

## How effective are your Post Employment Restraints

Much damage can be done to a business where an executive or senior manager resigns taking valuable customer information and confidential information. Restraint of trade clauses, or post-employment restraints, play a crucial role in protecting the legitimate interests of the employer.

In order to protect business interest's employment contracts should contain protections which operate after the employment ends.

### The purpose

Restraints of trade are included in employment contracts to protect an employer's trade secrets, confidential information, customer connections and staff connections by restricting an employee's activities after they have left employment.

Restraint of trade clauses will be enforceable to the extent that the restraint is **reasonably necessary** to protect the legitimate business interests of the employer. Whether a clause is reasonably necessary will depend on the particular clause and the facts of the case.

At common law, post-employment restraints of trade are on the face of it invalid as infringing public policy. A restraint clause in an employment contract will *only* be enforceable if the restrictions imposed are no more than necessary for the protection of the employer's legitimate business interests.

Legitimate interests that can be protected include confidential information, customers and staff. It is typical for a restraint clause to prevent an employee from:

- Soliciting the employer's clients;
- Setting up a competing business with the employer's business or working in a competitive business; and
- Poaching employees of the business.

### Reasonableness

When determining whether restraint clauses are reasonable, Courts will consider the following:

- The negotiation *process*, and in particular comments made when negotiating restraint clauses.

- The *bargaining position* of the parties. Was there an imbalance in power between the employer and the employee at the time of agreeing to the restraint? Whether the employee had the opportunity to obtain legal advice?
- The *nature* of the employer's business and characteristics of the employee. That is the closer the employee is to the employer's customers, the more likely the restraint will be reasonable.
- Whether any *consideration* was given for the restraint.
- The *duration and geographical area* of the restraint. The longer the time and wider the area, the less likely it will be reasonable. This can often be resolved by cascading clauses relating to time and area.

The reasonableness of the restraint must be decided at the date of entering into the employment contract. For this reason, it is important that the parties to the contract each have an opportunity to negotiate the terms of a restraint. In addition, employees should be encouraged to seek legal advice about the length and the effect of the restraint.

### **The trend of Waterfall or Cascading Clauses**

Restraints are often applied for a specified period, in relation to a particular geographic area.

A common device for reducing the risk of invalidity on the ground of unreasonableness is to include a 'waterfall' clause, which is so-named because it contains a number of varying periods of time and geographical constraints as alternatives.

The advantage to these is that each one is severable by a court without affecting the validity and enforceability of the restraint.

### **How do Courts enforce restraint of trade clauses?**

Restraint of trade clauses are prima facie void and the onus is on the employer to persuade the Court that the clause is reasonable and therefore valid and enforceable. When considering enforceability, the Court will consider two key issues:

- Whether the employer has a legitimate interest to protect.
- Whether the restraint is a reasonable protection of that interest.

### **What are the legal remedies?**

The common remedy sought by employers faced with an employee's breach of a restraint clause is to seek an injunction to restrain an employee or former employee from acting in a way, or continuing to act in a way, that breaches a term of the former employment contract. For example, an injunction may prevent a former employee from working for a competitor for a certain period of time or from using or disclosing information confidential to the former employer and its business.

## **Some Tips for business owners**

Some tips for drafting restraint clauses in employment contracts:

- Make sure the period of restraint is appropriate to the employee's position and access to confidential information;
- Make sure the prohibited activities to be prevented are similar to the employee's current activities; and
- Ensure contracts are reviewed regularly and updated to reflect changes in the employees role.

## **Conclusion**

Having an enforceable and valid restraint in employment contracts is crucial if an employer hopes to rely on it to enforce a former employee's post-employment obligations.

This issue needs to be considered by employers when the employment contract is drafted because a court will consider the reasonableness of the restraint as at the time the contract was entered. The Courts will only find that a restraint clause is valid and enforceable where a business can demonstrate that it has a legitimate interest to protect and that the clause is reasonable.

We are able to review, draft and advise on restraint clauses and their enforceability generally. If your business needs assistance please contact us on (03) 9600 0162 or email [info@lordlaw.com.au](mailto:info@lordlaw.com.au).