

Practical Reminder: If You Want to Be Able to Toll Your Restrictive Covenants, It's Best to Say So

September 12, 2011 by [Zachary C. Jackson](#)

Restrictive covenant agreements often contain “tolling” provisions which extend the duration of the covenants by the time of any violation. Sometimes, employers do not include tolling provisions in their restrictive covenant agreements, but nevertheless subsequently request that a court use its discretion to extend the duration of those covenants by the time of a violation anyways. A recent opinion from the United States Court of Appeals for the First Circuit highlights the danger in not including a tolling provision in a restrictive covenant agreement.

In [EMC Corporation v. Arturi](#), ___ F.3d ___ (1st Cir. Aug. 26, 2011), EMC requested a preliminary injunction prohibiting its former employee from using its confidential information, from competing with EMC, and from soliciting EMC customers. The trial court issued a preliminary injunction prohibiting the disclosure of confidential information. However, the trial court refused to issue an injunction prohibiting the former employee from competing or soliciting EMC’s customers because the one-year time periods in those restrictive covenants had already elapsed and there was no tolling provision to extend them. On appeal, the First Circuit affirmed the trial court’s refusal to extend the non-compete and non-solicit provisions absent a tolling provision. The court explained that under the governing Massachusetts law, “when the period of restraint has expired, even when the delay was substantially caused by the time consumed in legal appeals, specific relief is inappropriate and the injured party is left to his damages remedy.” The First Circuit also specifically pointed out that “EMC could have contracted...for tolling the term of the restriction during litigation, or for a period of restriction to commence upon preliminary finding of breach. But it did not.”

Thus, EMC serves as a cautionary reminder to employers to include tolling provisions in their restrictive covenant agreements if they want to increase the likelihood that a court will subsequently extend the duration of those restrictive covenants by the period of any violation.