Protecting the Company Jewels: Managing Post-Employment Employee Obligations

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Agenda

- Introduction
- Employee Duties During and After Employment
- The Role of Employment Contracts and Workplace Policies
- Restrictive Covenants: Types and Enforceability
- Practical Strategies for Risk Mitigation
- Questions

Introduction: Potential Issues When Employees Depart

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Potential Issues for Employers

- Employees breaching duties of confidence and utilizing trade secrets

- Employees soliciting clients of the organization or current employees

- Prudent to manage these risks during an employee’s employment so that organization is not on back foot when employment ends

Employee Duties During and After Employment

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Duties of Good Faith and Loyalty

- All employees owe an implied duty of good faith and fidelity during the employment relationship
- Includes obligations of honesty, loyalty, and acting in the employer’s best interests
- For non-fiduciary employees, these duties do not survive termination

Breach of Duty of Good Faith and Loyalty

- ***Mann Engineering Ltd v Desai*, 2021 ONSC 7580**
  - Court held that employee breached implied duty of loyalty, fidelity, and good faith by working for a competitor during employment
  - But be aware that damages must be provable and quantified, otherwise employers risk a successful finding but a low damages award

Duties of Confidentiality

- Duty not to misuse confidential information obtained during employment
- Includes trade secrets
- While these duties are implied, prudent to address confidentiality in employment agreement so these terms are specific and codified

Breach of Duty of Confidentiality

- *Arora v ICICI Bank of Canada*, 2024 ONSC 4115

  – Court held that former employee had breached duty of confidence by sharing confidential information with other competing banks and starting a company in order to provide services to other banks

  – Court held that by sharing confidential information, employee had breached duty of confidence as well as company policies/the employment agreement

Fiduciary Duties

- Only some senior or key employees will be considered fiduciaries
- Fiduciary duties are more onerous than the general duty of good faith owed by all employees
- Courts consider factors such as discretion, vulnerability of the employer, and the employee's ability to affect the employer's interests

Key Employees Can Owe Fiduciary Duties

- ***GasTOPS Ltd. v Forsyth*, 2009 CanLII 66153 (Ont Sup Ct)**
  - "[82] […] A key employee is one whose position and responsibilities are essential to the employer's business, making the employer particularly vulnerable to competition upon that employee's departure."

However, “Key” May Not Mean Fiduciary

- *Titus v Hack*, 2024 ONSC 3666, aff’d in 2025 ONCA 693

  – The defendant was a former Vice President of the plaintiff company

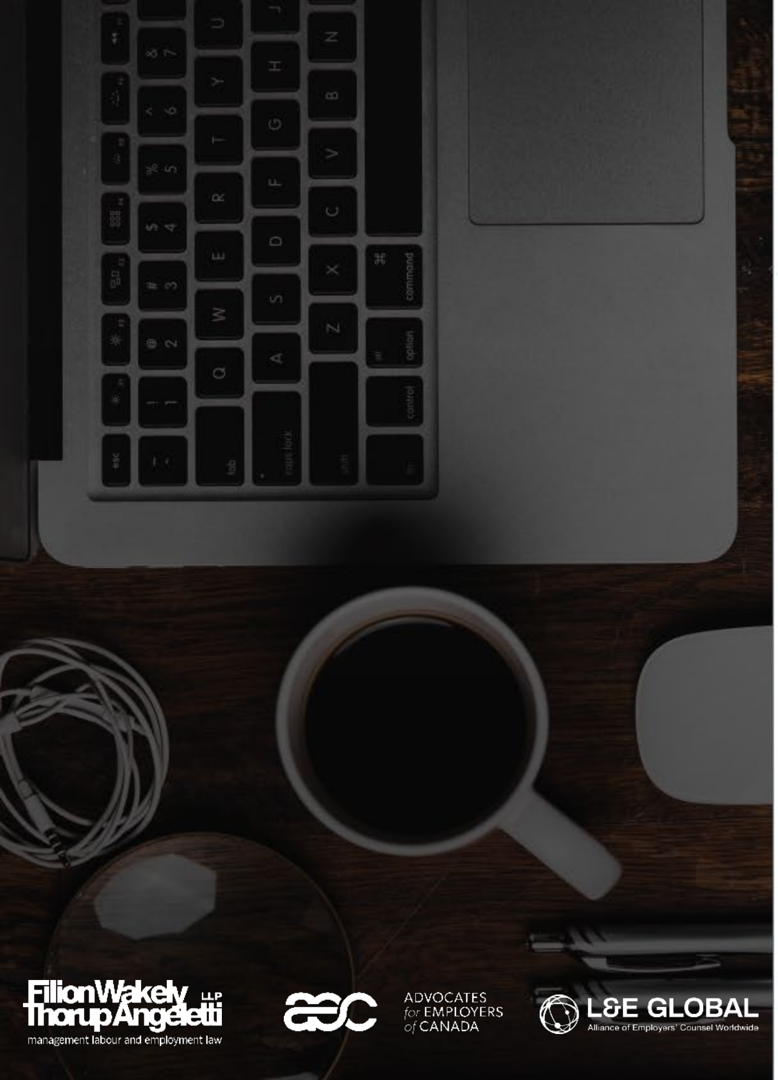
  – Despite his title, the defendant was primarily a salesperson under close supervision by the owner of the plaintiff company

