

## Did Michigan Just Torpedo the Ability to Navigate Around a Non-Solicitation Agreement?

An employee subject to a non-solicitation agreement departs to work for a competitor. The employee speaks with a customer and the customer soon moves his business to the new company. Is the agreement violated if it was the customer who first initiated the contact? A recent Michigan Court of Appeals decision may have changed the answer to this question.

### Non-Solicitation Agreements

A non-solicitation agreement is a common provision in an employment agreement which prohibits an employee from soliciting an employer's customers after leaving the company. Solicitation is just a formal word for asking for something. In a business context, it is defined in terms of trying to get someone to do something. A non-solicitation agreement attempts to get someone's agreement not to take customers away from a business.

A typical non-solicitation agreement between a business and an employee defines how long the employee must abide by the agreement, a designated covered geographical area, and a statement by the employee that they will not violate the agreement as an individual, as part of another entity, or for the benefit of anyone else.

### "Solicitation" – Is Who Initiates Contact the Critical Factor?

Courts around the country have attempted to define the contours of the term "solicitation." Based on these decisions, a school of thought developed that an employee may be able to avoid a violation of a non-solicitation agreement if 1) the customer initiates the contact with the former employee or 2) a general notice of new employment is provided to a customer and the customer then initiates the discussion of the customer doing business with the employee at the new firm. Based on this prior analysis, "non-solicitation" general announcements were often recommended as a tool to avoid a violation of the agreement.

This post-departure protocol, the practice of focusing on who initiates the contact, and/or the discussion of doing business, has to be reconsidered in view of the recent Michigan Court of Appeal's decision in *Total Quality, Inc. v. Fewless*, Case No. 346409 (Mich. Ct. App., July 9, 2020) in which the Court found that former employees are not guarded from enforcement of a non-solicitation agreement simply because the customer initiated the contact or the discussion of doing business. The Court instead offered a less than bright-lined test.

### The Agreement at Issue

The former employees' agreement in *Total Quality* contained a non-solicitation clause which provided that they may not:

directly or indirectly call on, solicit, or service any customer... of [the employer] in order to induce or attempt to induce such Person to cease doing business with [the company] ...

The former employer claimed that the former employees violated the non-solicitation agreement by *responding* to a client's uninvited request to answer an RFP. The former employees argued that the terms of the non-solicitation agreement "did not preclude them from responding to requests initiated by customers." They contended that they did not improperly solicit the customer because they did not initiate the contact, but rather only responded to the contact and the invitation to respond to the RFP. They argued that to rule that a response to an uninitiated contact was prohibited, it would convert the non-solicitation provision to a non-competition provision.

### **There is Not a Free Pass if the Customer Initiates Contact and the New "Active Role" Test**

The Court disagreed with the former employees and found that *accepting* business from a customer who initiates contact can constitute unlawful solicitation if the evidence shows the accused party "assumed an active role in [the customer's] decision making process." The Court considered if the purpose of the employees' conduct was to induce that business relationship to cease and found that the employees had taken affirmative steps to procure, and take away, the customer's business. In simple terms, who initiates the contact is not the determining factor.

The Court also found that the same conduct that violated the non-solicitation agreement also constituted an improper tortious interference with the former employer's relationship with its customers as the former employees knew that their actions were substantially certain to interfere with the business relationships.

### **Summary**

The Michigan Court of Appeals pronouncement should cause departing employees and hiring employers to recognize that employees cannot easily shield themselves from liability by simply not initiating contact and that a great deal of thought must be given to verify that they do not take an "active role in the client's decision making process" to move business to the new firm.

We hope you found this information helpful. Please contact us if you have any questions.

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