Brachers
With you all the way

Restrictions on competition by employees

Introduction

As specialist employment lawyers, we are increasingly seeing and hearing incorrect, inaccurate or incomplete views, opinions or understanding of the legal rules on preventing competition by former employees.

We have also seen an increase in poorly drafted, inadequate, contractual wording rendering the protection that has been sought useless.

We have produced this Myth & Jargon Buster to address some of the key misunderstandings and key failures and flaws that we have seen.

The hierarchy

It is useful to understand the hierarchy of restriction types. The more onerous the harder it will be to persuade the courts to uphold the restrictions as being a reasonable restraint on trade.

The most onerous restriction type is a 'non-compete' followed by a 'non-deal' restriction (for customers or suppliers) with a 'non-solicitation' restriction (for customers or suppliers) being the least onerous.

As a general rule a non-compete restriction will have the most severe impact on the employee and on the wider public interest in free trade. It generally prevents an employee working for a period of time in a competitive business or role.

Non-dealing normally permit the employee to work for a competitor but with restriction on their dealings with their former employers customers and so are less onerous.

Non-solicit allow them to work and to deal with, but not to actively seek business from, those former customers and so are less onerous.

Myths

Restrictive Covenants are not enforceable, they are illegal, you cannot stop an ex-employee from working

Wrong

Restrictive Covenants are potentially lawful and will be upheld and enforced by the courts if they protect a legitimate interest of the employer and go no further than is reasonable to do so.

Employers never try to enforce Restrictive Covenants

Wrong

It is true to say that it is rare that a dispute over restrictive covenants ends up in court but this is often because the clauses act to prevent the competition they were intended to in the first place or because a compromise deal is reached from a position of strength.

So we just need to put these in all of our contracts?

Wrong

In order to maximise the potential for both legal enforceability and commercial effectiveness (there is no point in having a legally enforceable but commercially useless restriction) you need to tailor and design your restrictions for each job role.

Some roles pose greater threat, in competition terms, than others, some are more senior than others, some threaten customer connections and goodwill, some supplier connections, some confidential information etc. Having a one size fits all approach is unlikely to be enforceable or effective.

I can borrow some of these clauses from another contract/template

Yes and No

As note above simply taking clauses from a template or another contract may not provide you with the appropriate, enforceable and effective protection for the threats your business has and is entitled to reasonably protect itself against.

In addition we increasingly see cases of poor transposition of clauses taken from other documents where wording has been missed or definitions that are crucial to the clauses enforceability or effectiveness are not brought with the clauses.

If we get it slightly wrong the courts can still interpret it to what we meant

Not necessarily.

Whilst in normal contractual interpretation the courts will, in the presence of less than clear wording, seek to give effect to the intention of the parties from the perspective of an objective bystander in the arena of restrictions they tend to take a much stricter line. They will very rarely seek to interpret a restriction that is not, on its wording clear and reasonable, to be something that is reasonable and clear.

This normally hurts the employer as the party that drafted the clauses and is seeking to rely on them.

The courts will reduce the restrictions to what is reasonable if they go too far

No

The general rule is that you seek too much, i.e. more than is reasonable, protection you get nothing. For example if a non compete clause was stated to last for 12 months post termination of employment and the courts took the view that this was unreasonably long but say 6 months would have been reasonable the employer gets nothing. The court will not replace 12 months with 6 months where you have overreached.

As long we get it right when they join we are then OK going forward

Not necessarily.

The reasonableness of a restriction is judged in law at the time it was entered into. This is commonly at the start of employment. We often see cases where the employee has been promoted or otherwise changed roles or where the business has evolved or changed materially such that its commercial threats are materially different. In such cases the original protection is often unenforceable or more commonly commercially ineffective.

It is therefore important to review the restrictions position on a regular basis from a commercial perspective and to consider this issue at any moments of career change for your employees.

Actions

Review

The first step in any assessment of the commercial protection that your business currently has is to review the position considering, amongst other things:

- What contractual protections do you currently have in your employee's contracts
- What are your key commercial competition threats and risks
- What other technical and operational safeguards do you have in place.

Businesses can often address competitive threats by operational and technical measures such as securing key information and limiting its availability and its accessibility thus reducing the harm ex-employees can do without resorting to legal means.

Analyse & Prepare

Develop your strategy, that works for your business. This may be based on purely operational or technical measures, it may have to be based on purely legal measures or a mixture of the both with a suite of tailored restrictions for key threat roles and positions.

Implement

Rolling out new contractual terms is not a simple process. It requires a clear commitment and plan to do so either through a mass change process or through a moment of change process. It can take time to implement but it is often time well spent.

Assisting you

For bespoke advice and assistance please contact us. We would be happy to meet with you to discuss you aims and ambitions and how we can assist you in achieving them.

Contact our specialist legal team

Catherine Daw
Head of Employment
01622 655281
catherinedaw@brachers.co.uk

Antonio Fletcher
Partner
01622 776516
antoniofletcher@brachers.co.uk

Jargon Buster

Restrictive Covenant / Post Termination Restriction
Legal terminology for a contractual commitment by an employee not to do certain acts in competition with his current employer normally after their employment ends. It can apply to all forms of contractual commitment that restrain the employee from competing.

Restraint of Trade
Legal terminology for a legal obligation that impacts on the general principle of free, unrestrained trade. A restrictive covenant is normally a form of restraint of trade.

Non-Solicit / Non-Solicitation
A term commonly used by lawyers to refer to a type of restrictive covenant that seeks to prevent an ex-employee from actively seeking work/business/custom from the customers of his former employer or prospective customers.

Non-Deal / Non-Dealing
A term commonly used by lawyers to refer to a type of restrictive covenant that seeks to prevent an ex-employee from dealing with or doing work/business with the customers of his former employer or prospective customers.

Non-Compete
A term commonly used by lawyers to refer to a type of restrictive covenant that seeks to prevent an ex-employee working for or being involved in a competing business.

Non-Poaching
A term commonly used by lawyers to refer to a type of restrictive covenant that seeks to prevent an ex-employee from actively seeking to entice away key employees of his former employer or prospective customers.

Non-Interference
A term commonly used by lawyers to refer to a type of restrictive covenant that seeks to prevent an ex-employee from actively seeking to interfere with/interrupt the relationships of his former employer with their key suppliers.

Injunction
A discretionary form of relief that the court is able to grant which, in the restraint of trade field, normally takes the form of an order no to do something i.e. breach the restrictive covenants, or face contempt of court proceedings.

Damages
The normal remedy for a breach of contract, including a breach of contractual restrictive covenants.

Void / Unenforceable
The legal terminology used to say that a restrictive covenant is legally ineffective and cannot be enforced.

Head office
Somerfield House
59 London Road
Maidstone, Kent
ME16 8JH

Call us on 01622 690691
Visit us at brachers.co.uk

@brachersllp

Brachers LLP

Maidstone | London | Discovery Park