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Navigating the shifting landscape of restrictive covenants

Emerging trends and issues to watch

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Restrictive covenants are a widespread tool in commercial and employment agreements; however, legislative and judicial scrutiny guiding their use is on the rise, making it more important than ever for organizations to understand the ins and outs of these provisions. We examine emerging legal and industry trends surrounding restrictive covenants, including current approaches to enforceability, statutory prohibitions across jurisdictions, sector trends, issues in hybrid agreements, and considerations for drafting.

Protecting a company's interests through restrictive covenants is a common and widespread tool used by businesses in Canada and the US; however, these covenants—including non-competition and non-solicitation clauses—continue to face legislative and judicial scrutiny, particularly on their enforceability and inclusion in different types of employment and commercial agreements. In light of this evolving landscape, it is critical that organizations understand and remain vigilant of key legal developments relating to these types of provisions.

In this article, we explore restrictive covenants in depth, highlighting emerging legal and industry trends, including the interpretation of restrictive covenants in hybrid commercial/employment agreements, and discuss key practical considerations for drafting clauses in both the employment and commercial contexts.

Current legal landscape

Current legal landscape

To understand the legal landscape of restrictive covenants, it is important to first consider the basic anatomy and use cases for these agreements. Restrictive covenants typically include confidentiality or non-disclosure clauses, non-solicitation clauses, and non-competition clauses. They can be utilized in a variety of contractual contexts—in an employment agreement to govern and/or restrict an employee's conduct and obligations during and post-employment; in strictly commercial agreements, such as purchase agreements; and within hybrid employment/commercial agreements, such as a shareholder agreement entered into by an employee, agreements entered into by employees in the context of the sale of a business, executive incentive plans, and franchise agreements.

Restrictive covenants, especially non-competition and non-solicitation clauses, are restraints of trade. They are presumptively illegal and unenforceable *unless* they can be argued as reasonable in the circumstances. Whether a covenant is reasonable in the circumstances depends on whether there is a reasonable balance between the parties' and the public interest of avoiding restraints of trade, assessed at the time the covenant was entered into. A restrictive covenant must be clear and unambiguous to be enforceable. There are also other factors that courts will consider when determining enforceability, including the reasonableness of the scope, the duration and geographic reach of the restriction, and in the employment context, the nature of the employee's role.

Importantly, courts have confirmed that restrictive covenants found within employment contracts are subject to heightened scrutiny compared to restrictive covenants negotiated in a commercial context, which are more often found to be enforceable. This is partly due to public policy concerns with restraining employees and the inherent power imbalance presumed within the employer-employee relationship. In contrast, parties negotiating in the commercial context have greater freedom of contract, particularly where the parties are negotiating on equal terms, are advised by competent professionals, and where the contract does not create an inherent power imbalance.

The analysis of covenants, in the context of these clauses being prima facie restraints on trade, can also depend on the type of covenant at issue. Courts have generally held that a non-solicitation clause is sufficient to protect an employer's proprietary interest, and a non-compete clause is warranted only in exceptional circumstances. The nature and scope of the activities or business being restricted is also critical to the reasonableness analysis, which we further discuss below (see section "Key considerations when drafting").

Confidentiality clauses

Confidentiality clauses also play a central role in protecting business interests. These clauses are designed to prevent employees or contractors from disclosing sensitive information, such as trade secrets, client data, proprietary technology, and pricing strategies. Unlike non-compete and non-solicitation clauses, confidentiality provisions are generally more enforceable, as they do not restrict a person's ability to work or compete but focus on safeguarding specific types of information.

In practice, confidentiality clauses are often drafted broadly to cover a wide range of information and may apply both during and after the term of employment or engagement. In some cases, these clauses are embedded within employment agreements, while in others they appear in standalone non-disclosure agreements (NDAs) or as part of broader commercial contracts.

Courts generally uphold confidentiality clauses, provided they are clear, reasonable, and not overly broad. Overly vague or indefinite language can still pose enforceability risks. For example, a clause that attempts to restrict disclosure of “any information” without defining what qualifies as confidential may be challenged. As a best practice, organizations should define the scope of confidential information, specify the duration of the obligation, and ensure that the clause is tailored to the nature of the business and the role of the individual when drafting confidentiality clauses.

