by **Jason Busch**

personnel plunder

A recent Wisconsin Court of Appeals ruling makes it harder for businesses to stop former employees from poaching their staffs.

"No employer can make a job so attractive that an employee will never leave."

— Bill Williams, attorney, Bell Moore & Richter S.C.

Considering how much time people spend at work, it's only natural to develop friendships that last beyond the terms of an individual's employment. So when one employee leaves for a new job and recognizes a good professional fit with his or her new employer for a friend and former coworker, it's also natural to suggest that person come and join him or her at the new employer, right?

Maybe so, but it might not be legal.

A lot depends on which employee, if any, signed a non-solicitation agreement with the former employer. As a recent Wisconsin Court of Appeals decision in *Manitowoc Co. Inc. v. Lanning* further proves, whether or not a non-solicitation agreement is enforceable also depends on how narrowly it's written.

For employers this means a review of existing non-solicitation agreements may be in order, and for employees it signals a bit of common sense being applied to state statutes concerning workers' rights.

NO SOLICITORS?

Non-solicitation clauses are not new, notes Bill Williams, an attorney with Bell Moore & Richter S.C. They have been common in certain types of business-to-business agreements for a long time, particularly where one employer's employee provides services at a customer's place of business.

In employment agreements they are nothing new either and seem to be an afterthought to a non-compete, Williams says. "Some see them as a means to prevent the employee from circumventing a non-compete. In my practice it is unusual to see a non-solicitation clause without a non-compete along with it.

"The two types of clauses are both designed to prevent a former employee from damaging the employer's business," Williams continues. "To some extent, they address different problems. A non-compete prevents a former employee from taking current or potential customers from the employer. A non-solicitation prevents an employer from losing its current employees. Often, non-soliciting clauses are intended to prevent current employees from defecting to a competitor, but in other cases they are simply designed to prevent the disruption of employees leaving the employer, regardless of what they do after they quit."

Manitowoc Co. Inc. v. Lanning concerned an employee non-solicitation provision, says Jennifer Mirus, an attorney at the Madison office of Boardman & Clark LLP. "Such provisions are commonly included as an element of broader non-competition agreements to prohibit former employees from 'poaching' other valued employees from the organization."

In *Manitowoc Co. Inc. v. Lanning*, Lanning signed an agreement containing the following provision:

> I agree that during my Employment by Manitowoc and for a period of two years from the date my Employment by Manitowoc ends … I will not (either directly or indirectly) solicit, induce, or encourage any employee(s) to terminate their employment with Manitowoc or to accept

employment with any competitor, supplier, or customer of Manitowoc.

According to an analysis from attorneys Luis Arroyo and Eric Rumbaugh at Michael Best & Friedrich in Milwaukee, Manitowoc "argued that the clause is not subject to the requirements of Wisconsin statutes because the clause does not limit competition or act as a restraint of trade. The Court of Appeals rejected this argument, noting that the employee non-solicitation clause limits how Lanning 'can compete with Manitowoc.' Accordingly, the Court of Appeals held that the clause must comply with Wisconsin statutes.

"Manitowoc argued the clause was designed to protect it from unfair competition and had no broader implications," Arroyo and Rumbaugh's analysis continues. "However, the Court of Appeals held that the 'terms of the restraint are far broader than Manitowoc would like to admit.' The court criticized the restraint for covering 'any employee' of Manitowoc, even low-level workers. The court also criticized the fact that the agreement covers solicitation of employees that Lanning knows only through social or recreational activities, or even employees that Lanning had never met.

"Finally, the court also found the non-solicitation provision overbroad because of its prohibition on non-competitive employee solicitations such as those resulting in an employee leaving Manitowoc for noncompetitive employment with a supplier or customer or even serving as a job reference for a former colleague who applies to work for a competitor, supplier, or customer 'or seeks to change industries altogether.'"

Many people believe that clauses restricting solicitation or competition are, in general, illegal or not enforceable, says Jessica M. Kramer, a partner at Kramer, Elkins & Watt S.C. in Madison. "That is not true. However, they are disfavored and are heavily scrutinized by the courts. This is because they can hinder ordinary competition of a free market."

