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EMPLOYMENT LAW DEPARTMENT

Protecting Business Interests When Employees Leave

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What can businesses do to protect themselves if employees decide to leave and go to work for a competitor?

One of the most serious challenges which a business can face is the damage caused when former employees use confidential information about the business, its clients and other employees and potential future business strategies.

To limit this risk, properly written “restrictive covenants” can be included in employment contracts to try to limit what employees can do after their employment ends.

There are different kinds of restrictive covenants: non-compete, non-solicitation (of clients and suppliers), non-poaching of staff and non-disclosure of confidential information. The different covenants have different levels of enforceability and employers will need to think carefully about what kind(s) of covenant(s) they really need in order to protect their business because the enforceability of such covenants can be challenged.

The enforceability of a restrictive covenant will usually depend on whether it is “reasonable” and is written as narrowly as possible in relation to a number of factors, including:

- Time period or length;
- Geographic scope;
- Subject matter or scope (which means what you are trying to protect);
- The nature of your business;
- The nature of the employee’s role; and
- Whether restrictions are usual in the sector

Before considering including a restrictive covenant in an employee’s contract, It’s important to make sure that the covenant is appropriate for the specific employee and their role, as standard form covenants which are used for all of the employees in the business are less likely to be enforceable. It is also important to get the covenant right, as Courts will not re-write it if the employer has made it too broad. If the covenant is too broad, a Court is likely to decide it is unenforceable rather than correct any mistakes or poor drafting choices that were made by the employer in the contract.

Enforcing a restrictive covenant can be time consuming and expensive so it is important that employees understand what is expected of them once their job ends. If a properly written covenant has been included in their contract, they can be “gently” reminded (if necessary) what is expected of them in the future and the employer thereby avoids unnecessary cost and risk.

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