

Part IX of “The Restricting Covenant” Series: Tolling and Technicians

Article By:

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This year’s Halloween festivities, my recent binge watching of “Stranger Things 2,” and Harry Potter’s invisibility cloak, inspired the topic of this ninth article in “The Restricting Covenant” Series, which discusses tolling provisions in non-compete agreements and restrictive covenant cases. Specifically, can a tolling provision provide judicial relief to an employer if its former employee hid under the cover of darkness and concealed violations during the restricted period? What relief do employers have in this situation?

What is a Non-Compete Tolling Clause?

Many employers include a tolling clause in their non-compete agreements. A tolling clause typically provides that the restrictions will be extended by the period during which the employee was in breach. So, for example, if an employee had a 12-month non-compete, and he or she breached it for six months, then the restricted period could be extended by an additional six months. The main rationale for including a tolling clause is straightforward – an employer wants to ensure that it receives the “benefit of the bargain” with respect to the full duration of the restricted period. It also can serve to discourage the employee from breaching the agreement.

A decision issued by the Court of Appeals of Wisconsin in 2007 aptly summarizes the debate on whether tolling provisions in non-compete agreements should be enforced:

We believe this case is appropriate for certification because the issue has not yet been addressed in Wisconsin, cases from other jurisdictions are split, and resolution of the issue involves policy questions. The enforcement of the clause may be unfair because it might serve, in effect, to double the damages [the employer] receives – an extension of the non-compete agreement commensurate with the violation as well as damages for the time the employee does not comply. In other words, one of the possible implications of allowing tolling or extension clauses in restrictive covenants is that the employer’s award of both an injunction and damages may be duplicative. On the other hand, it could be argued that awarding both an injunction and damages would not be duplicative because the monetary damages compensate for the ‘act violating the agreement,’ while the extension of the non-compete agreement serves only to provide the employer what it bargained for in the first place.

The Supreme Court of Wisconsin denied certification (*H&R Block Eastern Enterprises, Inc. v.*

Swenson, Wis. Ct. App. May 2007), leaving the issue in Wisconsin and elsewhere open to further debate.

As noted throughout this Series, enforcement of restrictive covenants varies by state. Some jurisdictions will enforce a tolling provision and some will not.

No Extensions Granted

Some courts will not toll restrictions even if the employer had a tolling provision in the employee's non-compete agreement. For example, in [Part VIII of this Series](#), I highlighted a recent decision from Minnesota (*Mobile Mini, Inc. v. Vevea*, D. Minn. July 2017), in which a federal court enjoined a former employee from soliciting customers through LinkedIn. However, most of the restricted period in Vevea's contract had expired when Mobile Mini first discovered the breach. Accordingly, Mobile Mini asked the court to "restart the clock" on the restrictions. If granted, this would have recommenced completely a six-month non-compete and a twelve-month non-solicitation from the date the court entered the injunction order. Mobile Mini's request was based on a tolling provision in Vevea's non-compete agreement, which provided that if she breached, the court may extend the term so that she "doesn't get credit for the time [Veeva] was breaching the Agreement."

Although the court in *Mobile Mini* entered an injunction against Vevea, it nonetheless found that restarting the clock on her restrictions "would amount to a windfall for Mobile Mini that is not in the interests of justice." In the court's view, "[t]o grant the sweeping relief Mobile Mini requests would amount to not merely preserving the status quo, but expanding Mobile Mini's rights under the Agreement related to terms that Vevea likely has not breached." The other factors considered by the court included the defendants' "voluntary remedial action," "willingness to try to comply" with the agreement for the remainder of the restricted period, and the "negative financial effects" that likely would grow to an unacceptable level for Vevea and her new employer.