Restrictive covenant statutory prohibitions across jurisdictions

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Ontario

Consistent with the public policy objectives identified in the common law, Ontario enacted a statutory prohibition on non-compete agreements in the employment context effective October 25, 2021. Under section 67.2 of the *Ontario Employment Standards Act* (ESA), no employer shall enter into an employment contract or other agreement with an employee that is, or that includes, a non-compete agreement. A non-compete agreement is defined as an agreement, or any part of an agreement, between an employer (including a prospective employer) and an employee (including an applicant for employment) that prohibits the employee from engaging in any business, work, occupation, profession, project, or other activity that is in competition with the employer's business after the employment relationship between the employee and the employer ends.

There are two specific exceptions to Ontario's non-compete prohibition:

1. **Sale of business exception.** A non-compete is not prohibited where a business, or part of a business, that is operated as a sole proprietorship or partnership is sold or leased, and immediately following the sale, the seller becomes an employee of the purchaser. In these circumstances, a non-compete entered into as part of the sale that prohibits the seller from engaging in any work, occupation, profession, project, or other activity that is in competition with the purchaser's business after the sale is not prohibited.

2. **Executive exception.** A non-compete agreement may be entered into with employees who hold certain defined executive positions, including employees who hold prescribed C-suite positions (CEO, CAO, CFO, COO, etc.) or the office of the president. This exception only applies to employees who are "executives" as defined in section 67.2(5) of the ESA, not "executives" writ large.

Ontario's non-compete prohibition does not apply to agreements entered into before October 25, 2021; rather, these agreements remain subject to the common law analysis of enforceability.

Québec

While there is no general statutory non-compete ban on non-competition clauses in employment contracts, such restrictive covenants are not allowed in certain specific contexts and are not enforceable in others.

The holders of a personnel placement agency licence issued in accordance with the *Regulation respecting personnel placement agencies and recruitment agencies for temporary foreign workers* may not take measures or agree on provisions preventing or restricting the employee's hiring by the client, beyond a period of six months following the beginning of the assignment of an employee to a client. The definition of "personnel placement agencies" under the Regulation is very broad, encapsulating any person, partnership, or entity that has *at least one activity* consisting of offering personnel leasing services to meet the labour needs of a client.

Under article 2095 of the *Civil Code of Québec* (CCQ), non-competition clauses are not enforceable by the employer if the employee was terminated without a serious reason (cause) or was constructively dismissed. However, after the termination of employment, the employee may agree to waive the protections afforded by article 2095 of the CCQ, including in the context of a settlement agreement.

Federal

On May 6, 2026, the federal government introduced Bill C-31, which proposes to amend the *Canada Labour Code* (CLC) to significantly restrict the use of non-competition clauses and certain other employment-related restrictions in federally regulated workplaces.

The bill would prohibit employers from entering into or imposing such clauses, rendering them void, or in Québec, null, and contemplates additional prohibited restrictions to be defined by regulation. As in Ontario, limited exceptions would apply, including in the context of a sale of business and for certain senior executive roles. The proposed amendments also include anti-reprisal protections and place the burden on employers to demonstrate that a clause is not caught by the prohibition. A transitional provision would delay, by one year following the coming into force of the prohibition, the application of the nullity rule to existing agreements.

Bill C-31 is currently at first reading, and we will provide further updates as it advances through the legislative process.

US considerations

In the United States, there is currently no statutory non-compete law at the federal level. During the Biden administration, the US Federal Trade Commission (FTC) issued a rule that would have banned virtually all non-competes against workers; however, the rule was immediately challenged in courts and ultimately abandoned under the Trump administration.

Although there is no nationwide statutory ban on non-competes, the FTC has made it a priority to investigate and prosecute anti-competitive labour-market practices, and has been pursuing enforcement actions against companies to limit the overly broad use of non-competes against non-managerial employees.

Additionally, at the state level, we are continuing to see a patchwork of divergent non-compete laws. A number of states impose specific notice requirements, wage criteria, and other procedural requirements, along with penalty provisions for violating them, or an outright ban. States' non-compete laws continue to evolve and vary, and it remains increasingly important for employers with a US workforce to ensure that restrictive covenants comply with the applicable state law requirements.

Quantitative analysis: sector trends in restrictive covenants

Quantitative analysis: sector trends in restrictive covenants

The use of restrictive covenants has increased in recent years across Canadian industries. This rise is especially noticeable in healthcare and technology, where the protection of customer and supplier relationships, confidential information, and competitive advantages are especially critical.

