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Does my non-competition clause still apply after I was laid off due to COVID-19?

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THE QUESTION

I was laid off because of COVID-19. I had a non-competition clause in my employment contract. My only employable skill is in this field. Does the non-compete still apply if I was laid off?

THE FIRST ANSWER

Susanna Allevato Quail, *Partner, Allevato Quail & Roy, Vancouver*

The effect of a non-compete clause does not change if you were laid off rather than quit or terminated for cause, so, to answer your specific

question, yes, your non-compete clause applies even if you were laid off. However, if your non-compete clause prevents you from getting a new job in your field at all, it may not be enforceable.

There are significant restrictions on non-compete clauses in Canadian law. An employer seeking to rely on a non-compete clause has to prove that the clause is justified. A non-compete clause that goes beyond what an employer reasonably requires to protect its legitimate business interests is likely to be struck down by a court. A non-compete clause that makes it effectively impossible for a former employee to earn a living in their field is also likely to be struck down. If your former employer isn't willing to waive your non-compete clause, it would be a good idea to have a lawyer review the specific facts of your situation.

THE SECOND ANSWER

Samia Hussein, *Lawyer, Sherrard Kuzz LLP, Toronto*

As legal counsel for employers, I regularly advise them through navigating non-competition clauses. A non-compete clause is critical to protect an employer from an employee that has acquired significant knowledge and influence over an employer's business. The clause prevents the employee from unfairly competing with the employer when they depart from the company.

In most cases, if an employer includes a non-competition clause in an employment agreement, it will apply to any situation where employment has come to an end, including if employment has ended because of a permanent layoff, often described as a "without cause" termination. However, in some cases, the employment agreement will limit the non-competition clause so it only applies if the employee resigns. Whether it

will apply in any one situation may depend on the terms of the individual employment agreement and whether there are any restrictions post-employment.

In assessing whether a non-competition clause is enforceable, courts will ask: 1) How long is the period of the non-compete; 2) to what cities or regions does it apply; and 3) what type of business activity does it prohibit? Assuming the clause has been drafted clearly and reasonably, the employer and employee should expect that the clause will apply postemployment.

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