

Employment Law

Post Termination Employment Restrictions



Author



Joanna Alexiou

Senior Associate - Head of Employment & HR Team

E: joanna.alexiou@mackrell.com

A post termination restriction, as the name suggests, is a clause which is part of a contract of employment that restricts certain activities after an individual has left your employment.

Although mainly found in contracts of employment, restrictive covenants can also be found in Shareholders Agreements and contracts.

An important function of a restrictive covenant is to ensure that employees who have been privy to confidential or commercially sensitive information, are not able to use it for competitive advantage, which might benefit their new employer. This may be a particular risk if they join a rival company.

What constitutes a legitimate restrictive covenant?

Many restrictive covenants are unenforceable because they are drafted in such a way that they are either too generalised, or else impose a restriction which would amount to an unlawful restraint of trade. An employer is, however, entitled to impose a legitimate restrictive covenant in order to protect:

- Solicitation or contact with clients.
- Confidential information and trade secrets.
- The stability of the rest of the workforce.

Main types of restrictive covenants

There are five main post termination restrictions which are:

- **Confidentiality Clauses:** Which covers an individual's duty to maintain the secrecy of matters, including trade secrets or other commercially sensitive information, such as pricing structures or client contact details.
- **Non-Compete Clauses:** Which seek to restrict an employee from joining a competing firm or setting up their own company in direct competition of yours.
- **Non-Poaching Clauses:** Which seek to restrict an individual from taking members of your workforce with them to their new employer.
- **Non-Solicitation Clauses:** Which aim to prevent former employees from enticing your clients away from your business
- **Non-Dealing Clauses:** These are similar to non-solicitation clauses, but go a step further in aiming to prevent an ex-employee from doing business with your clients even if they have not solicited an approach.

How do the Courts view post termination restrictions?

Historically, enforcing post termination restrictions has not been easy because of an individual's right to seek alternative work, coupled with their new employer's right to trade. However, the Courts have, in recent years, been more understanding of the former employer's rights to protect their business interests and the stability of their company.

In particular, cases which have involved senior employees have seen the courts approve non-competes restrictions for up to 12 months.

Blue pencilling

If the Court feels that a post termination restriction is as a whole too general, it can decide to ignore parts of the clause whilst acknowledging other specific parts of the clause which it deems to be allowable – such an action is known as 'blue-pencilling.'

What action can I take if an employee breaches a restrictive covenant?

If you feel that a former employee has breached the terms of a post termination restrictive covenant, there are a number of possible options open to you:

- Send a 'cease and desist' letter informing the former employee that you are aware of the breach and requesting an undertaking that they will refrain from breaching any covenants for the remainder of the restricted period

- **Obtain an injunction:** To prevent a former employee from breaching the terms of the covenant
- **Sue for compensation:** If your business has suffered financially as a result of a former employee breaching the terms of the restrictive covenant
- **Apply for an order to account for profits:** Where a former employee has breached a non-compete clause, which their new employer has used to obtain a material profit
- **Obtain an order to 'deliver up' documents:** If you believe that a former employee has in their possession sensitive company information, such as price lists or documents with client information.

“Post termination restrictions need to be carefully drafted and tailored to the individual circumstances of each company in order to ensure that there is a legally enforceable contract.”

At Mackrell our specialist Employment Law Team is able to provide expert advice and practical support in drafting restrictive clauses for inclusion in a contract of employment.

We take a holistic approach to restrictive covenants, often going beyond the drafting of agreements to include review and advice on existing contracts and representation in proceedings where matters become contentious. **For more information please contact us.**

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