

EMPLOYERS' ALERT

September 2007

Obligations of Departing Employees

WHAT'S NEW AT RUBIN THOMLINSON LLP

Christine Thomlinson was the moderator of the Workplace Investigation Teleseminar held by the Law Society of Upper Canada on September 18, 2007.

Janice Rubin was a panelist on the Conference Board of Canada's Webinar "Creating Inclusive Work Environments: Legal Updates You Want to Know" on September 26, 2007.

Janice was also quoted extensively in a Maclean's Magazine article on Toxic Workplaces in the September 3rd Issue. On September 14th she also appeared on BNN's show "Squeezeplay" to discuss the same issue. Should you wish a copy of the Maclean's article, please call or email our office and let us know.

We work with employer clients to provide optimal legal solutions to their challenging workplace issues. If you would like to know more about our practice, please do not hesitate to contact us at (416) 847-1814 or via e-mail at contact@rt-law.ca.

When employees leave the workplace, either voluntarily or involuntarily, questions often arise as to whether they are permitted to solicit the customers of their former employer.

Where the parties have entered into a non-solicitation or non-competition agreement, the question is whether those terms are valid and enforceable. However, what happens when an employee has not signed an agreement? Can any duties be implied by virtue of the role the employee plays within the employer's organization? One recent case has considered exactly this issue.

In *Boehmer Box L.P. v. Ellis Packaging Ltd. et al*, the defendants, Mr. Harfst and Mr. Spittal, were former sales representatives and account executives for the plaintiff, Boehmer. Just prior to leaving their employment, they accepted offers with a competitor, Ellis Packaging.

Fearing that Harfst and Spittal would injure their business, Boehmer brought a motion for an injunction in an attempt to restrain the two men from soliciting any of its customers and from using its confidential information.

Neither Harfst nor Spittal had signed an employment agreement. As a result, Boehmer argued that they were "fiduciaries". As such the company asserted they should be prevented from soliciting its clients even absent an express written agreement that prevented them from doing so. Fiduciary employees are recognized in employment law as owing special duties to the employer, and in a situation such as this one, may be required to refrain from soliciting the former employer's customers for a reasonable period of time.

In reviewing the roles of the former sales representatives and account executives, the Court held that the employees were not fiduciaries and were free to solicit Boehmer's customers. Simply stated, the employees' positions were not senior enough to meet the requisite criteria. This was despite the fact that they were responsible for a significant portion of the company's sales.

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Upcoming Events

More RT at the HRPAAO....

Christine Thomlinson will be co-chairing the Annual HRPAAO conference in Toronto on October 4, 2007.

Janice Rubin will be discussing "Creating a Fair Work Environment" at the Construction Institute's Ethic Workshop on October 1, 2007. Janice will also be speaking to members of the Powers Workers' Union on harassment in the workplace and the investigation process in Toronto on October 2, 2007.

Mark the date!

October 2, 2007 is the date of our next breakfast seminar "Managing the Aging Employee" where RT partner Christine Thomlinson will discuss the legal issues associated with employing an aging workforce – there are many, and we think you'll be surprised by some of them. This is a topic that no HR professional will want to miss. To RSVP, contact William at William@rt-law.ca or call (416) 847-1814.

This alert is prepared as a service for our clients and other persons dealing with employment issues. It is not intended to be a complete statement of the law or an opinion on any subject. Although we endeavour to ensure its accuracy, no one should act upon it without a thorough examination of the law after the facts of a specific situation are considered, and without seeking the advice of legal counsel. No part of this publication may be reproduced without prior written permission of Rubin Thomlinson LLP. This has been sent to you courtesy of Rubin Thomlinson LLP.

While the Court did not make such a finding here, it did state that if the employees had removed or used confidential information of the plaintiff, such as client lists, to solicit customers, they would be liable to the company for damages.

What does this mean for employers?

- Employees who have contact with clients of the employer should be required to sign a non-solicitation agreement and confidentiality agreement

Without such an agreement, employees may be able to solicit customers after departure which could seriously damage the company.

The enforceability of such a provision depends on length, scope and geographical limitations. Employers should contact legal counsel prior to drafting such an agreement. With very critical employees, non-competition agreements should also be considered.

- Employers should prepare for employee departures
When employees depart, they should be reminded, preferably in writing, that they cannot remove confidential information from the workplace. Consider describing specifically what types of information is considered confidential – i.e. client lists, marketing plans, and pricing formulas. At the same time, employers should also consider contacting key customers to solidify their relationship with them.
- Be mindful of confidential information and the solicitation of clients

If an employer determines that a new employee has removed confidential information from his or her former employer, or is soliciting former clients/customers, legal advice should be sought to determine whether such actions are illegal and what steps can be taken to remediate the situation short of litigation.