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• COURT STRIKES DOWN NON-COMPETE WHICH WOULD HAVE PREVENTED EMPLOYEE FROM STARTING A BAND IN MEXICO AND PLAYING AT A STAFF RETREAT IN CANCUN •

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A recent case from the Ontario Superior Court of Justice may cause some employers to reconsider the scope and application of their non-competition covenants. In *Ceridian Dayforce Corp. v. Daniel Wright*, [2017] O.J. No. 6156, 2017 ONSC 6763, the Plaintiff employer brought a summary judgment motion for a declaration that the non-compete clause in its former employee's employment contract was binding and enforceable.

The Judge summarized the key provisions of the non-compete provisions as follows:

1. The non-competition period, defined as the "Restricted Period" means the period up to 12 months from the date the employee ceases to be employed by the Company as determined by the Company in its sole unfettered discretion, provided that the Company informs the Employee of the length of the period within 5 business days of the Employee ceasing to be employed by the Company.
2. The Employee shall not, "directly or indirectly provide services, in any capacity, whether as an employee, consultant, independent contractor, owner, or otherwise, to any person or entity that provides products or services or is otherwise engaged in any business competitive with the business carried on by the Company or any of its subsidiaries or affiliates at the time of his termination (a "Competitive Business") within North America".
3. The Employee shall not "be concerned with or interested in or lend money to, guarantee the debts or obligations of or permit his name to be used by any person or persons, firm, association, syndicate, company or corporation engaged in or concerned with or interested in any Competitive Business within North America".
4. Nothing restricts the Employee from holding less than 1 % of the issued and outstanding shares of any publicly traded corporation.
5. During the Restricted Period, the Company is to pay the Employee his or her base salary, less applicable deductions.

In striking the clause down, the Judge ruled that the non-compete was overly broad for a number of reasons, the most important being that it prevented the employee from providing services in any capacity to any competitive business. To make her point, the Judge noted that the clause, if upheld, would prevent the employee from working as a janitor for a competing business or starting a band in Mexico and being engaged as an independent contractor by a competitor

to play at a staff retreat in Cancun. In the Judge's view, this was a complete restraint of trade which went far beyond what was necessary to protect the Plaintiff employer's proprietary interest. The fact that the prohibition stretched to include affiliate companies which were engaged in lines of business that were completely unrelated to the Plaintiff employer's business and prevented the employee from holding 1 per cent or more of the issued and outstanding shares of any publicly traded corporation was cited as additional protections which were unreasonable.

With respect to the clause's temporal scope, the Judge ruled that the evidence did not support the need for a 12-month period. Moreover, the clause was ambiguous because it did not set the time period of the restriction until after the employee's employment was terminated.

Lastly, it is important to note that none of the problems with the non-compete clause that were identified by the Judge were cured by the fact the company had intended to pay the employee his salary for the duration of the restricted period.

This decision serves as a good reminder to employers about the need to draft non-competition clauses as narrowly as possibly and tailor them to the job in question. As this case demonstrates, a blanket prohibition which blocks a departing employee from pursuing any activity with a competitor is unlikely to withstand judicial scrutiny.

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