The Wisconsin statute that governs restrictive covenants in employment — any clause in a contract that purports to prohibit or limit competition or restrain trade — has been around since the 1950s, Kramer explains. "Wisconsin courts heard cases on the topic prior to that time, but a controversial decision in 1955 spurred the need to codify and solidify the criteria for enforceability of these types of restrictive clauses. In particular, the state legislature decided to prohibit courts from 'blue penciling' such clauses, or rewriting them to be reasonable in a situation where, for example, an imposed restriction was written to last 10 years but a court thought if reduced to three it would be reasonable. This is no longer allowed since the statute's enactment. Now, what you see is what you get. The contract or clause, as written, must be reasonable to be enforceable."

LANNING'S FALLOUT

According to Mirus, the Wisconsin Court of Appeals' decision in *Manitowoc Co. v. Lanning* will make the enforcement of employee non-solicitation provisions significantly more difficult for Wisconsin employers. This is because the court held for the first time that employee non-solicitation provisions in agreements between employers and employees are subject to the same rigorous enforceability requirements as traditional non-competition agreements.

"Based on the court's decision, employers will now have to justify which of their employees are off-limits to solicitation, rather than restricting solicitation of all employees," Mirus explains.

Employers may have to identify a meaningful relationship between a former employee and the group of employees that cannot be solicited, and that relationship must create some unfairness by the former employee's solicitation, Mirus notes. Employers will

It's Not Easy Proving Breach of Non-Solicitation

Enforcing employee non-solicitation provisions often pose "proof" challenges, says attorney Jennifer Mirus of Boardman & Clark LLP.

"Proving solicitation can be difficult unless the solicitation was done in writing and the employer becomes aware of the written correspondence," explains Mirus. However, even that may not be enough.

In the *Manitowoc Co. Inc. v. Lanning* case, there was clear evidence that the former employee was soliciting current employees to leave their employment, Mirus notes. Still, the Wisconsin Court of Appeals ruled against Manitowoc Co. because the terms of its non-solicitation agreement were too broad and restrictive concerning employees who didn't pose a competitive threat.

It is important to note that employee non-solicitation provisions do not prohibit employees from choosing where to work, says Mirus. Generally speaking, while such provisions can prohibit a former employee from encouraging or soliciting other employees to leave their jobs, it is unlikely that an employer could prohibit the former employee from hiring a current employee. This is especially true if the other employees have not themselves signed non-competition agreements.

"Therefore, if a current employee who has not signed a non-competition agreement proactively reaches out to seek employment with the former employee, there may be no prohibition on the former employee hiring that individual," notes Mirus.

How does that work in practice? Jessica Kramer, a partner at Kramer, Elkins & Watt, explains.

"Let's say Employee A begins work somewhere, having no clue that the new employer has another employee (say, one in higher level position, who we'll call Employee B) sign a contract saying that Employee B will not solicit any other employees upon departure," Kramer posits. "This, technically, does not restrict Employee A's free will; rather, it restricts what Employee B can do. If Employee A wants to go work for a competitor, she can (assuming she did not sign a non-competition agreement).

"The issue will be whether Employee B asked Employee A to go work for that competitor. Employee A's actions are not bound by any contract she did not sign. Employee A has not violated anything. If Employee B did ask Employee A to leave, Employee A will not be in trouble at all, if Employee B is the only one that signed the contract. For this reason, many employers that use non-solicitation of employee clauses have all employees sign them."

The employer's claim is against Employee B, notes Kramer. However, the reason for an employee's decision to leave employment can be hard to nail down. Will Employee A admit that Employee B asked her to leave? Is there written evidence of Employee B's role? To get to the bottom of it, the employer may have to subpoena phone, text, and email records of both Employee A and Employee B, and possibly of the new employer, to know what went down.

"Such records cannot be subpoenaed without initiating a lawsuit, and even then length of retention of these records vary by carrier/provider, so that can be another hurdle to finding — and proving — the truth," says Kramer. "Litigation is time-consuming and can drag on for a very long time. For example, I recently handled a case where text messages that were over three years old were at issue."

Non-solicitation of employee clauses can be very tough to enforce, then, not necessarily because they are not enforceable as written, but because the facts necessary to prove that the clause was violated — that Employee's A departure was due to Employee's B solicitation — are not always readily available or provable, Kramer concludes. ***— Jason Busch***

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also have to be more selective as to the type of employment or activity for which the current employee cannot be solicited (i.e., is prohibiting solicitation of a current employee to work for a non-competitor justified?). Satisfying requirements such as these require careful consideration.

