

Restrictive Covenants in Employment Contracts

What?

Employment contracts may contain covenants to restrict the activities of employees for a period of time after their employment ends.

A restrictive covenant must protect a **legitimate business interest**; otherwise it may constitute an unlawful restraint of trade. An employer may legitimately protect the following business interests:

- Trade connections (*professional relationships between, for example, employees and customers*)
- Trade secrets and confidential information (*for example, the secret recipe for a food product produced by the business*)

A legitimate business interest may be protected by a restrictive covenant, but only to the extent that such protection is **necessary**. To be enforceable against a former employee, a restrictive covenant must apply for a **limited time period** and in respect of a **limited geographical area** (where applicable).

CAREFUL DRAFTING IS KEY TO ENSURING THAT RESTRICTIVE COVENANTS ARE ENFORCEABLE. ENSURE THAT RESTRICTIVE COVENANTS:

- REFLECT THE EMPLOYEE'S ROLE
- REFLECT THE CIRCUMSTANCES OF THE BUSINESS
- ONLY GO AS FAR AS IS NECESSARY

REVIEW RESTRICTIVE COVENANTS IN EMPLOYMENT CONTRACTS REGULARLY – SO THAT THEY CAN BE AMENDED TO CONTINUE TO REFLECT THE ABOVE.

Types?

Non-solicitation:

A restrictive covenant can be used to prevent a former employee soliciting customers away from a business. – *the enforceability of these restrictive covenants will be based on factors such as: the market in which the business operates and the former employee's seniority within the business.*

A non-solicitation restrictive covenant is likely to be enforceable where it prevents a former employee from soliciting current employees away from a business.

It will be more difficult to enforce a non-solicitation clause which seeks to

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The information in this newsletter is not meant as a substitute for advice on particular issues and is written in general terms. You should seek specific advice before taking any action based on the information in this newsletter.

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prevent a former employee from soliciting away potential customers (*specifically identifying the 'potential customers' may increase the likelihood of the covenant being enforceable*).

A restrictive covenant preventing former employees from soliciting away current employees is likely to be enforceable – *factors such as how long the former employee's influence will last and over which current employees the influence will extend, should be considered when drafting a restrictive covenant for this purpose.*

Non-dealing:

Non-solicitation clauses help protect against a former employee actively enticing customers or employees away. A non-dealing clause restricts the provision of services by a former employee in circumstances where he takes no active steps to deal with clients or employees of his former employers (*for example, where the clients of a business approach the former employee themselves*)

The enforceability of a non-dealing clause will depend on the business interest it is in place to protect; for example, is there a substantial personal connection between a former employee and the business' clients, which legitimately needs restricting?

Non-competition:

Non-competition clauses prevent former employees from being involved in a competing business. Non-competition clauses may not be necessary if, for example, an employee has signed a confidentiality agreement; as a result, non-competition clauses can be difficult to enforce.