

Law Watch



Restrictive Covenants

Restrictive covenants are designed to protect an employer's business in respect of the specialist knowledge held by individual employees.

Their content and individual terms vary but they appear for example in employment contracts, partnership agreements, shareholders' agreements and directors' contracts. They can cover the

prevention of an employee from acting in competition with his previous employer, the prevention of solicitation of other employees from the business, or the prevention of contact with customers of the previous business, amongst other aspects.

Restrictive covenants are contained in a variety of employment contracts as a matter of course and are often standard terms. It is likely however that during the recession and in the climate of redundancies and job losses that these will become more prevalent and of more importance, both to employers and to employees.

However, businesses must take care when drafting restrictive covenants. The general rule is that in fact, they are unenforceable. However, they can be upheld if they are reasonable with reference to the interests of the parties concerned and to the public. This generally involves consideration of the term and whether the employer can show that it exists to protect legitimate business interests and goes no further than reasonably necessary to achieve that aim. In considering this, a Court will consider aspects such as the nature of the business, the previous role of the employee, the length of the restrictive term, its geographic reach and ultimately, its effect. Ultimately, if such a term is found to be unreasonable, it will be struck out as unenforceable. Equally, if the employee has been wrongfully dismissed, then the contract of employment will cease to be effective, which will include the restrictive covenant terms which apply after employment.

If however, a restrictive covenant is valid, a breach may be restrained by an injunction. Such action may be necessary to protect the interests of a business as a breach by an employee of his restrictive covenants could have potentially catastrophic consequences. Conversely, if an ex-employee sets up a new business which may risk breaching his restrictive covenants, any threat of an injunction by his previous employer may risk closing down that business. Such an action is costly for all involved.

It is therefore advisable for employers to ensure that any restrictive covenants drafted can be enforceable so that they may be relied upon if necessary. This means incorporating a 'reasonable' covenant which carries less risk of being struck out by a court than an onerous provision. Equally, if employees wish to remain working in a similar field upon leaving employment, they must be clear upon the meanings of the terms and their obligations.

We provide advice both from an employment law and from a litigation perspective. If any such issues arise, it is important for both parties to seek early and swift advice to resolve the matter quickly and to prevent a high level of costs from being incurred.

If you would like advice on restrictive covenants, or want to know more about whether you could take any action or prevent such action being taken against you, please contact Catherine Preece on 01332 225225 or by email: catherine.preece@smithpartnership.co.uk.



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