A review of Management Information Circulars filed by Canadian public companies from 2006 to 2025 reveals overarching sector trends in the use of restrictive covenants in executive-level employment agreements. However, it is important to note that the absence of disclosure of restrictive covenant terms does not necessarily indicate that issuers do not use such covenants—companies may simply choose not to disclose this information in their public filings. The observations below are therefore based on publicly available disclosures and may not fully reflect market practices.

Healthcare

In the healthcare sector, restrictive covenants are commonly used to protect patient relationships, referral networks, and specialized service models, such as dental or pharmacy chains.

Upon reviewing public filing data, we identified that the duration of restrictive covenants used in executive-level employment agreements in this sector ranged from 6 months to 3 years post-employment, but on average, the length of post-employment restrictive covenants for executives was approximately 12 to 18 months post-employment.

Most examples from the healthcare sector we reviewed used non-competition, non-solicitation, and confidentiality covenants in their executive employment agreements. This is consistent with the nature of the relationships and information that is sought to be protected in this sector.

Technology

In the technology sector, restrictive covenants are often used to help protect intellectual property as well as client and supplier relationships. In the public disclosures of technology companies we reviewed, all companies included non-solicitation clauses as part of their executive employment agreements.

We also observed that, in recent years, it appears that companies in the technology sector used shorter non-competition clauses alongside longer non-solicitation clauses, particularly in the agreements for executive roles that related to client management and product development.

Addressing executive roles

While restrictive covenants are often included in the employment agreements for senior executives, as part of our analysis, we observed that some companies opt to use different restrictions based on the nature of the executive employee's role.

For example, we observed that CEOs and/or president roles often face longer non-solicitation restrictions, ranging from 18 to 36 months post-employment, whereas other C-suite executives are typically subject to shorter non-solicitation restrictions, ranging from 6 months to 12 months post-employment. As the nature of the role is a factor in the analysis of whether a restrictive covenant is deemed reasonable, it is expected that individuals with the most access to strategic information and influence over key relationships would be subject to broader and longer restrictions than other executives.

Issue to watch: hybrid agreements

Issue to watch: hybrid agreements

When analyzing the enforceability of restrictive covenants, courts will examine the context in which the restrictive covenant was entered into. As discussed above, restrictive covenants that are analyzed in the employment context are often subject to "heightened scrutiny" compared to covenants entered into in the commercial context.

In light of this distinction, an evolving area of legal interpretation has emerged: restrictive covenants in "hybrid agreements"—contracts that contain both employment and commercial elements. These agreements blur the lines between employment and business arrangements, creating unique challenges for courts when assessing their enforceability.

Hybrid agreements can take different forms. The most common examples include:

- shareholder agreements entered into by employees;
- employment continuation letters following business acquisitions;
- franchise agreements with employment-like dynamics; and
- executive compensation arrangements, such as long-term incentive plans.

In this section, we first describe the general framework courts have applied when analyzing the employment and commercial elements of "hybrid agreements" before reviewing recent case law that highlights how courts have analyzed restrictive covenants in different types of hybrid agreements.

Framework for classifying hybrid agreements: employment versus commercial

Courts apply heightened scrutiny to restrictive covenants in employment agreements, while commercial agreements are assessed under a stricter standard. How does this framework operate when hybrid agreements are added to the equation? In addressing this issue, a contextual approach is used to determine whether to apply employment or commercial standards. Key factors in this analysis include:

- **Purpose of the covenant:** Is it protecting goodwill from a business sale or restricting post-employment competition?
- **Nature and structure of the agreement:** Is the covenant embedded in a commercial transaction or standalone employment contract?
- **Context of negotiation:** Was the agreement negotiated at arm's length with legal counsel, or under a power imbalance typical of employment relationships?
- **Nature of the relationship:** Does the restricted party resemble an employee? Or a commercial partner?

We discuss each of these factors in further detail below.

Purpose of restrictive covenant

The central question courts will consider when assessing hybrid agreements is the purpose for which the covenant was entered into, and in particular, whether it was intended to protect the goodwill of a business or to restrict post-employment competition. The court's focus is on the function of the covenant, not merely its form.

In *Payette v. Guay Inc.*, 2013 SCC 45, the Supreme Court of Canada emphasized that the analysis must focus on the reason the covenant was included: "The 'bargain' negotiated by the parties must be considered in light of the wording of the obligations and the circumstances in which they were agreed upon"[1]. In that case, the Supreme Court found the restrictive covenants were to be interpreted in light of the rules applicable to commercial contracts, noting that the restrictive covenants were not part of the contract of employment since their purpose was to protect the assets acquired by the respondent company.

