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Insights

It is Time to Consider Revising Your Employee Non-Solicitation Provisions

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Employment agreements frequently contain restrictions that disallow a departing employee from soliciting former employees and co-workers to join the employee's new employer. These restrictions are also referred to as "non-poaching" employee restrictions.

Restrictions of this type have generally been enforceable under Indiana law. Provisions of this type commonly are worded to the effect that a departing employee "shall not solicit for employment or suggest to any individual employed by Company at the time of employee's separation from Company that the employee leave Company's employment or otherwise induce or entice any such employee to leave his/her employment with Company."

In December 2019, the Indiana Supreme Court, the highest governing court in Indiana, issued a decision that primarily focused on other issues pertaining to employment agreements, but also addressed the enforceability of employee non-solicitation provisions. *Heraeus Medical, LLC v. Zimmer, Inc*., 135 N.E.3d 150 (Ind. 2019). We mentioned *Heraeus* in a prior KD Alert one year ago. Indiana practitioners have since focused more specifically on the employee non-solicitation provision of the Heraeus holding and are using it to defend claims based these types of provisions. We thus revisit the issue now.

In short, *Heraeus* stands for the proposition that a restriction that prohibits an employee from soliciting or inducing "*all*" former employees and co-workers to work with the departing employee is not enforceable. Rather, the Indiana Supreme in *Heraeus* noted that the Indiana Court of Appeals in *Heraeus* correctly held that an employee non-solicitation provision was unreasonably broad because it extended to "any" individual employed by the former employer, and "*not just to those who have access to or possess any knowledge that would give a competitor an unfair advantage*" (emphasis added). The Indiana Supreme Court in *Heraeus* also noted the statement that non-solicitation of employee restrictions must be limited only to those employees in which the employer has a legitimate "protectable interest." The Indiana Supreme Court independently concluded, as had the Indiana Court of Appeals, that the employee non-solicitation covenant at issue was too broad and unenforceable, because it prohibited solicitation of "all" employees.

Although the *Heraeus* decision initially appears to primarily address Indiana's blue pencil doctrine as it applies to employment agreements, Indiana practitioners have cited and consider *Heraeus* to be dispositive of a proper non-solicitation of employee provision, arguing that any restriction that restricts solicitation or poaching of "all" employees is unenforceable under Indiana law. Unfortunately, there are literally thousands of employment agreements in Indiana that have restrictions that say exactly that, -- restricting solicitation of "all employees." Such restrictions were generally considered enforceable until *Heraeus*. Accordingly, now is a good time to consider reviewing your employment agreements, and to perhaps revise and amend the

employee non-solicitation provision. *Heraeus* underscores the importance of careful drafting of employment agreements, and again emphasizes that Indiana will not enforce agreements that courts consider too broad.

For questions, please contact any one of the members of our **Employment Law Practice**.

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