

## RESTRAINT OF TRADE IN EMPLOYMENT CONTRACTS

1. Regardless of the size of the business, If you risk losing business when key employees leave you should consider well drafted restraint of trade covenants to protect your business assets such as goodwill, confidential information, customer connections and staff.
2. During and after employment employees have an obligation not to disclose confidential information of their employer, whether or not there is an express provision against disclosure of its confidential information in the employee's employment contract
3. For employment contracts, many aspects need careful scrutiny because in many cases these "restraint of trade clauses" are illegal and invalid
4. Courts are particularly strict on agreements that attempt to limit a person's right to be employed and earn a living.

### **General Information about Restraints**

There are two distinct issues in being able to use restraint of trade clauses:

- To what extent can employers prevent former employees from using information that the employer regards as confidential?
- Secondly, to what extent can an employer restrain an employee from competing once the employee leaves

In general, at common law all restraints of trade are contrary to public policy and will therefore be void unless the restraint can be justified.

The restraint will only be enforceable if it is reasonable in regard to the interests of the parties and the public.

The court will consider a number of factors in determining whether a particular restraint is reasonable in the circumstances.

- (i) Geographical location;
- (ii) Time limit; and
- (iii) Definition of Restricted activity

### **(i) The geographical area of the restraint**

The geographical extent of the restraint must bear some reasonable relationship to the geographical area in which the business is conducted.

If a company operates in only Victoria they could not lawfully restrain someone from seeking employment with a company anywhere in Australia which produces

a similar product, however they may be able to do restrain them from employment within Victoria.

**(ii) The time period of the restraint**

For a restraint to be valid the time period must bear some relationship to the period during which it would be reasonable to expect the goodwill of the business would attach to the person on whom the restraint was imposed.

The court will have regard to the expertise of the employee their knowledge of confidential information of the business and the type of industry and the speed with which product and market development is occurring in that industry.

If a change in technology of the industry is rapid a restraint of 6 or twelve months may be considered reasonable, however 5 years would be excessive.

**(iii) The scope of the activities that are restrained**

The activities restrained must bear a reasonable relationship to the nature of the activity being conducted either by the Business or the individual being the subject of the restraint.

The court will look at what the employee did within the business and whether the clause is going beyond the scope of the activities which they conducted.

**WHAT TO DO IF YOU ARE AN EMPLOYER:**

Employment contracts should include express contractual provisions prohibiting disclosure of confidential information and preventing employees from working with competitors;

Restraint clauses must be properly drafted and tailored to accurately reflect the employer's business activities. Cascade or step-up clauses which provided for progressively narrower restraint areas and progressively shorter length of time should be used in case a Court needs to create a narrower or shorter valid restraint.

It is not enough to have evidence that the employee possesses specific and identifiable confidential information to ensure that a restraint of trade is upheld. There must be evidence that disclosure of that information to a competitor would damage an employer's interests. You must be able to show that the business has suffered a real and demonstrable commercial loss.

Emphasis on induction and departure as to the Employees continuing obligation in relation to Restraint of Trade and Confidentiality must occur

**For further details please contact Adrian Riccioni on 9739 7377**

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