

## Open Season On Your Employees?

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Practice Area: Labor and Employment

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On January 19, 2018, the Wisconsin Supreme Court issued a decision in *The Manitowoc Co., Inc. v. Lanning*, stating that non-solicitation of employee ("NSE") clauses are considered restrictive covenants, subject to the strict rules surrounding noncompete agreements. This means that any NSE clause found to be overbroad will be unenforceable.

John Lanning was a chief engineer for a division of The Manitowoc Company ("Manitowoc") for over 25 years. Although Lanning did not have a traditional noncompete, he signed an employment agreement containing a non-disclosure clause and a NSE clause. Under the NSE, Lanning was prohibited, for two years, from soliciting or encouraging any Manitowoc employee to quit his or her job or to accept employment with a competitor, supplier, or customer of Manitowoc.

Lanning resigned from Manitowoc in 2010 to become the director of engineering for a direct competitor. Manitowoc claimed that Lanning contacted at least nine Manitowoc employees about jobs with his new employer, taking one employee to lunch, taking another employee on a facility tour, and participating in a third employee's job interview.

In an effort to enforce its NSE, Manitowoc sued Lanning, alleging violation of the agreement. Although Manitowoc prevailed at trial, the Court of Appeals reversed, finding that the NSE was overbroad and unenforceable. The Wisconsin Supreme Court agreed.

### **NSEs Are Restraints of Trade.**

Before considering whether the NSE was overbroad, the Wisconsin Supreme Court determined that the NSE constituted a "restraint of trade", subjecting it to Wisconsin's rigorous statute covering noncompete agreements, Wis. Stat. § 103.465. The Court first established that § 103.465 applies to all employment covenants that deal with restraint of trade.

Because the NSE restrained competition by limiting a competitor's access to the labor pool, the Court found that the NSE was a restraint of trade and, thus, subject to § 103.465. Specifically, the NSE would limit Lanning from working with other former Manitowoc employees in the future. Additionally, the Court determined that the NSE was a restraint of trade because it would hinder the mobility of Manitowoc employees, preventing Manitowoc employees from having complete information regarding potential jobs elsewhere.

### **What Makes an NSE Unenforceable?**

After establishing that the NSE was a restraint of trade, the Court considered whether the NSE was enforceable under § 103.465. Like all restrictive covenants, the NSE would be enforced only if it was "reasonably necessary for the protection of the employer."

The NSE prohibited Lanning from soliciting "any employee", which ultimately contributed to the unenforceability of this provision. Manitowoc argued that it had a protectable interest in all of its employees because it expended substantial time and money in their training and had an interest in the knowledge and experience they had gained through this training. However, the NSE contained no limitation based on the nature of the employee's position, Lanning's personal familiarity with the employee, or the geographical location of the employee.

The Court noted that the NSE prohibited Lanning from participation in the solicitation of any of the 13,000 worldwide employees, regardless of whether he knew or previously had worked with them, or whether they were highly-skilled or line employees. Accordingly, the Court found this restriction to be "overbroad on its face". Because the provision was overbroad, it was unenforceable under § 103.465.

### **How Do I Protect My Employees Now?**

Based on the guidance provided in *Manitowoc Co. v. Lanning*, businesses have the opportunity to retool their agreements to limit poaching by competitors. As preliminary steps, employers should:

- Compare current NSEs to the NSE in this case.
- Consider whether your NSE is specific or broad.
- Promptly revise your NSE if necessary.
- Limit execution of your NSE to employees who carry a risk of draining your talent.
- Re-execute your newly-revised NSEs with your pool of key employees.

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