



# Matt Gingell™

Making sense of employment law

## Restrictive covenants: A guide for HR professionals

There are various types of restrictive covenants found in employment contracts. A restriction could prevent the employee for a certain time from going to work for a competitor or setting up in competition. Other restrictions might prevent the employee from trying to solicit (poach) clients or staff for a certain period – or deal with clients, whether the employee poaches them or not. Restrictions are useful in protecting the interests of the business, but there are limitations in what the Courts allow.

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

The important thing to remember is that the employer cannot rely on a restriction if a less onerous one would have adequately protected its business interests. Let's take for example a restriction preventing the employee for 6 months from poaching clients 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 restriction might be justified - say because of the difficulty in policing a non-poaching restriction. It may be necessary if the employer 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 employers' clients will follow the departing employee to their new company irrespective of other restrictions.

### 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 restriction is no longer than necessary because the Courts are not able to substitute the length for a shorter period.
- It'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 couldn'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 your terms.
- When it comes to drafting restrictions it's always best to seek legal advice.

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