

Michigan Court of Appeals Lets Non-Solicitation Case Go Forward Even Though Customer Initiated Contact

Former employees are not shielded from enforcement of non-solicitation agreements simply because the customer initiated the business contact, the Michigan Court of Appeals has determined in Total Quality, Inc. v. Fewless, et al., Case No. 346409 (Mich Ct App, July 9, 2020).

The court's decision underscores that non-solicitation and non-competition agreements are viewed as restrictions on trade and, thus, courts often scrutinize them very closely. Because of the potential for close judicial scrutiny, it is critical that employers have well-constructed non-solicitation and non-competition agreements in place before a dispute or litigation arises.

In this case, Total Quality, Inc. (TQI) claimed former employees Terry and Nathan Fewless violated the non-solicitation agreement by violating its third provision—namely, responding to customers' requests to do business. The Fewlesses argued, however, that unlike with a covenant not to compete, TQI's non-solicitation agreement "did not preclude them from responding to requests *initiated by customers*."

The court disagreed and determined that accepting business from a customer who initiates contact can constitute unlawful solicitation if the evidence shows the accused parties "assumed an active role in [the customer's] decision-making process." In other words, who "initiates" the contact is not the determining factor.

The Fewlesses also argued that the third provision of the non-solicitation clause ran afoul of Michigan's non-compete statute, MCL 445.774a(1). They failed, however, to cite authority supporting the notion that non-solicitation agreements are subject to the statute. Even if their argument had been properly supported, the Court of Appeals found the scope of the prohibited activity was "reasonable and allows [the Fewlesses] to compete with [TQI] as long as they do not solicit [its] customers, employees, and business relationships." The court also found the nonsolicitation agreement's two-year term reasonable under MCL 445.774a

The bottom line in this case is that former employees are not shielded from enforcement of non-solicitation agreements simply because the customer *initiated the business contact*. However, because courts do analyze these agreements closely, many other pitfalls may exist for employers when disputes arise. Contact competent counsel, such as a member of Bodman's Workplace Law Group, to optimize your agreements so that they are well-positioned to survive a legal challenge.

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