  – Notwithstanding that the defendant’s role with the plaintiff company was important, it did not make the plaintiff company “peculiarly vulnerable” to his competition necessary to establish fiduciary status

Practical Considerations – Beware of Key Employees

- Indicia the Court will typically consider:
  - The employee's job duties;
  - The extent/frequency of contact with customers/suppliers;
  - Whether employee was primary contact;
  - Extent employee was responsible for sales/revenue;
  - Extent employee had knowledge of customers and their pricing;
  - Extent employee's information as it relates to customers was confidential

The Role of Employment Contracts



Benefits of Well-Drafted Employment Contracts

- Make conditions of employment clear from the outset
- Protect legitimate business interests after the employee departs
- Limit entitlements upon termination through enforceable contractual provisions

Essential Elements and Enforceability

- There must be “consideration”
  - something of value must be provided
  - contract should be signed before work commences

- Contractual provisions must comply with or exceed statutory entitlements (e.g. under the *Employment Standards Act, 2000*)

- Regularly update contracts to reflect changes in the law and case law

Termination Provisions

- Termination clause fails if any part violates the *ESA*
- Common drafting mistakes: failure to account for severance pay, benefit continuation, or to exclude common law notice
- Promotions can “outgrow” the contract and render termination clauses unenforceable

Employment Agreement as Evidence

- Set expectations in the employment agreement regarding an employee’s responsibilities
- What is the employee *really* responsible for? Include it in the agreement
- If litigation commences, the agreement will inform the Court of the parties’ intentions
- However, *substance* matters over form

Workplace Policies

- Function in addition to employment agreement to clarify employee expectations and protect organizational interests

- Some potential examples:
  - Confidentiality/Non-Disclosure policies
  - Policy regarding return of company property upon termination

- Again, *substance* matters over form

Restrictive Covenants

Types of Restrictive Covenants

- **<u>Non-Competition</u>**: restricts the employee from working for a competitor or starting a competing business during employment or after it has ended

- **<u>Non-Solicitation</u>**: restricts the employee from soliciting clients, customers, or other employees after employment has ended