Similarly, in the recent Ontario Superior Court decision of *Wyse Meter Solutions v. Papanicolopoulos*, 2024 ONSC 840, the Court held that "to determine whether a restrictive covenant is linked to a contract for the sale of assets or to a contract of employment, the Court must identify the reason why the covenant was entered into"[2]. In that case, the Court looked to the stated purpose of the restrictive covenant and option agreements at issue, which the Court found were in consideration for the defendant's employment with the plaintiff company. As such, the Court found that there was some merit to the argument that the defendant's purchase of shares was in the context of an employee/employer relationship, not the sale of a business or commercial context.

These cases show that courts look beyond the form of the agreement and focus on the underlying purpose of the covenant, whether it protects a commercial interest or functions as a restraint on post-employment activity.

Context of negotiation and bargaining power

Courts will also consider whether the parties negotiated the agreement at arm's length, had legal representation, and whether there was a power imbalance typical of employment relationships. In *Payette*, the Supreme Court held that the rules for restricting covenants relating to employment do not apply with the same rigour or intensity where the obligations are assumed in the context of a commercial contract, especially where the evidence shows the parties negotiated on equal terms and were advised by competent professionals, and where the contract does not create an imbalance between them[3].

This principle was also discussed in *Ruel v. Rebonne*, 2022 ABQB 271, where the Court analyzed the covenant at issue with a commercial lens, emphasizing that the share purchase and sale agreement arose from a fairly negotiated business sale, with both sides represented by legal counsel[4]. Likewise, in *Parekh et al. v. Schecter et al.*, 2022 ONSC 302, the Ontario Superior Court found that the associate dentist had directly negotiated the clause and it was not imposed unfairly, supporting the application of commercial standards.

These cases demonstrate that bargaining power and negotiation context are critical in determining whether a restrictive covenant should be assessed under a commercial or employment framework.

Structure of agreements

The placement and integration of the restrictive covenant within the broader framework of the agreement is another key factor. Courts look at whether the covenant is embedded in a purchase or sale agreement, suggesting a commercial context, or whether it is part of a standalone employment agreement.

For example, in *People Corporation v. 2578649 Alberta Ltd.*, 2024 ABKB 711, multiple agreements were at play, including an executive employment agreement and a restrictive covenants agreement. In determining whether to uphold the covenants entered into as part of the executive employment agreement, the Court looked at both agreements and the relationship between the agreements. The Court found the executive employment

[1] *Payette v. Guay Inc.*, 2013 SCC 45 at 45 [*Payette*].

[2] *Wyse Meter Solutions Inc v. Papanicolopoulos*, 2024 ONSC 840 at para. 59 [*Wyse*].

[3] *Payette v. Guay Inc.*, 2013 SCC 45 at para. 39 [*Payette*].

[4] *Ruel v. Rebonne*, 2022 ABQB 271 [*Ruel*], appeal allowed in part in 2023 ABCA 156.

agreement was not a hybrid agreement—rather, it was an employment agreement with the purpose of governing the contract of service between the individual and the plaintiff[5].

Therefore, because the executive employment agreement stood alone and was not integrated into the commercial transaction, the Court applied employment law standards to assess the enforceability of the covenants at issue.

A similar approach was taken in *Wyse*, where the Court found that although the employee had signed multiple agreements, including a shareholder agreement, the restrictive covenants were primarily tied to his employment relationship, not to a sale of business or goodwill[6].

Relationship of the parties

Finally, courts examine the actual relationship between the parties to determine whether it resembles a commercial or employment one. This includes assessing whether one party was economically dependent, had limited decision-making authority, or lacked bargaining power.

For example, in *Wyse*, the Court emphasized that although the employee entered into a shareholder agreement, he had no discretion to make decisions, he was not a director or officer, and he operated under the supervision of his managers[7]. These facts supported the view that the relationship was more like an employment relationship than a commercial partnership.

As the Supreme Court held in *Payette*, the true nature of the relationship must be assessed to determine whether the covenant applies to a commercial or employment agreement.

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[5] *People Corporation v. 2578649 Alberta Ltd. (Quinn Advisory Group)*, 2024 ABKB 711 at 37 [*People Corporation*].

[6] *Wyse Meter Solutions Inc v. Papanicolopoulos*, 2024 ONSC 840.

[7] *Ibid*., at 90.

