



ILLINOIS STATE BAR ASSOCIATION

LABOR & EMPLOYMENT LAW

The newsletter of the Illinois State Bar Association's Section on Labor & Employment Law

Drafting enforceable customer solicitation restrictions

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Legal Issues in Drafting Restrictions

A restriction on soliciting customers should be part of most noncompetition agreements. Because the restriction does not prevent working in an industry or geographic area, it is more likely to be enforced than one that does and may still be enforced if a broader restriction is not.¹ Also, a customer restriction may by itself provide sufficient protection against competition by former salespersons.

The legal requirements for a customer restriction, as for other restrictions, are legal consideration, protection of a legitimate business interest, and reasonable scope. Because it is a narrower restriction, no geographic limitation is ordinarily needed.²

The primary drafting problem is the scope of restricted customers. A ban as to all customers risks being held overbroad and unenforceable, especially if the employer dominates the relevant market, has a large number of customers spread across a wide geographic area, or has distinct product lines or services that draw different types of customers.

Cases Enforcing Restrictions as to All Customers

Bans on soliciting and doing business with any of an employer's customers, even certain prospective ones, have been enforced in many court decisions. In *Tower Oil & Tech. Co. v. Buckley*, 99 Ill.App.3d 637, 425 N.E.2d 1060 (1st Dist. 1981), the court affirmed a jury award of damages for a salesperson's breach of a three-year restriction on soliciting or selling industrial lubricants to any customer or prospect shown on the company's records. The restriction applied to just 2.4% of the Chicago-area market and

protected a legitimate business interest of preventing the loss of an established clientele to a salesperson to whom the company had provided training and customer access. Since it merely prohibited soliciting and selling to a small percentage of Chicago-area customers, the restriction needed no geographical limit to be reasonable. See also *PCX Corp. v. Ross*, 168 Ill.App.3d 1047, 522 N.E.2d 1333 (1st Dist. 1988) (enforcing a two-year, nationwide restriction on soliciting or dealing with any of employer's customers).

In *McRand, Inc. v. van Beelen*, 138 Ill.App.3d 1045, 486 N.E.2d 1306 (1st Dist. 1985), the court enforced a two-year restriction on soliciting any customer and a one year restriction on soliciting prospective customers for which the employee had recorded business development time. The court agreed that no geographic restriction was needed and found the time lengths reasonable based on how long it took to establish a major account. Noting that courts are hesitant to enforce restrictions as to customers with whom the employee had no contact during employment, the court remanded the case to determine whether the employee had contact with a sufficiently large percentage of the customers to justify enforcing the restriction as to all of them and, if not, to limit the restriction to those with whom he had contact. See also *Corroon & Black of Ill., Inc. v. Magner*, 145 Ill.App.3d 151, 494 N.E.2d 785 (1st Dist. 1986) (remanding for same determination and possible modification).

More recently, the federal court in *Brown & Brown, Inc. v. Ali*, 592 F. Supp. 2d 1009 (N.D. Ill. 2009), modified a two-year restriction on soliciting all of the employer's customers and those prospective customers who were known to the employee. While the provi-

sion was unenforceable as written, the court modified it to apply only as to customers with whom the employee had dealt.

Cases Refusing to Enforce, Even in Modified Form, Restrictions as to All Customers

Many court decisions have, in contrast, refused to enforce or modify restrictions on soliciting all customers. In *Eichmann v. National Hosp. and Health Care Serv., Inc.*, 308 Ill.App.3d 337, 719 N.E.2d 1141 (1st Dist. 1999), a temporally and geographically unlimited restriction on competing as to all existing and future insurance customers was deemed so overbroad and unfair that the court refused the company's request to enforce it just as to the customers that the employee had serviced. See also *Dryvit Sys., Inc. v. Rushing*, 132 Ill.App.3d 9, 12, 477 N.E.2d 35, 38 (1st Dist. 1985) (lack of geographic limitation, among other factors, voided customer solicitation restriction in an agreement that reflected no attempts to reasonably limit its restrictions).

In *Lawrence & Allen, Inc. v. Cambridge Human Res. Group, Inc.*, 292 Ill.App.3d 131, 685 N.E.2d 434 (2nd Dist. 1997), the court refused to enforce an agreement's noncompetition and nonsolicitation restrictions. The latter's lack of a geographical limitation was a critical factor, because it applied to all clients nationwide (and regardless of how long ago the clients had last used the employer's services), while the employee had only dealt with local, non-national ones. See also *Hay Group, Inc. v. Bassick*, 2005 WL 2420415 (N.D. Ill. Sept. 29, 2005) (one-year restriction on soliciting or doing business with any of the employer's more than 7,000 worldwide clients too overbroad to enforce, even in modified form,

when the employee had provided services to only 45 of those clients).

