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Careful Drafting Required: Restrictions on Employee Solicitation Subject to Wisconsin Non-Compete Law

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Many employers want to prevent their trusted employees from leaving the company and poaching their employees. In *Manitowoc Company, Inc. v. Lanning*, No. 2015 AP1530 (January 19, 2018), the Supreme Court of Wisconsin examined a non-solicitation provision prohibiting Manitowoc Company's former employee, Lanning, from "directly or indirectly soliciting, inducing, or encouraging any employee of Manitowoc Company to terminate his or her employment with Manitowoc Company or to accept employment with a competitor, supplier, or customer of Manitowoc Company." Lanning, a "successful, knowledgeable, and well-connected" 25-year employee of Manitowoc, left the company to go work for a competitor. He then contacted at least nine Manitowoc employees about potential employment opportunities with his new employer, took one Manitowoc employee out to lunch, took one Manitowoc employee on a tour of the competitor's plant in China, and participated in another Manitowoc employee's job interview with the competitor. Manitowoc then brought suit based on Lanning's violation of the non-solicitation provision of his employment agreement.

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In a case of first impression, the Supreme Court of Wisconsin upheld the court of appeals's finding that Wisconsin Statutes Section 103.465, which explicitly refers to a "covenant not to compete" applies to agreements prohibiting solicitation of employees. The Court found not applying Section 103.465 to non-solicitation provisions would be contrary to the law and stated the law consistently has required looking at "the effect of the restraint rather than its label." The court held that the non-solicitation provision at issue restricted "Lanning's ability to engage in the ordinary competition attendant to a free market, specifically restricting Lanning's freely competing for the best talent in the labor pool. In addition, the limitation on Lanning also affects access to the labor pool by a competitor," including Lanning's new employer.

The court then went on to analyze the provision under Section 103.465. Wisconsin courts have consistently interpreted Section 103.465 as requiring restrictive covenants:

(1) be necessary for the protection of the employer, that is, the employer must have a protectable interest justifying the restriction imposed on the activity of the employee;

(2) provide a reasonable time limit;

(3) provide a reasonable territorial limit;

(4) not be harsh or oppressive as to the employee; and

(5) not be contrary to public policy.

The court held that the non-solicitation provision failed to satisfy this test, finding the law does not protect

against the raiding of a competitor's employees generally. The court rejected Manitowoc's position that it had a protectable interest based on its investment in time and capital in recruiting, training, and developing employees. The provision at issue applied to each of Manitowoc's 13,000 worldwide employees. It was not limited geographically, by the nature of the employee's position, or to those with whom Lanning had personal familiarity or influence. It was not limited to those employees with sensitive or company-specific information. It was not limited—on its face—to preventing a former employee from going to a competitor to perform similar services. The court also found that the non-solicitation provision would apply to "encouraging an entry-level employee to terminate his or her employment to pursue higher education." Although Manitowoc was seeking to apply the provision in a much narrower context, the court refused to enforce it, as to do so would be judicial reformation.

Wisconsin employers may want to carefully examine their non-solicitation agreements to ensure they are narrowly tailored to protect legitimate business interests. It is sometimes tempting for an employer to enter into a broad agreement to protect against every possible situation, but ultimately, this strategy may leave the employer without protection. While Wisconsin courts will strike offensive provisions of agreements if remaining provisions can be separately enforced, they will not judicially modify overbroad provisions to allow employers to enforce the provisions in a narrower context.