The *Mobile Mini* court's reluctance to "restart the clock," or even extend the restrictions to the amount of time equal to the period of Vevea's breach, is not uncommon. Some courts will refuse to extend restrictions beyond the timeframe expressly specified in the parties' written agreement, even in situations where the employer did not discover the breach until just before the restrictions were set to expire. Georgia courts, for example, will not enforce a tolling provision of a non-compete. *ALW Marketing Corp. v. McKinney* (Ga. App. Ct. 1992) ("Since this [tolling] clause effectively extends in perpetuity the potential duration of the covenants, it renders [them] both unreasonable and unenforceable on their face.").

The Upside Down – For Whom the Non-Compete Tolls

Some courts will extend the restrictions so that the employer receives the full benefit of the entire restricted period. In *Proudfoot Consulting Co. v. Gordon* (11th Cir. 2009), for example, the court affirmed the lower court's extension of a six-month non-compete. The district court found that Gordon's breach justified tolling the six-month restrictive period from the time he began to work for a competitor through the date of the district court's judgment, resulting in the court granting injunctive relief and awarding Proudfoot damages. The court rejected the defendant's argument that he had a good faith basis in concluding that his new employer was not a competitor of his former employer, stating "[t]he fact that Gordon may have reasonably erred in determining the scope of the competitor non-compete covenant does not grant him license to work for a competitor in violation of the Agreement."

Similar to the court in *Proudfoot*, a New York appellate court in *Delta Enterprises Corp. v. Cohen* (Sup. Ct., App. Div. 1st Dept. 2012) affirmed the lower court's extension of a two-year non-compete to account for the period the defendant was in breach. The agreement's tolling provision provided for the tolling of the various restrictive periods "during any period in which Employee is in violation," and stated that "all restrictions shall automatically be extended by the period Employee was in violation of any such restrictions." The court rejected the defendant's argument that such a provision was *per se* unenforceable or violative of public policy, "especially where . . . there was evidence that defendant consulted with counsel before executing the agreement, that he received \$50,000 in consideration thereof, and there are significant and multiple indications of his bad faith" breach of the restrictions. There also was evidence that the defendant breached the restrictions even after the trial court had issued a temporary restraining order against him.

Tolling Even in the Absence of a Contractual Tolling Provision

Finally, even if the employer did not include a tolling provision in the parties' agreement, a court sitting in equity might nonetheless extend the restrictions or stop the clock on the running of the restrictions based on a legal doctrine called "equitable tolling."

For example, in a case involving a cardiologist, the Court of Appeals of Washington in *Emerick v. Cardiac Study Center, Inc., P.S.* (2015) found that the trial judge, which had granted injunctive relief just days before the non-compete would have expired, was "within its equitable authority and did not abuse its discretion when it tolled the running of the noncompete covenant until [the Dr.] is in compliance to ensure that [he] was not rewarded for his violation of the covenant." The trial court did not abuse its discretion when it granted equitable relief that provided the former employer "the benefit of the bargain." Other courts around the country have applied the doctrine "equitable" tolling to extend the restrictions, particularly in egregious circumstances where the employer can show the employee took very specific steps to evade detection of his or her breach.

It is not uncommon for employers to learn that a former employee has violated a restrictive covenant until many months after the end of the employment relationship. Employers should review their non-compete agreements to ensure that it contains an express tolling provision. This will bolster any request to equitably extend the restrictions. Also, some courts might refuse to extend them without an express tolling provision.

Regardless of whether the breach is at the beginning or end of the restricted period, employers must act quickly and seek judicial relief to enforce the restrictive covenants. Enforcement of non-competes typically involves a weighing of the "equities." If an employer delays without good reason, a court could hold that delay against the employer and decide not to enforce or extend the restrictions.

The goal of this Series is to provide a brief overview and some interesting insights and practical pointers when dealing with unique issues that might arise in the context of restrictive covenants. It is not intended to provide and should not be construed as providing legal advice. Each situation is different, and if legal advice is needed, you should seek the services of a qualified attorney who is knowledgeable and experienced in this area of the law to address your specific issues or needs. Stay tuned for future articles in this Series, which will discuss the restrictive covenant landscape for many other occupations and industries, including internists, inspectors, instructors, and more.

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