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Restrictive covenants: HR guide

Description

Introduction

It is important that you have appropriate **restrictive covenants** in your employment contracts so that when staff leave the organisation your business interests are protected.

Types of restrictive covenants

A **restrictive covenant** could prevent the employee for a certain time from going to work for a competitor or setting up in competition. Other **restrictive covenants** might prevent the employee from trying to solicit (poach) clients or staff for a certain period â?? or deal with clients, whether the employee poaches them or not.

The law

The general rule is that a **restrictive covenant** is only enforceable if it goes no further than necessary to protect the legitimate interests of the business. Whether the clause is enforceable will depend on the

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circumstances. Factors which might be relevant could include the type of business involved, the seniority of the individual, their access to clients and confidential information, the geographical area concerned and the length of the restriction.

The important thing to remember is that the employer cannot rely on a **restrictive covenant** if a less onerous one would have adequately protected its business interests. Letâ??s take for example a **restriction** preventing the employee for 6 months from poaching customers who they were involved with in their last year. It may sufficiently protect a company selling widgets if within those 6 months the company has had enough time to secure the client relationships through a new salesperson. In those circumstances, an additional **restriction** prohibiting the employee from joining a competitor is likely to be unenforceable because it would go beyond what was required.

There will be some situations though when a non- competing **restrictive covenant** might be justified â?? say because of the difficulty in policing a non-poaching **restriction**. It may be necessary if the employee is very senior and has had access to highly confidential information. It could be argued that merely being at a competitor would damage their former employer and that the former employerâ??s clients will follow the departing employee to their new company irrespective of other **restrictions**.

As part of the Governmentâ??s Smarter regulation to grow the economy policy paper, the Government plans to limit the length of any non-compete clause to three months. The change would allow employees greater flexibility to join a competitor or set up a rival business after they have left their employer.

Practical tips

- Think carefully about the seniority of the employee involved, what you need to protect, geographical scope and the industry norms.
- Make sure that the duration of the **restrictive covenant** is no longer than necessary because the Courts are not able to substitute the length for a shorter period.

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- Itâ??s often appropriate to reduce the length of the **restriction** by the period of any garden leave as the employee would usually be away from the business during that time.
- Regularly review the appropriateness of the **restrictions** and individual circumstances. An employee may start in a junior role without the need for **restrictions**. Later, however, they could be promoted into a senior role. You couldnâ??t then unilaterally impose restrictions but an employee could, for instance, be required to agree to them, as part of a pay increase or bonus award.
- Define all terms.

When it comes to drafting **restrictive covenants** itâ??s always best to seek legal advice.

This guide is intended for guidance only and should not be relied upon for specific advice.

If your business needs any advice on **restrictive covenants** or other employment law issues please do not hesitate to contact me on 0203 797 1264.

Do check mattgingell.com regularly for updated information.

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