"While all employers would like to insulate their existing workforce from any and all external solicitations, the Court of Appeals' decision tries to limit the enforceability of employee non-solicitation provisions to only those situations where the solicitation would be unfair when involving a former employee," says Mirus.

The provision at issue in the *Manitowoc Co. v. Lanning* case was too broad for a few reasons, Kramer says: (1) because it applied to all employees of the Manitowoc Co., not just those in certain roles that may be particularly valuable vis-à-vis the work Lanning was doing and could do for a competitor; (2) it prevented Lanning from not only poaching the employees away, but from encouraging any such employees to work for a competitor (encouraging could be construed broadly); (3) it extended not only to solicitation to work for competitors, but also for suppliers or customers, which greatly (and unnecessarily) widens the pool of prospective employers; and (4) it prevented Lanning from encouraging the employees from terminating their employment with Manitowoc Co., regardless of whether they were going to a competitor.

"This means that if an employee were extremely unhappy and Lanning, as a friend and former co-worker, encouraged the employee to leave, the provision would have been violated," notes Kramer. "The court chose the third reason to illustrate a particularly preposterous-sounding example: under the language of the provision, Lanning could not encourage a former colleague to work for any customer of Manitowoc Co. Starbucks was a customer of Manitowoc Co. If an employee decided to go back to graduate school, and Lanning encouraged that employee to work as a barista at Starbucks during graduate school, Lanning would have been violating the agreement. Such restriction, the court reasoned, was in no way reasonably necessary for Manitowoc Co.'s protection."

As a result, these clauses have to be reasonable in all respects, or they will be invalid in the court's opinion, Williams says. "More fundamentally, an employer now has to be prepared to show that it has a legitimate business interest to protect, and that its clause is no more restrictive than is necessary to protect that legitimate interest.

"This suggests to me that a restriction that is imposed just because the employer does not like employee turnover is going to be struck down," Williams continues. "The employer will have to show that the clause is necessary to protect its intellectual property or possibly its investment in developing its employees' skills. Assuming the employer can make that showing, it then has to prove that the restriction is not overbroad as to time or scope.

"*Manitowoc Co. v. Lanning* suggests that, to have any chance, the non-solicitation clause has to be limited in time, must be imposed only on former employees who could pose a competitive threat, and must prohibit solicitation of only those employees from whom an employee could reasonably require a non-compete. The case leaves a lot of unanswered questions."

NON-SOLICITATION IS NOT DEAD

While enforcing non-solicitation agreements might be a little more difficult thanks to the *Manitowoc Co. v. Lanning* decision, there is very much still a place for them in the workplace, employment law attorneys say.

Even employers who consider themselves "great places to work" may benefit from including employee non-solicitation provisions in agreements with employees, Mirus says. "Most of us operate in markets that heavily compete for top talent, and every step you can take to retain your key employees may tip the scales in your favor.

"Moreover, having such provisions can give you leverage to avoid frustrating situations," continues Mirus. "Imagine having a falling out with a key employee who has demanded, in your view, an unjustified pay raise. That employee then quits in anger and sends you an email that she 'will be happy to watch you sink' without her. The next thing you hear, she is inviting your key employees to a Packers game to introduce them to her new business partners. If the employer does not have an employee non-solicitation provision in place, there may be very little the employer can do to stop this activity."

Kramer agrees, noting the workforce is very fluid and mobile, and that is not changing anytime soon. According to the Bureau of Labor Statistics, she notes the median length of employment with one employer currently stands at only 4.2 years.

"When it comes to staying where one is happy versus leaving, there is almost always an offer one cannot refuse," Kramer explains. "If you are the current employer, you want to make the tempting offer refusable through a non-solicitation clause."

Adds Williams, "No employer can make a job so attractive that an employee will never leave. Even business owners can 'defect' by selling their business. One interesting element of *Manitowoc Co. v. Lanning* is that, while sec. 103.465 (of Wisconsin statutes) is typically thought of as an employee protection law, the court focused on the law's function as regulating restraints of trade; in other words, as a type of antitrust law.

"This is a useful way for employers to look at this subject, as it explains how the courts can extend the statute's reach beyond the typical employee non-compete clause." IB