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EMPLOYMENT LAWSCENE ALERT: WISCONSIN COURT OF APPEALS FINDS NONSOLICITATION OF EMPLOYEES PROVISION UNENFORCEABLE UNDER RESTRICTIVE COVENANT STATUTE

In *Manitowoc Co. v. Lanning*, 2015AP1530 (Aug. 17, 2016), the Wisconsin Court of Appeals ruled—for the first time—that Wisconsin Statute § 103.465, which governs the enforceability of restrictive covenants in employment relationships, applies to employee non-solicitation provisions.

In 2008, John Lanning, an employee at The Manitowoc Co., entered into an agreement that prohibited him, for a period of two years after his employment ended, from either directly or indirectly soliciting, inducing, or encouraging "any employee to terminate their employment with Manitowoc" or to "accept employment with any competitor, supplier or customer of Manitowoc." The Manitowoc Co. claimed that, after leaving the company in 2010 to work for a direct competitor, Lanning communicated with at least nine employees in connection with possible employment opportunities at his new employer. The Manitowoc Co. claimed this was a violation of the employee non-solicitation provision and filed suit against Lanning. The Circuit Court granted summary judgment in The Manitowoc Co.'s favor, awarding damages and attorneys' fees. Subsequently, Lanning appealed to the Wisconsin Court of Appeals, which ultimately reversed the lower court's ruling.

On appeal, The Manitowoc Co. argued that § 103.465 should not apply to employee non-solicitation provisions but, rather, only to covenants not to compete The Court quickly dismissed that argument, stating that any covenant between an employer and employee that "seeks to restrain competition" or operates as a "trade restraint" clearly falls within the confines of § 103.465. The Court noted that the employee non-solicitation provision limited how Lanning could compete with The Manitowoc Co. and "did not allow for the ordinary sort of competition attendant to a free market, which includes recruiting employees from competitors." Therefore, the Court determined that the employee non-solicitation provision had to comply with § 103.465.

With the applicability of § 103.465 to employee non-solicitations decided, the Court then embarked to determine whether the provision The Manitowoc Co. sought to enforce was reasonably necessary to protect the Company's legitimate business interests from unfair

competition from a former employee. The Manitowoc Co. argued that it had a legitimate interest in preventing Lanning from "systematically poaching" its employees, and it believed the provision was narrowly tailored to protect it from such a threat.

The Court disagreed, however, determining that the actual terms of the agreement, as written, were far too broad and, therefore, unenforceable. As drafted, the non-solicitation provision prevented Lanning from soliciting *any* employee, whether entry level or a key employee, to leave The Manitowoc Co. for *any* reason, whether to retire to spend more time with family or work for a competitor. Because the Court found that the provision restricted "an incredible breadth of competitive and noncompetitive activity," it concluded that the employee non-solicitation provision, as drafted, did not protect a legitimate business interest and, as such, the provision could not pass the strict scrutiny that § 103.465 required and, accordingly, found the covenant unenforceable.

In light of this decision, employers should review their current agreements that contain employee non-solicitation agreements. Although employers have the right to require employees to enter into agreements with employee non-solicitation provisions, the provisions must be crafted narrowly and carefully—just like covenants not to compete—to meet the strict scrutiny analysis required by § 103.465. To be enforceable, employee non-solicitation provisions must focus on protectable interests, such as restricting former employees from soliciting current employees with whom the former employee had a direct business relationship with from ending their employment in order to engage in direct competitive activity adverse to the employer. An experienced management-side employment attorney can assist employers with drafting such provisions in order to meet the enforceability standards required by the Wisconsin restrictive covenant statute.