



## **ENFORCEABILITY OF PERSONNEL NON-SOLICITATION CLAUSES**

**By: Jeffrey R. Beitler\***

It is no secret to design professionals that getting new business in this competitive market is quite difficult. Therefore, design professionals must do all they can to protect that business in the event workers at their company decide to leave and attempt to take business with them. This raises the important question of whether or not a Non-Solicitation clause contained in an employment contract provided to the employee is enforceable in New York State.

The short answer is yes, but there is some gray area subject to interpretation by the courts. The primary caveat is that the Non-Solicitation clause must be specific, and follow a three-prong test promulgated by the New York State Court of Appeals in 1999.<sup>1</sup> This three-prong test provides that a personnel Non-Solicitation Clause (also referred to as a Restrictive Covenant) is enforceable, if reasonable, and: 1) is no greater than is required for the protection of the legitimate interest of the employer; 2) does not impose undue hardship on the employee; and; 3) is not injurious to the public. Significantly, a violation of any of these three requirements will render the Non-Solicitation clause invalid.

The reasonableness of the Non-Solicitation clause is paramount under the law, if the clause is to be enforced. For example, to be enforceable the clause must: not be excessive in time and area necessary to protect the employer's legitimate interests; not be harmful to the general public; and not be unreasonably burdensome to the employee. Courts will apply this test of reasonableness by focusing on the particular facts and circumstances, in context with the agreement itself. Courts may also sever, and grant

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<sup>1</sup> BDO Seidman v. Hirshberg, 93 N.Y.2d 382 (1999).

partial enforcement, if the Non-Solicitation/Restrictive Covenant clause is deemed overly broad.

A recent Appellate Division, First Department case (which covers Manhattan venued cases) provided an example of the Court's refusal to fully enforce a Non-Solicitation clause<sup>2</sup>. In that case a mid-sized to large company set forth in an employee's contract that the employee may not solicit the company's existing clients and work with that client following leaving employment within 18 months after termination of employment. The Court held that a Non-Solicitation clause of this type would not be enforced if that employee did not acquire a relationship with the prospective client through the direct services of that employee. The Court held that the company had a legitimate interest in preventing former employees from exploiting the goodwill of a client, which had been created at the employer's expense. However, if the former employee had no relationship with the client and did not work with the specific client during the employee's time with the company, the Courts will not enforce this clause. As such, the Non-Solicitation clause should state that the employee may not solicit the company's clients with whom the employee has had contact with, and/or provided services for, while employed by the company, to ensure its effectiveness.

The Courts have held that when the former employee cultivated or developed relationships with the firm's client through the employee's expense accounts, and was paid substantial compensation by the firm to forge relationships with the firm's client, the Non-Solicitation clause was found to be enforceable. Under those circumstances, the Non-Solicitation clause would not impose undue hardship on the employee and was not injurious to the public. Notably, that same decision also held that when there is evidence that the former employee did not solicit a client of the firm, but rather the client sought out the former employee due to an existing relationship with the former employee which predated his employment with the firm, then the Non-Solicitation clause would not be enforced.

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<sup>2</sup> Perella Weinberg Partners LLC v. Kramer, 230 A.D.3d 451 (1<sup>st</sup> Dep't 2024).

The Appellate Division also held that if the Non-Solicitation clause is too broad to be enforced, the Court can sever the overbroad portions and grant partial enforcement. As such, the Court will determine whether to enforce Non-Solicitation clauses on a case-by-case basis, and may even enforce Non-Solicitation clauses as to specific clients for the same former employee, but choose not to enforce the Non-Solicitation clause as to other clients, due to the level of involvement (or non-involvement) with the clients, during the former employee's employment with the company.

There are many decisions to be made by design professionals on this important issue and navigating the professional, and legal minefields, can be challenging. As such, a design professional should strongly consider retaining a qualified attorney knowledgeable in this area to assist them in the preparation of Non-Solicitation clauses in their employment contracts.

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