CARTER/LEDYARD

our resources

# Enforceability of "Non-Solicit of Employees" and "No-Hire" Provisions Under New York Law

**April 04, 2018**

**Client Advisory**
April 4, 2018 by Jeffrey S. Boxer and Alexander G. Malyshev

Employers often try to prevent departing employees from taking other employees with them through non-solicitation of employees or no-hire provisions. These provisions limit an employee's ability to encourage other employees to leave the company for a competitor or to hire a company's employees for a competitor. Employers frequently assume that these restrictions are enforceable without realizing that they are post-employment restrictive covenants just like non-compete agreements, and that, as a result, they may not be enforceable unless they are carefully and thoughtfully drafted. This advisory summarizes the law regarding enforceability of non-solicitation of employees and no-hire provisions in New York and highlights issues for employers to consider when drafting these kinds of agreements.

Courts analyzing the contours of no-hire and non-solicitation of employee provisions in New York have recognized that there is little judicial guidance on their enforceability. *See Reed Elsevier Inc. v. TransUnion Holding Co.*, 2014 U.S. Dist. LEXIS 2640, *18 (S.D.N.Y. 2014). The handful of courts that have examined these provisions have done so using the same analysis that is applied to non-competes and other post-employment restrictive covenants. Under this analysis, a no-hire or non-solicitation provision is enforceable under New York law only if it (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose an undue hardship on the employee, and (3) does not injure the public. *BDO Seidman v. Hirshberg, 93* N.Y.2d 382, 388-389 (1999); *Renaissance Nutrition* Inc. v. Kurtz , 2012 U.S. Dist. LEXIS 2490, *8 (W.D.N.Y. 2012).

Nonetheless, non-solicitation of employees and no-hire provisions are generally viewed as more reasonable and less burdensome than other restrictive covenants because the departing employee is not precluded from pursuing his or her livelihood. *See Genesee Val. Trust Co. v. Waterford Group, LLC*, 130 A.D.3d 1555, 1558 (4th Dep't 2015) ("A covenant not to solicit employees is 'inherently more reasonable and less restrictive' than a covenant not to compete[.]"). As a result, most New York courts analyzing non-solicitation of employees or no-hire provisions have focused primarily on whether the provisions protect a legitimate interest of the employer. *See Lazer Inc. v. Kesselring*, 823 N.Y.S.2d 834, 838 (Sup. Ct. Monroe Co. 2005) (the "reasonableness inquiry may be avoided altogether when the court finds that application of a particular restrictive covenant will not serve any legitimate employer interest.").

Broadly speaking, under New York law, an employer has a legitimate interest "(1) to prevent an employee's solicitation or disclosure of trade secrets, (2) to prevent an employee's release of confidential information regarding the employer's customers, or (3) in those cases [where] the employee's services to the employer are deemed special or unique", including where the employee developed unique client relationships at the employer's expense. *Master Card Int'l Inc. v. Nike, Inc.*, 164 F. Supp. 3d 592, 602 (S.D.N.Y. 2016) *citing Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 70 (2d Cir. 1999); *BDO Seidman*, 93 N.Y.2d at 392. Courts in New York have enforced non-solicitation of employees or no-hire provisions that prevented competitors from poaching employees with access to confidential information or from targeting employees with unique personal relationships with the employer's clients. *Master Card*, 164 F. Supp. 3d at 602; *Genesee Val. Trust*, 130 A.D.3d at 1558.

New York courts have resisted employers' attempts to expand the protectable interests that could support the enforcement of a non-solicitation of employees or no-hire provision. By way of example, courts in New York have held that the following were not legitimate interests that could support these provisions: (1) the stabilization of the employer's workforce, (2) the costs associated with recruiting and hiring employees, (3) the employer's expending significant resources to train and educate employees, and (4) the prevention of *en masse* resignations. *See Lazer*, 823 N.Y.S.2d at 839 (collecting authorities); *Renaissance Nutrition Inc. v. Kurtz* , 2012 U.S. Dist. LEXIS 2490, *9 (rejecting attempt to enforce "covenant on the grounds that [the employer] expended resources in training and educating these employees and that replacing them would be costly and burdensome."); *In re Document Techs. Litig*, 2017 U.S. Dist. LEXIS 104811, at *26 (S.D.N.Y. 2017) (finding that "the potential harm to a company's operations arising from the coordinated *en masse* resignation of several employees" is "not a legally cognizable interest for the purpose of a restrictive covenant.").

While enforcement of a non-solicitation of employees or no-hire provision often focuses on whether the provision protects a legitimate interest of the employer, the provision also needs to be reasonable, and cannot impose an undue burden on the employee or injure the public. Courts have raised concerns about the reasonableness of a provision and the burden on an employee where a contract prevents the employee from "encouraging" another employee to consider other employment options, particularly if the other employment options are not in competitive businesses, or if the employer seeks to use the non-solicitation provision to try to prohibit employees from sharing ordinary complaints about their working conditions. *Lazer*, 823 N.Y.S.2d at 839; *In re Document Techs. Litig*, 2017 U.S. Dist. LEXIS 104811, at *28.

With the courts providing only limited guidance, employers drafting no-hire and non-solicitation of employee provisions should carefully consider what legitimate interests they are trying to protect and take steps to tie these provisions to safeguarding confidential information, unique employees and client relationships. Employers should consider limiting no-hire and non-solicitation of employees provisions to competitive businesses. Finally, employers also should think carefully about whether a no-hire or non-solicitation provision could be deemed unreasonable or unduly burdensome because it precludes ordinary griping among employees.

---

Questions regarding this advisory should be addressed to **Jeff Boxer** (212-238-8626, boxer@clm.com), **Alexander Malyshev** (212-238-8618, malyshev@clm.com) or your regular Carter Ledyard attorney.

## related professionals

**Jeffrey S. Boxer** / Partner
**D** 212-238-8626
boxer@clm.com

**Alexander G. Malyshev** / Partner
**D** 212-238-8618
malyshev@clm.com