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To Quit or Not to Quit?

Implications of employee notice provisions.

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"You can't fire me—I quit!" Recent precedents construing "notice" provisions in employment agreements suggest that quitting is not so simple. Such provisions have recently come to the fore as potential mechanisms for employers to place limits on competition by departing employees. This article discusses recent decisions in this area, and in particular the possible implications of enhanced notice provision enforcement for the departing employee, particularly with respect to requirements mandating reporting of terminations.

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Background

New York employers seeking to restrain the conduct of former employees have long had to contend with the settled rule that "New York disfavors non-compete agreements as an unreasonable restraint on trade." *Reed, Roberts Assocs. v. Strauman*, 40 N.Y.2d 303, 307 (1976). Employers bear the burden of demonstrating that a covenant that restrains competition following resignation is reasonable given the particular circumstances in duration and geographic scope, does not harm the public interest, does not impose undue hardship on the employee, and is not broader than necessary to protect the employer's legitimate protectable interests. See *BDO Seidman v. Hirschberg*, 93 N.Y.2d 382, 388-89 (1999); *Reed, Roberts*, 40 N.Y.2d at 307.

In the 1990s, New York decisions and cases from other jurisdictions began to reflect a relatively more lenient approach to so-called garden leave provisions, whereby employees agree to "tend their garden" and sit out from employment for a fixed period of time.

True to the name given to such arrangements, the employee is not required to provide ongoing services to the former employer, apart from transition assistance on an as-needed basis. See generally Jeffrey S. Klein & Nichols J. Pappas, "'Garden Leave' Clauses in Lieu of Non-Competes," 241 NYLJ, 24 (2009). Commercial considerations dictate that few employers are willing to pay without receiving services in exchange; in consequence, garden leave provisions tend to be reserved for senior-level or otherwise uniquely talented employees, whom courts recognize are likely to have financial resources to weather a change of jobs, and prospects for future employment that are less likely to be impaired by a compulsory period of absence from the field than might those of less-unique employees. Garden leave provisions typically provide that the employee continues to be paid and receive benefits during the agreed upon period of non-employment. Significantly, unlike employees who are subject to post-employment restrictions on competition, employees on garden leave remain employees, and continue to be bound by an ongoing duty of loyalty to their employers.

Amount of Notice

Several recent decisions by New York courts have analyzed a type of clause that falls somewhere on a spectrum between the clear poles of post-employment and continuing-employment restrictions represented by the types of provisions described above: provisions requiring a certain amount of notice before cessation of the employment relationship. Like garden leave provisions, such clauses afford the employer a chance to make substitute arrangements to replace or cover the work the departing employee would have performed. In businesses where client relationships are critical, the employer can attempt to transition accounts to another employee, before the departing employee who formerly serviced the account has set up shop elsewhere. Depending on the circumstances, such provisions also can serve an ancillary purpose of ensuring that sensitive information the employee may possess on the day notice is given grows stale prior to departure. As reflected in the decisions below, however (which involve financial service professionals acting as brokers and counsel), notice provisions are not reserved for exceptionally unique or senior personnel. Further, employers often expect that rather than sitting on the sidelines, an employee subject to a notice provision will continue to render services for all or part of the notice period.

Most notice provisions are drafted to permit the employer to shorten the notice period at its discretion, and accelerate a parting of the ways. For a variety of practical reasons—abundance of caution regarding trade secrets, perception of reduced commitment, fear that other employees may inquire about greener pastures elsewhere—employers frequently exercise this option. In other circumstances, however, the employer may prefer based on transitional needs or competitive concerns to use the full notice period. Both employer and employee should be mindful that the notice scenario can present tricky issues for both sides.

Increased third-party financing may theoretically make **more money available** for litigation, but would **responsible investors** competing in a robust marketplace ever cause increased **frivolous** litigation?

Enforcement

In particular, what happens when the employee does not wish to abide by the requirement that he or she remain actively associated with the employer for the specified notice period? Though at-will employment agreements may contain notice provisions, "it is a 'long settled rule' that employment at will "may be freely terminated by either party at any time for any reason or even for no reason." *Murphy v. American Home Prods.*, 58 N.Y.2d 293, 300 (1983). Thus, several courts have refused to find a continued employment relationship simply on the basis of failure to provide proper notice. See, e.g., *Denniston v. Taylor*, No. 98 Civ. 3579, 2004 WL

226147, at *7 (S.D.N.Y. Feb. 4, 2004) ("[F]ailure to comply strictly with a termination notice provision of an at-will employment contract does not vitiate the effectiveness of the termination"); see also *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle*, 271 A.D.2d 636, 638 (2d Dep't 2000) (employer's failure to provide written notice of termination did not render the immediate termination ineffective).

Indeed, employers who seek to enforce such provisions could effectively be asking a court to force someone who no longer wants to work for the employer to continue to be employed against the employee's will, and to abide by concomitant, unwanted duties of loyalty. At least one court outside this state found such relief unacceptably hard to swallow. In *Bear, Stearns v. Sharon*, 550 F. Supp. 2d 174, 178-79 (D. Mass. 2008), a Massachusetts federal district court held that specific enforcement of a notice provision would violate state and federal Constitutional prohibitions on involuntary servitude. In particular, the court focused on the language of the clause providing that during the notice period, "you may be asked to perform all, some or none of your work duties in Bear Stearns's sole discretion."

