

Post-Employment Restrictive Covenants

Any express contractual terms that restrict a former employee's activities after termination are called **restrictive covenants** and are subject to the restraint of trade doctrine.

Restraint of trade doctrine: Any contractual terms that seek to restrict an individual's freedom to earn a living and use their skill and knowledge is, in principal, **void and unenforceable.**

Such terms however, may be enforced if it is both reasonable in the interests of the parties, and reasonable in the interests of the public.

To be reasonable in the interests of the parties, the employer must have a legitimate business interest to protect and the restraint must go no wider than is reasonably necessary to protect that interest, for example, the duration, geographical location etc. If these tests are satisfied, the courts will then consider the restraint from the employee's perspective to assess whether it is fair in the light of the general principle of restraint of trade. The severity of the restraint will be balanced against the employer's need for protection and is judged on the facts of each case.

The type of interests which an employer can seek to protect are:

- a) Trade secrets or other confidential information
- b) Customer/client connection (i.e. goodwill); and
- c) A stable workforce.

There is a three stage process of assessing the reasonableness of such restrictive covenants, which has been re-iterated by the High Court (*TFS Derivatives Ltd v Morgan [2004] EWHC 3181 (QB)*).

With the rise of social media and internet use, commercial information can be found more easily now than ever before. This means that sometimes the business information that a restrictive covenant is in place to protect is so accessible, that there is a risk of the courts finding that there is no longer a legitimate business interest to protect. This of course is not always the case.

To have a better chance of being enforced, the covenants should be carefully drafted to suit the specific circumstances of the employer and each particular employee. The employer should not include every conceivable type of covenant to try and ensure blanket protection. If this is done, a court may conclude that the employer has not given careful consideration to what protection is really required. An employer should avoid drafting "multiple choice" restrictions, the risk in this approach is that the clause may be void for uncertainty.

The reasonableness of covenants are assessed in the light of the facts and circumstances as they were at the time when the contract was entered into, although the parties' reasonable expectations are also to be taken into account. For this reason, it is particularly important to keep employee's restrictive covenants under review as their careers change, because what was appropriate at the beginning of an individual's employment may not still be so when it comes to an end. When the employer seeks to enforce a covenant by way of an injunction, the courts will also assess whether the covenant is reasonable at that time.

If you are an employer and need help drafting or enforcing a restrictive covenant, please contact a member of our employment team. If you are an employee, needing to defend the same please contact a member of our team on **0207 112 8841**.

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