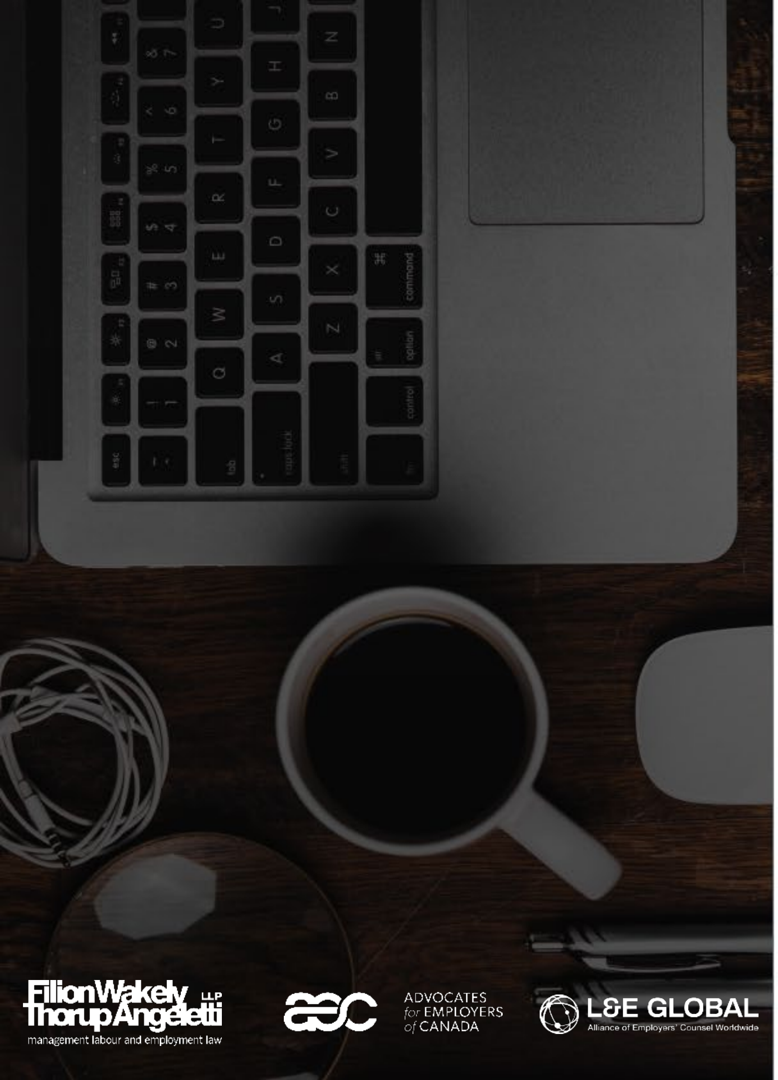
- **<u>Confidentiality/Non-Disclosure</u>**: restricts the use or disclosure of proprietary or confidential information during and after employment

Presumption of Unenforceability

- The employee/employer power imbalance

- Clauses restraining trade presumed to be unenforceable and illegal

- Employer must establish a clause or agreement protects the employer's legitimate business interests and is not a "restriction on trade"



Prohibition on Non-Competition Clauses

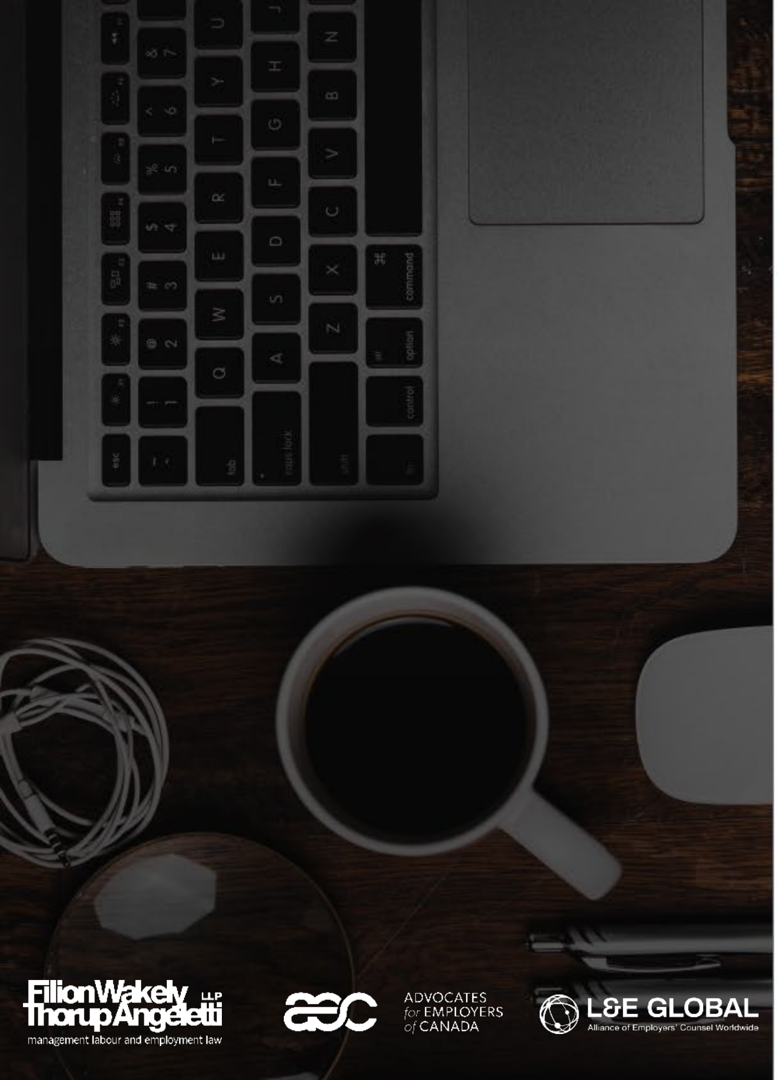
- *Working for Workers Act* amended the *ESA* in October 2021 to prohibit non-compete agreements