Recent decisions by New York state and federal courts, however, indicate that relief that falls shy of specific performance may be available to employers who seek to compel specific performance related to the duty of loyalty that attaches to an ongoing employment relationship, rather than performance of the employee's services. In two of these recent decisions, the employment agreement at issue (which in both instances was with the same company) not only expressly required 90 days' notice, but specifically provided that, "[i]n the event the Employee terminates employment before the expiration of the Notice of Termination Period or terminates employment without giving notice, employee covenants that for the balance of the Notice of Termination Period or, if no notice is given, ninety (90) days," the employee would abide by certain restrictions on competition. The agreement provided that for the notice period, the employees would retain their capacity as employees, and would continue to receive base pay, but would no longer participate in the employer's employee compensation plan. See *Ayco v. Frisch*, 795 F. Supp. 2d 193, 197-98 (N.D.N.Y. 2011); *Ayco v. Feldman*, 1:10-CV-1213 GLS/DRH, 2010 WL 4286154 (N.D.N.Y. Oct. 22, 2010). Both decisions analyzing this provision held that, regardless of whether or not the employee actually departed prior to the expiration of the stated notice period, the restrictions on competition contained therein were effective.[1]

Another recent decision accorded post-employment effect to a notice provision that did not contain any post-termination non-compete, in a dispute where the employee had already begun working elsewhere. The court initially denied plaintiff's motion for a temporary restraining order that would have barred the departing employee—who had no post-employment contractual restrictions—from working for a competitor following his resignation. Following expanded briefing and expedited discovery, however, the court crafted a remedy whereby the former employee would be required to "sit out" for the length of the notice period from ongoing employment with the *new* employer, on the theory that such relief would serve as a deterrent to violating notice provisions.[2] See *AllianceBernstein v. Clements*, unpublished decision dated May 24, 2011. Plaintiff would be required to pay for the notice period. The defendant appealed, on the theory that "anticompetitive covenants covering the postemployment period will not be implied." *MGM Court Reporting Serv. v. Greenberg*, 74 N.Y.2d 691, 693 (1989). The matter settled while on appeal.

Additional Considerations

From a policy perspective, treating notice provisions as the equivalent of non-compete covenants can be viewed as an extension of the "employee choice" doctrine, whereby courts will not scrutinize the reasonableness of a covenant that is written so as to provide the employee with an election between receiving certain benefits in exchange for refraining from competition following employment, or competing immediately provided such benefits are forfeited. E.g., *Murphy v. Gutfreund*, 583 F. Supp. 957, 962 (S.D.N.Y. 1984). Specific enforcement of notice provisions effectively treats the employee as having irrevocably

made his or her "employee choice" in advance, i.e., to stay and receive certain benefits. Where such benefits are merely the employee's regular pay or some lesser version thereof, however, it is questionable whether the employee has actually received consideration sufficient to support a binding surrender of the right to quit that would otherwise have existed.

Even where there is no dispute concerning whether the employee will abide by the requirement to give a certain amount of notice, tendering resignation can cause mistrust about an employee's loyalty and commitment in the months or weeks leading up to the departure. Departing employees may begin to disengage, and the departure may affect morale of remaining employees. These concerns are heightened given that following resignation many employers, particularly in regulated fields, begin or intensify security protocols, particularly with regard to electronic systems. Employers may wonder: Is the employee performing transition services when he or she accesses the company's prized client database—or poaching critical assets? Employees may face a Catch-22. The ongoing duty of loyalty applicable to current employees requires the employee to remain abreast of developments and to aid transition efforts while still employed. Every time an employee accesses company databases or attends strategic meetings, however, the employee is learning information that he or she might feel more comfortable not knowing when starting work at a competitor, to avoid any suggestion of improper disclosure or unfair competition. Personal conflicts may arise or escalate in the weeks prior to departure as well; although it would behoove most employees to try not to burn bridges on departure, the news (especially in a down economy) that an employee is leaving may fuel personal animosity.

When such tensions bubble over, can the employee—who has, after all, already tendered a resignation—be terminated "for cause"? Little guidance exists concerning termination during the "notice" period. In *Natsource v. Paribello*, 151 F. Supp. 2d 465, 478 (S.D.N.Y. 2001), the U.S. District Court for the Southern District did address a claim of termination during the notice "window." Interestingly, the employee, rather than the employer, sought to claim termination, which triggered certain more favorable consequences than resignation. The court disagreed, finding that "[b]ecause [the employee] had already resigned prior to [his employer] asking him to leave the trading floor, [the employee] terminated the employment first." Id. at 478.[3]

Employees should be mindful of this issue, however, because termination (as opposed to resignation) may have serious reputational implications for employees. Many employers require that incoming employees disclose any prior terminations for cause. Failure to disclose such a termination could be grounds for termination or other adverse action by the new employer should the truth emerge subsequent to employment. As noted above, moreover, many notice provisions affect professionals in the financial industry. FINRA's "Broker Check" database ensures that termination for cause becomes part of a financial professional's public record. Though employees may post their own version of events—including the fact of resignation prior to any purported termination—the employer's version will in most instances not be expunged. Employees would do well to remember that their incentives are not likely to be aligned with those of their employer during the notice period, and evaluate risk accordingly.

1. The *Ayco* decisions suggest that one way for an employer to increase the chance of a notice provision having "teeth" to protect against competition is to be similarly explicit concerning prohibitions on competitive activity during the notice period.

2. The court's decision in the *Clements* case was heavily influenced by *Evolution Markets v. Penny*, 23 Misc. 3d 1131(A) (West. Sup Ct. 2009), a case that likewise granted relief in the form of interrupting employment elsewhere. The *Penny* decision involved not a notice provision, but a post-employment restrictive covenant.

3. *Natsource* reads like a cautionary tale concerning continued client contact during the notice period, since the decision reflects that the employer feared solicitation of customers, and in fact at least one customer withdrew its business with an explanation that the decision to do so was prompted by the employer treating the resigning broker unfairly.

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