

EMPLOYERS' ALERT

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WHAT'S NEW at RUBIN THOMLINSON LLP

Janice Rubin has been appointed Chair of the National Women Moving Women campaign of the Canadian Women's Foundation. The campaign's goal is to raise six million dollars to assist 2,500 Canadian women to move out of poverty in the next 5 years, by funding their participation in economic development and skills training program. For more information, check out www.cdnwomen.org.

Our breakfast seminar entitled, **Terminations for Tough Times** was held on September 11. Chris Thomlinson hosted the breakfast and discussed the survey results collected from the survey that we asked our Employers' Alert audience to participate in over the summer. Attendees found the information useful and the speaker engaging.

Janice spoke at the Credit Union Managers' Association's Silver Anniversary Conference on September 15. She discussed what you need to know to manage your workplace effectively and legally.

Janice also conducted a webinar entitled "Creating Inclusive Work Environments: Legal Update You Want to Know" on September 17. This webinar was hosted by the Conference Board of Canada.

James Heaney spoke at the Ontario Dental Hygienists' Association's Annual Conference on September 19. James reviewed the basic principles of employment law and human rights law as they apply to dental hygienists.

David Whitten spoke at the Bredet 2008 Educational Conference on September 23. He discussed post employment obligations from an employers perspective.

David also spoke at Miller Dallas on September 25 about employment contracts.

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.

The recent decision in *H.L. Staebler Co. v. Allan* [2007] O.J. No. 3460 (Ont. S.C.J.) demonstrates how narrowly the courts interpret limitations on employee conduct after the employment relationship has ended.

Restrictive Covenants Must Be Drafted Narrowly To Be Enforceable

In this case, two employees resigned their position with their employer. The employees were commercial insurance salespersons and had signed employment contracts containing restrictive covenants. The restrictive covenant was a "hybrid" between a non-competition agreement and a non-solicitation agreement, because the clause prohibited the employees from conducting business with any clients of Staebler for two years that were handled or serviced by the employee at the date of his or her termination. The agreement did not stop the former employees from acting as insurance brokers, selling commercial insurance, or accepting employment with a competing insurance brokerage. They were also at liberty to contact other Staebler clients they did not handle or service, with a view to entice those clients to transfer their insurance business from Staebler.

After the employees resigned, they moved to a new employer and began soliciting their former clients. Staebler obtained an injunction preventing the two from soliciting business from the clients whom they formerly serviced, but before the injunction was obtained, 118 clients had transferred their business to the

new employer. In fact, in the two-year period following their resignations, the two employees earned combined commissions of \$1,239,211 from these clients. Staebler commenced a claim against the employees and their new employer.

The claim was successful at trial. The Court found that the restrictive covenant was reasonable and enforceable. Particular emphasis was placed on:

- the damage the employees could do to their former employer on departure;
- the fact that the restrictive covenant only precluded accepting work from clients the employees managed; and
- the fact that the employees signed a more restrictive covenant with their new employer that demonstrated it was industry standard to restrict employees' behaviour after departure.

Further, the Court also held the new employer liable to Staebler for inducing breach of contract.

On appeal, however, the decision was reversed. The Court of Appeal held that the employer had failed to establish that the two year "hybrid" covenant was reasonably necessary. The Court of Appeal held that a non-solicitation clause which precluded solicitation but permitted

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accepting work that was not solicited is generally sufficient in conventional employer/employee situations.

Where an employer seeks to enforce a more restrictive provision, as in this case, there is an even higher onus on the employer to show it was necessary. The Court of Appeal held that there were a number of issues with the covenant which made it unenforceable and overly broad including:

- the provision failed to be reasonable in its scope because it precluded the employees from doing “business” with their former clients. The provision had no limitation on the type of business suggesting it extended beyond insurance sales but to any business;
- the provision had no geographical limitation on where the “business” could not be done. The Court found this to mean that the former employees could not do any work for any former client anywhere in the world, even if it was unrelated to insurance and in an area where Staebler did not operate; and
- the Court of Appeal disagreed with the trial judge that the restrictive covenant the employees signed with their new employer was more restrictive. It held that while the provision with the new employer encompassed a larger client base, it had a shorter duration and

precluded only specific work that could not be done for former clients.

As such, the Court of Appeal reversed the decision and ordered costs payable to the employees. It also ordered that an assessment be made on the damages caused to the employees by the injunction.

What Does This Mean For Employers?

Restrictive covenants must be drafted narrowly

This case illustrates that courts do not like enforcing restrictions on employees’ post termination conduct. In this case, the fact that the clause was seen as too broad, gave the Court the opportunity to declare it unenforceable. Had the agreement only precluded the solicitation of clients for the purposes of selling insurance within the city they worked for a 6 month period, it is much more likely the provision would be enforceable. Such a provision would have provided significant protection to the employer given that the majority of the client loss occurred relatively quickly after the former employees left the company. The overriding message of this case is that employers should draft these covenants as narrowly as possible should they wish to rely on them in the future. ●

UPCOMING EVENTS

October 17

Chris Thomlinson will be speaking at the Canadian Institute’s 8th Annual Advanced Forum on Employment Law on October 17. Chris will be discussing managing violence, bullying and harassment in the workplace.

October 22

Chris Thomlinson will be Co-Chairing the upcoming Annual HRPAs HR Law Conference on October 22. Chris will also be hosting a session entitled “Employment Law Updates”.

October 29

Janice Rubin will be speaking at the Annual Conference that is being hosted by the Barrie and District HRPAs on October 29. Janice will be speaking about conducting workplace investigations.

December 3 & 4

The fourth session of **Conducting Internal Workplace Investigations** will take place on December 3 and 4. This session is currently full, however if you would like to attend our next session on January 20 and 21 please contact us at (416) 847-1814 or contact@rt-law.ca to register.