- Section 67.2(1): “No employer shall enter into an employment contract or other agreement with an employee that is, or that includes, a non-compete agreement”

Exceptions to the Statutory Prohibition

- Some sales of business, subject to specific criteria

- Executive positions, including:
  - CEO, President, CAO, COO, CFO, CIO, CLO, Chief HR Officer, Chief Corporate Development Officer;
  - Any other chief executive position



Prohibition on Non-Competition Clauses – Consequences

- If a non-competition clause is found within an employment agreement, it will be rendered unenforceable

- Employers must therefore ensure that no clause within an employment agreement can be construed to be a non-competition clause in disguise

Non-Competition Clauses

- Even if permitted by statute, must comply with strict common law guidelines to be enforceable
- Must protect a legitimate business interest
- Must have reasonable:
  - Scope of restricted activity
  - Geographic scope
  - Length of time

Non-Competition Clauses – Scope of Restricted Activity

- ***Ceridian Dayforce Corporation v Daniel Wright*, 2017 ONSC 6763**
  - Non-compete clause included 12-month restricted period and prohibition on providing services "in any capacity" in any business "competitive" with the business carried on by former employer
  - Court held this was overly broad and went far beyond proprietary interest of former employer

Non-Solicitation Clauses

- Alternative to non-compete clauses that must also be narrowly drafted and reasonable in terms of extent of activity restrained and temporal and geographic scope

- Must not be a non-compete clause in disguise. In *Donaldson Travel Inc. v Murphy,* 2016 ONCA 649, the Court found that following clause unenforceable:

> [The personal respondent] agrees that in the event of termination or resignation that she will **<u>not solicit or accept business</u>** from any corporate accounts or customers that are serviced by [the appellant], directly, or indirectly.

Geographic Limitations

- ***Payette v Guay Inc.*, 2013 SCC 45 (CanLII), [2013] 3 SCR 95**
  - [73] […] I am of the opinion that a territorial limitation is not absolutely necessary for a non-solicitation clause applying to all or some of the vendor’s customers to be valid, since such a limitation can easily be identified by analyzing the target customers.

Geographic Limitations

- ***Kerzner v American Iron & Metal Company Inc.*, 2018 ONCA 989**
  - [63] […] However, it does not follow from *Payette* that non-solicitation clauses never can be found unreasonable based on geographic scope. The motion judge's conclusions were based on the specific context of the scrap metal industry, and any parsing of the non-solicitation provisions to disentangle non-geographically bounded obligations only could strengthen his conclusion that the restrictive covenant was untenably broad.

