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Restrictive Covenants

Many employers often approach us for advice in relation to incorporating post termination obligations into an employee's contract of employment. These obligations are more commonly referred to as 'restrictive covenants'. These are clauses in a contract of employment which are designed to protect the employer's business when an employee leaves their employment.

If an employee breaches a restrictive covenant, the employer can seek to enforce the employee's post termination obligations in court by obtaining an injunction. The employer may also be able to obtain damages from the employee.

Broadly speaking, there are four main types of restrictive covenant. These are:-

1. **Non-compete covenants**

These restrictive covenants seek to prevent an employee from directly competing with the employer post employment or working for a competitor.

2. **Non-solicitation covenants**

These restrictive covenants seek to prevent an employee from entering into working relationships with the employer's existing customers.

3. **Non-poaching of employees**

These restrictive covenants seek to prevent an employee from recruiting (poaching) existing employees from the employer.

4. **Non-disclosure of confidential information**

These restrictive covenants seek to prohibit the use of any confidential information acquired by the employee during their employment.

It is important for the employer to realise that a restrictive covenant has to be fair in order for it to be enforceable at court. A restrictive covenant will usually seek to prevent an employee from doing something for a fixed period of time and in a fixed geographical area. If the employer is simply attempting to stop an employee from earning a living in the future, the restrictive covenant will be unenforceable at court.

The employer has to show that they are protecting a legitimate business interest. Therefore, a restrictive covenant which attempts to stop an employee from working in a particular industry for 5 years post employment is unlikely to be enforceable simply because any competitive advantage the employee may have had at the end of his or her employment would certainly not last for 5 years. Therefore, any period must be for a reasonable period of time. The exact amount would depend on the particular circumstances and this would be discussed with the employer. Rarely would a period of more than 12 months be deemed reasonable and the norm is between 6-12 months.

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Similarly, the geographical area in which the restrictions apply must also be reasonable. Therefore, a worldwide restriction (or even a restriction incorporating the whole of the UK) on the employee would probably be unreasonable. Careful consideration must be given to the area in which the employer seeks to restrict his employee from working post employment for it to be enforceable against the employee should it become necessary.

If a court deems the length of time or the geographical area is unreasonable, then the restrictive covenant will be unenforceable against the employee. It is also worth noting that should an employee be successful in making a claim for unfair dismissal against the employer in the Employment Tribunal then any restrictive covenants are unenforceable.

We always advise our employer clients to seek advice from us prior to drafting employment contracts with restrictive covenants. If you have employees who do not have restrictive covenants in their employment contracts, they are free to leave their employment and set up in direct competition with you, employ your employees and deal directly with your customers. If you want to prevent this then contact our employment team for advice and assistance.

In the alternative, you may already have restrictive covenants incorporated into your employment contracts. If you wish us to carry out a free appraisal on your employment contracts then contact our employment department.

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