

EMPLOYMENT LAW DEPARTMENT

Protecting Business Interests When Employees Leave

Dean Wilson LLP Solicitors

Ridgeland House, 165 Dyke Road, Brighton, BN3 1TL **01273 249 200**

What can an employer do to protect itself if an employee decides 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 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: provisions which seek to restrict former employees from competing with the employer for a period of time and within a certain geographical region, non-solicitation of clients and suppliers, non-poaching of employees 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 starting point with post termination restrictive covenants is that they are not enforceable as they are in restraint of trade. However, the courts will enforce a restriction if it is satisfied that the restriction is necessary to protect the former employer’s legitimate business interests and is reasonable in terms of extent and duration.

The enforceability of a restrictive covenant will therefore usually depend on whether it is “reasonable”. Factors which influence reasonability include:

- Time period or length of the restriction, with generally the shorter the period of restraint the more likely the restriction will be enforced;
- Geographic extent – an employer will only ever be able to restrain a former employee’s activities within a geographic area where they were previously active;
- What the legitimate business interest is that the employer is seeking to protect. This will usually be customer connections and the like;
- 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 unlikely 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 as the usual remedy is to apply to the High Court for an injunction to prevent ongoing breaches and an order for damages. 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 it may be appropriate to draw to the attention of a departing employee that they are subject to restrictions and will be expected to abide by them.

If an employer is considering taking action to enforce a restriction which appears to be being breached swift action is of the essence and therefore legal advice should be sought without delay.

Clare Waller

 01273 249277

 crw@deanwilson.co.uk