer of the former employer. This was a case of first impression in Wisconsin: no court previously had looked at whether the non-solicitation of employees came under the scope of the statute. Addressing that question first, the court concluded that the statute applied to any covenant which could be viewed as a restraint on trade. Here, the covenant restricted the former employee's ability to engage in ordinary competition in the free market, and specifically restricted his ability to freely compete for the best talent in the labor pool. As such, it came under the statute. Turning to the covenant itself, the court concluded that the provision violated Wisconsin law and was unenforceable. The court reasoned that there was no reasonable protectable interest justifying the restriction on the employee's ability to solicit other workers. Among other things, the provision contained no limitations based on the employee's personal familiarity with or

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influence over particular workers, or any geographical limitation in which he worked. Instead, it prohibited him from soliciting its entire workforce which the court viewed as overbroad. Geographical restrictions and personal familiarity clauses are not normally applied to non-solicitation of employee provisions. Given this new case, however, it would be a good idea for Wisconsin employers who want to enforce non-solicitation of employee's provisions to reevaluate their agreements to see if these concepts are covered. Otherwise, their agreements may not survive scrutiny based on the new interpretation of the law.