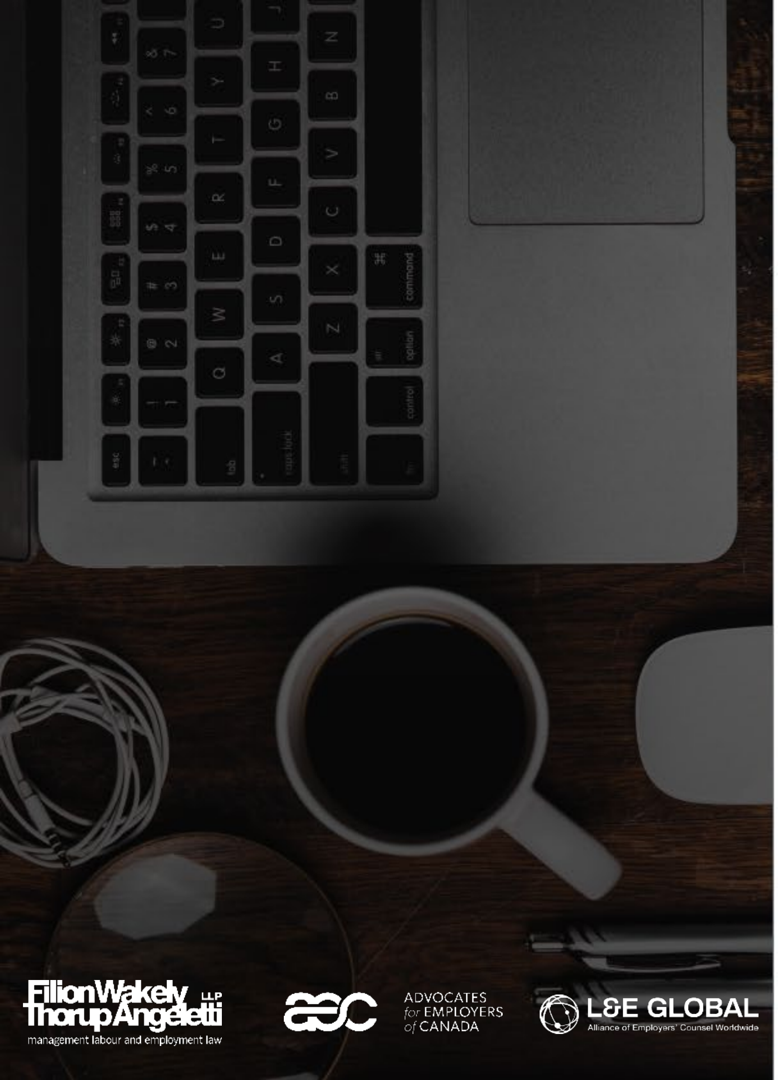
Recent Case on Non-Solicit Clauses

- ***F45 Training Canada Ltd v 2685802 Ontario Ltd*, 2025 ONSC 7357**
  - Non-solicit clause prohibited franchisee "from diverting or attempting to divert any business or customer of the Franchise Business to any other competitive establishment, by direct or indirect inducement or otherwise”
  - Court found that clause was unclear and ambiguous, and thus did not pass threshold test, rendering the restriction unreasonable

Confidentiality/Non-Disclosure Clauses

- Designed to protect confidential information, trade secrets, and intellectual property of employer
- Should clearly define what constitutes confidential information, and be unique to specific business environment/industry
- Typically given less scrutiny by courts than other restrictive covenants

Practical Strategies for Mitigating Risk



During the Employment Relationship

- Use well-drafted employment contracts with enforceable termination, restrictive covenant, and confidentiality provisions
- Implement clear workplace policies on confidential information and use of company property
- Regularly review and update employment agreements to reflect changes in the law

At and After Employee Departure

- Conduct a thorough exit process: recover company property, revoke system access, and remind the employee of ongoing obligations
- Provide written reminders of restrictive covenant and confidentiality obligations at termination
- If a breach is suspected, seek legal advice promptly
- Document the departure process to support any future legal claims

Litigation Considerations

- So an employee may have breached a duty – should an employer commence litigation?
- Practical considerations:
  - Is there any anticipated loss from the breach?
  - Is there any business impact besides a loss?
  - Is there any paper trail for the breach?
  - Is an injunction necessary?

Litigation Considerations

- A breach of duties may not be enough to justify damages, harm must be proven
- *Titus v Hack*, 2024 ONSC 3666, aff’d in 2025 ONCA 693
  - The defendant employee was not found as a fiduciary or in breach of non-competition post-resignation
  - However, the employee was found to have breached his employment duties of loyalty and good faith
  - No evidence of harm from breach, no damages

Litigation Considerations

Litigation is anticipated. What do you do?

- Preserve records of the employee's access to employer tools and resources
- Identify changes to the employer's businesses that are attributable to the departing employee
- Maintain relationships with existing customers

Questions?

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