How courts determine context in hybrid agreements

How courts determine context in hybrid agreements

In this section, we review types of hybrid agreements that courts have analyzed to determine whether the restrictive covenant at issue should be analyzed as being entered into in an employment or commercial context.

Employee shareholder agreements

These agreements arise when employees acquire shares in a company, often as part of incentive or retention programs. While they resemble commercial contracts, the employment context and power imbalance can make them hybrid agreements. In *Wyse*, the Ontario Superior Court considered whether restrictive covenants in a shareholder agreement signed by an employee should be assessed under commercial or employment standards[8]. The employee had signed an employment agreement and a restrictive covenant agreement, and later agreed to be bound by a shareholder agreement. Although the shareholder agreement was commercial in form, the Court found that there was merit to the argument that the purchase of shares under the shareholder agreement was in the employment context, as opposed to the sale of business or commercial context because there was no goodwill attached to the employee, he was not the "face" of the business, and only held a small percentage of the issued and outstanding shares of the business.

In contrast, in *People Corporation*, the Alberta Court distinguished between a restrictive covenant agreement linked to a share purchase and an executive employment agreement that was not linked[9]. The Court rejected the characterization of the employment agreement as hybrid, reinforcing that a clear linkage to a commercial transaction is essential.

Employment continuation letters

Employment continuation letters following business acquisitions also raise hybrid agreement issues. When restrictive covenants appear in continuation letters following a business acquisition, courts look at whether the covenant was part of the sale transaction or imposed as a condition of employment. In *Diamond Delivery Inc. v. Calder*, the Supreme Court of British Columbia held that the covenant in a continuation letter was primarily linked to the sale of the business. It was accepted in exchange for transaction benefits, not merely as a condition of employment[10]. Likewise, in *Ruel*, the Alberta Court held that a restrictive covenant included in a business sale agreement remained commercial even though the vendor later became a commissioned salesperson. The subsequent employment relationship did not change the covenant's character[11].

Franchise agreements

Franchise agreements are another area where hybrid agreement considerations arise. Franchise agreements grant rights to operate under a brand and often impose non-compete clauses. While they can resemble employment relationships due to the power imbalance between the parties, courts generally uphold covenants that protect legitimate business interests.

In *MEDIchair LP v. DME Medequip Inc.*, the Ontario Court of Appeal acknowledged that franchise agreements can resemble employment relationships but focused on whether the franchisor had a legitimate interest worth protecting[12]. In that case, the Court upheld the covenant because it safeguarded goodwill and operational methods.

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[8] *Ibid*.

[9] *People Corporation v. 2578649 Alberta Ltd. (Quinn Advisory Group)*, 2024 ABKB 711.

[10] *Diamond Delivery Inc. v. Calder*, 2023 BCSC 194.

[11] *Ruel v. Rebonne*, 2022 ABQB 271 [*Ruel*].

[12] *MEDIchair LP v. DME Medequip Inc.*, 2016 ONCA 168 [*MEDIchair*].

Unique considerations for executive compensation

Unique considerations for executive compensation

Executive employees often receive compensation through long-term incentive plan (LTIP) awards, which typically reward executives with equity-based or performance-based compensation. Where these agreements are entered into in the context of a transaction or linked to share ownership, these executive compensation agreements raise both employment and commercial elements.

Restrictive covenants are also used in LTIP arrangements to trigger forfeitures of awards upon a breach. Rather than providing for an outright prohibition on competitive activity, these arrangements provide more favourable incentive treatment for employees who comply with the restrictive covenants. These arrangements are often used to encourage employees to act in the best interests of the company by making certain incentive awards conditional on specified post-employment conduct. Care should be taken to ensure these clauses are clear and reasonable and do not constitute penalty clauses.

Key considerations when drafting

Key considerations when drafting

To ensure restrictive covenants are enforceable and aligned with current legal standards, the following practical considerations should be kept in mind when drafting.

Avoid ambiguity

Courts consistently reject restrictive covenants that are vague or overly broad. Ambiguity in language, whether in defining prohibited activities, geographic scope, or duration, can render a clause unenforceable. Use clear, objective terms and avoid generalizations. For example, instead of prohibiting "competitive activity", specify the nature of the business, services, or products that fall within the restriction.

Tailor the scope

A one-size-fits-all approach is rarely defensible. The scope of the restriction should reflect the employee's actual duties, seniority, and access to confidential or proprietary information. Overreaching clauses that apply to junior employees or those without meaningful exposure to sensitive data are more likely to be struck down.

