

Non-competition clauses for employees

Introduction

An employer can try to protect confidential information, business connections and its workforce by imposing restrictions on ex-employees carrying out competitive activities. However, the courts will only enforce restrictions where there is a legitimate business interest to protect and the restrictions are no more than necessary to protect that interest. The courts will not enforce covenants which stifle competition or prevent an ex-employee pursuing their career in a reasonable manner.

Non-competition

The most onerous restriction is a non-compete covenant. This tries to prevent the ex-employee competing with the business for a specific period and within a specific geographical area. Because such a restriction could prevent a person from working, it is very difficult to enforce, though the courts are willing to enforce sensible non-compete covenants in respect of very senior employees: for example, a 12-month, UK-wide non-compete clause against a senior director in the insurance industry.

Non-solicitation

Employers who wish to protect their client/customer/supplier connections must rely on non-solicitation or non-dealing covenants. The courts will enforce such covenants if they are limited to those clients, etc, with whom the employee personally dealt in the last few months of their employment. The covenants should last no longer than necessary to allow a replacement to make contact with the clients, etc, and preserve the relationship.

Non-poaching of employees

Non-poaching covenants are intended to prevent the ex-employee from taking some of their colleagues with them to a competitor. The courts' attitude is to balance the right of employees to move jobs against the employer's interest in maintaining a stable workforce. These covenants are normally effective only if there is a clear link between the ex-employee and the other

employees *and* the covenants are limited in time *and* the "protected" employees are those who influence where business goes or possess confidential information.

Confidentiality obligations

Confidentiality covenants are aimed at preventing the ex-employee from disclosing or using their employer's confidential information after their employment has ended. There is a general duty of confidentiality, even without specific contractual obligations, but specific obligations (specifying what is confidential information) can also be used. These covenants are not usually time-limited, but apply for as long as the information remains confidential.

Making the restrictions effective

While many contracts include some or all of these restrictions, this does not mean that they are enforceable. Certainly, if the covenants are drafted without any consideration of the role of the particular individual employee, they will be less likely to be enforceable. Instead, account should be taken of what contact the employee will actually have with clients, suppliers and other employees and what influence over them they might have, and assess the nature and level of confidential information they will handle, etc. The clauses need to be specific to the individual employee and business, and contain no more restrictions than are reasonable to protect the employer's legitimate business interests.

Conclusion

Well-drafted restrictions, specific about what is to be protected and lasting no longer than is reasonable can protect a business against improper and damaging competitive activities, but such restrictions cannot be used to prevent fair competition. When employing or promoting someone, consider whether post-employment restrictions might be appropriate and how far they should extend, so they can be included in (or added to) their employment contract.

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