In *Jefco Labs., Inc. v. Carroo*, 136 Ill.App.3d 793, 483 N.E.2d 999 (1st Dist. 1985), a restriction prohibited selling any competitive product to any customer who had been "solicited or contacted by, or placed an order with, any salesperson during the 18 months preceding termination." It also imposed what the court only described as an "extreme penalty" for its violation. While describing other equitable factors that disfavored enforcement, the court held the restriction unenforceable primarily because it applied to customers that the salespersons had never known or solicited. In that instance, the lack of a geographic restriction made the restriction "patently unreasonable."

Drafting Lessons from the Cases

Although enforced in some cases, a restriction on soliciting all customers risks being held too unfair to enforce it in modified form. Restrictions should therefore ordinarily be limited to customers the employee dealt with or had confidential information about. This is especially true for an employer with a large or diverse customer base.

A restriction as to all customers may be justified by the limited number or geographic scope of the customers. It might also be justified by specialized training, knowledge, or company confidential information that the employee received. In those instances, the drafter should consider expressing why the restriction needs to include all customers in order to adequately protect the employer's legitimate business interest. Also to be considered is a geographic restriction or narrower alternative, which may still be en-

forced if a broader one is not. All agreements should include a direction that if any restriction is deemed overbroad, the court should modify and enforce it to the fullest extent that is found reasonable.

The drafter also needs to take care in defining a current customer, which may differ across industries. An example definition is a customer who has purchased from or done business with the employer within 12 months before termination. Without a limiting definition, the court may find that the restriction impermissibly includes former customers, as to whom the employer ordinarily has no legitimate business interest.

A restriction on soliciting potential customers should be limited to those the employee either recently solicited or has relevant confidential information. It may also include, at least in some instances, potential customers that the employee knows the employer recently solicited. Otherwise, the employer ordinarily has no legitimate business interest in future or potential customers.³ *Ken-Pin, Inc. v. Vantage Bowling Corp.*, 2004 U.S. Dist., LEXIS 1050 *20, 2004 WL 783092 * 7 (N.D. Ill. Jan. 20, 2004). When a restriction on potential customers is used, it should be drafted so that it is readily severable from the restrictions on existing customers.

The drafter also needs to consider whether the restriction should bar doing business with a customer that initiates the relationship with the former employee. The latter restriction may often be justified, but is subject to more scrutiny because it places restrictions on customers, who are not parties to the agreement. However, the lack of harm to customers can be shown through the number of other providers or sources that are avail-

able to them. See *Howard Johnson & Co. v. Feinstein*, 241 Ill.App.3d 828, 837, 609 N.E.2d 930, 935 (1st Dist. 1993). If a doing-business restriction is included, it should be drafted to be readily severable from the former so that the nonsolicitation restriction may still be enforced if the doing-business restriction is not.

Finally, while few cases discuss how long a customer restriction may last, reasonableness has been tied to how long it normally takes to develop a new customer, which again varies across industries. Three years might be reasonable in an industry that sells capital equipment, but patently unreasonable when normal customer or product turnover is relatively quick. Indicating in the agreement the basis for the length of the restriction should increase the chance that the court will enforce the restriction, even if for a shorter time than specified. ■

1. *Abbott-Interfast Corp. v. Harkabus*, 250 Ill. App.3d 13, 18, 619 N.E.2d 1337, 1341 (2nd Dist. 1993) (A noncompetition agreement which restricts a specific activity, such as soliciting particular clients, is subject to a lower degree of scrutiny than an agreement which prohibits the employee from engaging in any type of competition with the employer.)

2. *Health Prof'l, Ltd. v. Johnson*, 339 Ill.App.3d 1021, 791 N.E.2d 1179, 1192 (3rd Dist. 2003) (territorial limitation not required for activity restriction designed to protect employer's customer relationships). However, the lack of a geographic limitation may be unreasonable if the solicitation restriction has no other limitation on the customers to which it applies. *Lawrence & Allen, Inc. v. Cambridge Human Res. Group, Inc.*, 292 Ill.App.3d 131, 138-39, 685 N.E.2d 434, 442 (2nd Dist. 1997).

3. A restriction as to future customers is effectively a broad restriction on competing within an industry since, without further limitations, all potential purchasers are future customers.

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ILLINOIS STATE BAR ASSOCIATION'S
LABOR & EMPLOYMENT LAW NEWSLETTER,
VOL. 50 #1, JULY 2012.
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