Kinnected

Keeping BC's Kinesiologists Informed

BCAK Updates

During 2015 BCAK achieved a membership milestone, exceeding 900 total members with approximately 860 Practicing members. Our five-year plan, initiated in 2011 was to reach 800 members by the end of 2016. This number may not seem relevant to most; however, it is a strong indicator that kinesiologists are being utilized to a greater extent in the BC workforce than ever before.

The majority of you as members recognize that it requires determination to stick it out in this profession as we struggle to compete for work both on a professional and financial level, primarily based on the fact we are not government regulated health professionals and therefore not recognized to the same extent as (and by) those professionals who are regulated. As we have mentioned previously, regulation is somewhat of a double-edged sword, being that it imposes additional legal requirements and costs on kinesiologists, with no guarantee of increased recognition, wages or access to work within BC's health care system. Our primary focus over the past four years has been to increase recognition of the profession and the skills of members and this appears to be paying off, despite the slow process. We hope you will find the subsequent update information and articles enlightening and valuable towards your professional kinesiology career.

Legislative Assembly of British Columbia

Marketing and Promotions

In October of 2015, a contingent represented by BCAK President Hardip

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THE DEPARTING KINESIOLOGIST - LEGAL IMPLICATIONS IN THE PURSUIT OF COMPETITIVE OPPORTUNITIES

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Issue

As with most relationships, employment relationships also come to an end. The law implies various obligations on employees[i], some of which survive the termination of employment. But what is the nature and scope of the restrictions that the law requires when a treating professional such as a kinesiologist decides to end his/her employment relationship with a current employer and seek out a competitive opportunity elsewhere? What legal rights and obligations do the parties have in relation to retention of clients or patients upon the conclusion of the employee's employment relationship?

The scope of this discussion is to highlight some of the legal implications (and obligations) of a departing professional employee with respect to terminating an employment relationship and seeking to compete with a former employer.

Discussion

The principal concerns for most kinesiologists when leaving their current employment will generally be to ensure that they may continue to practice in the geographical area of their choice and continue to work with clients/patients that they have previously provided treatment and professional services to during the course of their current employment. This is generally the case with any treatment professional and is not necessarily unique to kinesiologists. However, there are a number of legal implications that may present legal and other barriers and restrictions that may be triggered by such a cessation of the employee/employer relationship. Potentially thorny issues arise, which are governed by a number of sources, which may include the provisions of their employment contract; common law and equitable principles; as well as any rules, guidelines and policies that may have been adopted by the particular profession's governing body[ii] in relation to such matters (where the profession is self-governing).

Such professionals should also note that there are common law and equitable principles, which may serve to (or at least seek to) restrict an employee from competing "unfairly" with their former employer following the termination of the employment relationship. Although British Columbia courts have generally held that there is no general restriction on former employees competing with their former employer and enticing the employer's clients/patients after termination, such conduct of the professional must not be considered to be "unfair".

For example, courts have held that acts such as the copying of client/patient lists while still employed have been found to breach the general "duty of good faith" owed by an employee to their employer and doing so will likely constitute unfair competition. In addition, senior employees in a managerial-type role within the organization, or an individual deemed to be in a fiduciary relationship[iii] with the employer, will be subject to a higher standard of conduct and correspondingly stricter duties than regular employees due to such status.

Beyond the misuse of confidential information or trade secrets of an employer, departing professionals (other than fiduciaries) are generally considered free to do the following:

(a) seek employment or pursue a competitive opportunity elsewhere, including with a competitor;

(b) take to this new position the skills and general knowledge acquired in the course of his / her employment with the former employer;

(c) solicit those clients/patients who the employee can freely recall from memory (without reliance on the employer's materials, client/patient lists etc.); and

(d) recruit or solicit other employees / professional staff of the former employer.

It should be mentioned that some employers may seek to enforce restrictive covenants that may form part of an employee's employment contract[iv] which seeks to restrict or limit a departing employee's ability to compete with their former employer. However, the general rule is that restrictive covenants in the employment context are generally considered as being contrary to public policy, as a restraint of trade. Accordingly, such provisions have frequently been held by the courts to be not legally enforceable, unless the restrictive covenant is clearly worded, not overly broad in terms of geographical area and/or duration of the purported restriction and generally considered reasonably necessary to protect the employer's proprietary interests. It is generally insufficient for an employer to point to a concern of maintaining competitive advantage to equate to "proprietary interest".

Summary

This area of the law is constantly evolving and is reasonably complex. Professionals such as kinesiologists planning on competing with their former employers upon termination of their employment relationship ought to both use their common sense and if in doubt, consult a lawyer with experience in this area before actively undertaking steps compete with their employer following the termination of their employment.

It should also be noted that in some circumstances unwarranted or unlawful interference by the former employee with the contractual relationships between the employer and its clients/patients can potentially constitute tortuous or unlawful conduct, that can be actionable against both the former employee and his new employer in damages or other legal remedies.

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[i] There are a number of key factors that are generally used to determine whether a professional is an "employee" or an "independent contractor". There is a large body law that has developed in this area when considering whether the associate or professional employee is indeed an employee or an independent contractor. Unfortunately, both of these important issues are beyond the narrow scope of this discussion.

[ii] see e.g.: Rule 3.7-1 and Rules 3.7-8 and 3.7-9 of the *Code of Professional Conduct for British Columbia* (for lawyers)

[iii] The unique legal implications of a "fiduciary" are beyond the scope of this discussion, but the law will generally impose more stringent obligations upon a party that is deemed to be a "fiduciary".

[iv] A discussion of the enforceability of such restrictive covenants (seeking to potentially limit of restrict the departing employees ability to compete) through non-compete or non-solicitation clauses, is beyond the scope of this discussion.