Limit duration and geographic reach

Courts assess whether the time and geographic limits are reasonable in light of the employer's legitimate business interests. A shorter duration (e.g., 6 to 12 months) is more likely to be upheld than a multi-year restriction, unless exceptional circumstances exist. Similarly, geographic scope should be tied to the actual market area in which the employee operated. Overly expansive regions, especially those where the employer has no presence, may be deemed unenforceable.

Consider the nature of the agreement

The nature of the agreement, whether employment, commercial, or hybrid, affects how courts interpret restrictive covenants. In employment agreements, courts apply a stricter standard due to the inherent power imbalance. In contrast, covenants in commercial agreements (e.g., sale of business) are more likely to be upheld, especially where parties negotiated at arm's length. Hybrid agreements, such as those involving contractor-consultants or post-employment consulting arrangements, require balancing of both perspectives.

Context of negotiation

Enforceability often hinges on whether the covenant was freely negotiated. Courts may consider whether the parties had equal bargaining power, access to independent legal advice, and an opportunity to revise the terms, as discussed. Including a line that confirms these elements were present can strengthen the enforceability of the clause.

Align with industry standards

Courts often look to industry norms when assessing reasonableness. For example, a non-compete clause in the tech sector may be viewed differently than one in professional services or retail. In particular, in the sale of professional practices, especially within the dental, medical, and veterinary sectors, courts have been willing to accept longer durations and broader geographic scopes. This reflects the unique nature of these industries, where patient loyalty and continuity of care are important. The transfer of goodwill in these transactions is not merely commercial but relational, and courts recognize that protecting this asset may require stronger restrictions.

Franchise agreements reflect a similar trend, with courts acknowledging the need to protect territorial exclusivity and brand integrity. In *Garcha Bros Meat Shop Ltd v. Singh*, the franchise agreement included a 30-month non-compete clause within a 10km radius. The B.C. Court of Appeal found that, because of the nature of the retail business, there was a strong prima facie case for the enforceability of the clause, highlighting the importance of industry reliance on location and customer loyalty.

Benchmarking against similar roles in the same industry can help justify the scope and duration of the restriction. Where possible, include a rationale for the covenant that reflects the nature of the business and business needs.

Jurisdictional considerations

Restrictive covenant law varies significantly across jurisdictions. Some Canadian provinces impose statutory limitations or outright bans on certain types of covenants (e.g., non-competes in employment). Similarly, a number of states in the United States impose wage criteria, notice requirements, minimum consideration, and in some cases, an outright ban on enforcing non-competes and certain types of non-solicits. Always verify the relevant legal framework and tailor the clause accordingly. Where cross-border operations are involved, consider including a governing law clause and assessing enforceability in each relevant jurisdiction.

Particular care should be taken when employees perform their work in Québec or work for employers who have their domicile or establishment in this province. The conflict of laws rules set out in the *Civil Code of Québec* provide that choice-of-law clauses in employment contracts may not be fully enforceable in certain scenarios:

1. Employees who habitually work in Québec cannot be deprived of the public order protections that apply in the province.

2. If the employee does not habitually carry out their work in any one jurisdiction, employees cannot be deprived of the public order protections that apply to employees in the jurisdiction where the employer has its domicile or establishment.

Public order protections include article 2095 of the CCQ, which provides that employers may not enforce non-competition provisions if the employee is terminated without serious reason or is constructively dismissed. Therefore, employers of employees who habitually work in Québec may not be able to enforce non-competition provisions in case of termination without serious reason or constructive dismissal, even if the contract is made subject to another governing law.

Use of forfeiture clauses

Employers may consider the use of forfeiture clauses as part of termination agreements for deferred compensation paid to employees upon their exit from the organization, which would be triggered in the event of post-employment competition or solicitation. As these clauses are entered into in the context of a termination as opposed to a contract of employment, the court's analysis in respect of the covenant's reasonableness will likely differ from the analysis applied under an employment agreement. However, forfeiture clauses need to be carefully drafted to ensure they are reasonable and to avoid the prohibition against penalty clauses (particularly in common law jurisdictions).

Navigating the road ahead

Navigating the road ahead

As the legal and regulatory landscape around restrictive covenants continues to evolve, organizations should take a proactive approach to reviewing and updating their agreements. Whether in employment, commercial, or hybrid contexts, clarity and precision are key to the enforceability analysis. By tailoring covenants to the specific business interest at stake and documenting the negotiation context, businesses can better protect their operations.

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