

Post Termination Restrictive Covenants

Overview

Post termination restrictive covenants are contractual clauses which may be contained within a contract of employment. Restrictive covenants often restrict your right to conduct activities in competition with your former employer after the employment relationship has ended. Such clauses may also be contained in other contractual documents, such as a shareholders agreement or collateral contracts.

Post termination restrictive covenants are particularly important in the contracts of employment of senior employees, who will be in possession of confidential information, have good relationships with key customers and will have influence over other members of staff. As a senior employee, you would potentially be able to use that knowledge and customer loyalty for the benefit of a competing employer.

It is, therefore, important that you are aware of the effect of any post termination restrictions affecting your employment. Advice should be sought either when negotiating a new contract, when you are thinking of moving on, or upon the termination of your employment.



Legitimate business interests

Generally, clauses contained within a contract of employment which attempt to restrict your right to compete are unenforceable because they are viewed as unlawful restraints of trade.

An employer may, however, enforce a post termination restriction which is drafted in a manner that is designed to go no further than reasonably necessary to protect the employer's legitimate business interests.

Legitimate business interests which an employer is entitled to protect by way of post termination restrictions include:

- The employer's trade secrets or confidential information;
- An employer's connections with clients; and
- The stability of the employer's workforce.

Types of post termination restrictions

There are generally five types of post termination restrictions which an employer may include in a contract of employment to seek to protect its legitimate business interests:

Confidentiality Clause - A confidentiality clause imposes a duty to keep secret the employer's trade secrets or confidential information. Trade secrets or confidential information could include, for instance, know how, pricing lists or customer lists. Remember that even without an express contractual confidentiality clause, you will still owe an implied duty of confidentiality to your former employer.

Non-Solicitation Clause - A non-solicitation of customers clause imposes a duty not to approach your ex employer's customers or prospective customers with a view to doing business with them.

Non-Dealing Clause - A non-dealing clause also aims to prevent you from doing business with your ex employer's customers or potential customers. However, a non-dealing clause is distinct from a non-solicitation clause, in that it aims to prevent you from dealing with a customer or client who may have come to you for your services or expertise even where you have not encouraged such an approach.

Non-Compete Clause - A non-competee clause aims to prevent you from working for a competitor in a competing capacity, or seeking to set up a competing business.

Non-Poaching Clause - A non-poaching clause aims to prevent you from trying to take your ex-employer's staff with you to your new employment or business.

Is the restrictive covenant enforceable?

In assessing whether a clause is enforceable, the Court will consider the following:

- Is the restriction reasonably limited in time?
- Is the clause reasonably limited in geography?
- Does the clause go further than is necessary to protect a legitimate business interest, i.e. trade secrets, customer relationships or protecting the workforce?

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Recent decisions

Whilst Courts have generally in the past been reluctant to enforce onerous restrictive covenants against an employee, on the basis that the employee has a right to move to another employer after their employment has ended, in a series of high profile cases during recent years, the Courts have upheld the right of employers to enforce non-compete restrictions upon senior employees for periods of up to 12 months. These decisions were based on three factors.

- That confidentiality and non-solicitation clauses did not adequately protect the employer
- That the senior status of the employees meant that, in competing, they posed more of a risk to the business and;
- That the restrictive covenants were not widely drafted.

These decisions have made it more likely that an employer will be able to enforce more onerous restrictive covenants against senior or key employees.

The blue pencil test

Even if a Court assesses a post termination restriction as too wide to be enforceable, the Court can, in certain circumstances, sever the offending parts of the clause and still allow the employer to rely on the remaining reasonable aspects of the post termination restriction. This is commonly referred to as 'blue pencilling'. However whilst the Court may sever the offending parts of a restriction which are too wide, the Court will not rewrite the clause to make it enforceable.

Enforcement action

If you breach a restrictive covenant, your employer has a number of options available to it which could have far reaching consequences for you.

An employer can obtain an injunction to prevent you from breaching the restrictive covenant. An employer could also obtain a springboard injunction which prevents serious economic loss to a previous employer caused by former staff members taking an unfair advantage of any serious breaches of their contract of employment. An example is an injunction preventing an employee from using confidential information which the employee has obtained whilst in employment for the benefit of a competitor.

In the event that your employer obtains an injunction, you may not only be prevented from working for the new employer, but would also be ordered by the Court to pay the legal costs of your employer, which could be considerable, alongside your own legal fees.

If your employer suffers financial losses due to your breach of a restrictive covenant, then your employer would also be entitled to sue you for damages to cover the losses they have sustained.

In the event that your employer is able to demonstrate that you have joined a competitor in breach of a non-compete clause and used its confidential information for the benefit of your new employer, then your employer may be able to seek an order for you to account for the profits made by your new employer.

An employer may also obtain an order for you to hand back (or 'deliver up') documents, such as pricing or customer lists, which may be in your possession and could be used for the benefit of a competitor.

Garden leave

As well as restrictive covenants, your employer could also include a provision in your contract of employment entitling it to place you on garden leave prior to the termination of your employment as another way of protecting its confidential information and customer relations. If you are placed on garden leave, you should receive pay and benefits and remain an employee, but you will usually be prevented from attending work or carrying out normal day to day duties, including accessing the company's systems, information or having contact with clients, for a specified period of time until the termination of your employment. During this period, you will be obliged to continue to abide by your contractual obligations and you will continue to owe your employer a duty of trust and confidence. It may be that the period of garden leave is taken into account in deciding what period of post termination restriction is enforceable.

Conclusion

Restrictive covenants are a complex and evolving area of employment law. Given the harsh and very expensive consequences of breaching a valid restrictive covenant, it is vital to get specialist advice on your post termination restrictions. Each restrictive covenant is different and whether or not the clause is enforceable will depend on your particular circumstances and the way in which the clause is drafted.

Please feel free to discuss your own position and concerns. Contact your nearest office on:

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