

Member's Quarterly

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Ask the Expert

Worst Mistakes Made in Non-Competition Clauses

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What are the biggest mistakes you've seen employers make in non-competition clauses?

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1) In Ontario, having these clauses in employee contracts at all, since legislation recently rendered such contracts unenforceable, except for C-suite employees.

2) Note that this legislation does not impact on existing employee non-competition clauses.

Therefore, if you have an employee with a valid clause, under no circumstances, have them sign a new contract. By doing so, you will have just rendered the existing protection that you did have unenforceable. Just keep that old contract.

3) Ensure that the non-competition clause provides very different protection than the non-solicitation clause. The courts have made it clear that if the non-solicitation clause provides adequate protection, no non-competition clause will be enforceable.

4) Do not have a clause with a geographic area or duration. An agreement, or part of an agreement, may be considered a non-compete agreement whether or not it is time-limited or geographically restricted. Therefore, if a non-compete agreement has no geographic restriction, it is still considered a non-compete agreement and is still enforceable.

5) Lengths of non-competition for your various level of employees. If everyone has, for example, a one-year non-competition restriction, the court will say that you did not put your mind to it as the reasonable protection you require is, in reality, different for different categories of employees. As a result, again, it will be unenforceable for everyone.

6) Ensure you have a clause stating that if any portion of the contract or clause is unenforceable, the remainder will still be enforceable. Otherwise, having a non-competition clause or even a portion that is weak would invalidate the entire clause

7) Put your mind to the protection you need. If you give yourself too much protection in the type of non-competition, the length of non-competition or the area of the non-competition, the court will render the entire clause invalid and you'll have no protection at all.

Always remember that even an invalid non-competition clause can be useful because you generally don't know for certain that it will be unenforceable until a judge says so. Few employees wish to take that chance.

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