

RESTRAINT OF TRADE

Restraint of Trade Clauses in Employment Agreements

A restraint of trade clause in an employment agreement seeks to impose limitations or restrictions on an employee's conduct after termination of employment.

The general rule is that all restraints of trade are contrary to public policy and therefore void. However, there are exceptions and restraints of trade may be justified by the special circumstances of a particular case. The courts' approach is that a restraint is valid only insofar as it is reasonably necessary to protect the employer's trade secrets or the relationship with its customers. Restraints will be unenforceable if they go wider than is necessary to protect these interests. In most instances these clauses are only valid if they are reasonable.

Clauses often provide that an employee will not :

- Approach or solicit any customers of the employer for a specific period, usually months
- Recruit employees of the employer
- Use or disclose confidential information after leaving employment
- Work for a competitor for a specified period of time in a specific location (ie) for 6 months within metropolitan Melbourne

A non-solicitation clause will only be valid in situations where the former employee had direct contact with the employer's clients and was therefore able to develop a business relationship with them.

In determining the validity of non-recruitment clauses, the seniority of the former employee will play a large part. For example, if the person was privy to salary information it would give them a distinct advantage in being able to entice employees away from the employer's business.

The courts will only protect the misuse of information where that information is truly confidential. For example, where employees have deliberately copied business records and then used them to compete against their ex-employer the restraint has been upheld.

To determine what would be a reasonable length of time to restrain an employee from working for a competitor it is relevant to look at the length of time it would take a new employee to become proficient at the job and hence be able to demonstrate to clients that he or she is able to service their requirements.

The onus of establishing that a restraint is reasonable and not contrary to public interest lies on the person seeking to enforce the restraint.

Restraint clauses must be properly drafted to accurately reflect the employer's business activities and to ensure that they are reasonable.

This article contains general information only and is provided as legal advice. Professional advice should be taken before any course of action is pursued, or any information here is relied upon.

For advice about employment issues contact Jodie Gerritsen or Henri Kauthen on 9890 3321.



701 Station Street, Box Hill, Victoria 3128
Tel : 03 9890 3321 Fax : 03 9898 4266
email : legal@robinsongill.com.au
www.robinsongill.com.au