Torkin Manes
BULLETIN

Torkin Manes Cohen Arbus LLP
Barristers & Solicitors
151 Yonge Street, Suite 1500
Toronto, ON M5C 2W7
Tel: 416 863 1188
Fax: 416 863 0305
torkinmanes.com

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FOCUS ON LABOUR RELATIONS AND EMPLOYMENT LAW

Managing your workplace: 'The Times, They Are A-Changin'

Irv Kleiner

The economic landscape in the province will continue to undergo significant changes in the coming months. In response to those changes, employers will be required to consider ways and means to retain their customer base while operating more efficiently. Restrictive "non-competition" covenants are one strategy employers often use to ensure customer retention. The use of temporary workers is a means by which employers can effectively adjust the size of their workforce in response to changing business conditions. Both strategies must be considered in the context of new jurisprudence and legislative changes.

Enforceability of Restrictive Covenants in Employment Agreements

The Supreme Court of Canada recently determined that non-competition covenants and other restrictive covenants in an employment contract are not enforceable if any of the significant terms are ambiguous. In the case of *Shafron v. KRG Insurance Brokers (Western) Inc.*, the High Court held that to ensure the firm establishment of the scope of an employee's obligations not to compete after termination, the courts will not repair contractual terms that are unclear or ambiguous. In the *Shafron* case, the employee had executed employment agreements that contained a covenant in which the employee agreed that for three years after leaving his employment for any reason other than termination without cause, he would not work for an insurance brokerage within the *Metropolitan City of Vancouver*. After leaving KRG, and within the three-year period, he took a job as a salesman for another insurance agency in Richmond, B.C. His former employer sued him under the restrictive covenant. The trial judge dismissed the action, finding that the term "*Metropolitan City of Vancouver*" was not clear, certain or reasonable. The Court of Appeal found that it could notionally "sever" or effectively rewrite the agreement to clarify the geographic limitation in the covenant and have it apply to specific parts of the Greater Vancouver area.

The Supreme Court of Canada reversed the Court of Appeal and held that "notional severance" cannot be applied to a restrictive covenant. The Court recognized that restrictive covenants are restraints of trade and generally contrary to public policy. The Court held that while parties are free to enter into contracts that expressly provide such a limitation, the covenant must be "reasonable." The Court further held that it is not possible for a court to determine whether or not a covenant is reasonable if the provision is ambiguous in that it is not clear what activities, timeframes, or geographical parameters are subject to the restriction. The Court found that a restrictive covenant that is ambiguous is unreasonable and as such, unenforceable against a former employee. The Court recognized the distinction between restrictive covenants in agreements for the purchase and sale of a business and those in employment agreements. The Court recognized that there is greater freedom to contract between

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buyer and seller than between employer and employee and that there is "an imbalance in power between employee and employer." The absence of the payment for goodwill, such as in the case of the sale of a business, and the imbalance in bargaining power, the court held, "justifies more rigorous scrutiny of restrictive covenants in employment contracts as compared to those in contracts for the sale of a business."

The Supreme Court confirmed that the geographic scope of the covenant, the timeframe of the covenant, and the economic activity sought to be restricted are relevant in assessing reasonableness. However, in order for the covenant to be considered reasonable, the Court said the covenant must be clear and unambiguous. In addition, the Court also found it would be inappropriate for a court to repair a deficiently drafted covenant in the context of employment. In this regard, the Court stated that:

"Employers should not be invited to draft overly broad restrictive covenants with the prospect that the court will sever the unreasonable parts or read down the covenant to what the courts consider reasonable. This would change the risks assumed by the parties and inappropriately increase the risk that an employee will be forced to abide by an unreasonable covenant."

In challenging economic times when it is likely that there will be increasing mobility of employees (voluntarily and otherwise), and when employers will undoubtedly do everything legally possible to preserve their customer base, they should ensure that employment agreements that include a restrictive covenant are unambiguous and reasonable.

Government of Ontario Introduces Laws to Protect Temporary Help and Agency Employees

Bill 139, the *Employment Standards Amendment Act* (Temporary Help Agencies) was introduced on December 9, 2008. The current *Employment Standards Act* does not specifically address temporary employees or what the Bill refers to as "assignment employees."

There are more than 700,000 people in Ontario in temporary jobs, many through temporary help agencies. There are about 1,000 temporary help agencies in Ontario.

The primary thrust of the Bill is to provide more substantial protection for temporary workers, including the elimination of the "elect-to-work" exemption from the holiday-pay provisions, and the notice of termination and severance provisions of *the Employment Standards Act*. Currently, an employee who has the option of electing whether or not to work on any day of the week when employment is offered is not entitled to paid public holidays, nor to notice of termination and statutory severance pay. It should be noted that the Province has already enacted a regulation that eliminated the public-holiday exemption for elect-to-work employees so that they now have an entitlement to the same holidays as other employees.

Temporary employment agencies often charge a finder's fee as a disincentive to their clients to hire on a permanent basis a temporary employee provided by the agency. Under the Bill, a temporary agency would be restricted from imposing a fee in cases in which the employee has worked for the client for six months or more. The six months begins on the first day the temporary worker performed work for the agency's client. A client would then be able to employ an assigned employee six months after the commencement date without having to pay a finder's fee to the agency, regardless of the time worked for the client during the six months and regardless of any interruption in the employment.

Employers who engage temporary employees should be aware of the changes likely to be proclaimed and of the regulation relating to holidays for temporary workers.

Irv Kleiner is head of our Labour Relations and Employment Law Group and deals exclusively with management-side labour relations and employment law. He represents public- and private-sector employers in a number of industries and conducts labour negotiations on behalf of unionized employers.

Irv can be reached at 416 777 5403, or ikleiner@torkinmanes.com