



Every business knows that it can take years to build up a loyal customer following but a matter of days for this to be destroyed by an ex-employee.

Normally, a business seeks to protect its goodwill by adding restrictive covenants into its contracts. However, will your covenants stand up in court if you need to enforce them later down the line?

Most businesses are under the impression that if a covenant is in the contract and the ex-employee breaches that covenant then they will be able to enforce the agreement. However, this is simply not the case.

Enforceability

In order for a restrictive covenant to be enforceable you must show that:

1. You have a legitimate business interest that needs protecting; and
2. The protection is no more than necessary in all the circumstances.

When determining if a covenant is necessary a court will consider the reasonableness of it; the duration; the geographical area covered; the patients it refers to and the seniority of the person who is subject to it. This is not an exhaustive list.

The courts are very wary when it comes to enforcing restrictive covenants, as they do not want to restrain trade and prevent a person from being able to earn a living. Therefore, if a clause is drafted too widely, without consideration for the business interest you are seeking to protect, it is unlikely that it will be enforced.

It should be noted that a court will not amend a clause to make it more reasonable and

therefore enforceable; they will simply reject it, leaving you unprotected.

You therefore need to carefully consider which covenants are required to protect your business interest.

Types of Covenants

The main types of restrictive covenants are:
Non-solicitation. This prevents a positive act by the employee of contacting former customers, or making an initial approach, with a view to obtaining their business.

Non-compete. This prevents an employee working for a competitor. Such clauses are harder to enforce than non-solicitation clauses, given the courts' reluctance to restrain trade.

Non-dealing. This prevents an employee dealing with any customer or potential customer of a business.

Non-poaching. This prevents an employee from taking staff with them to a new company.

Practical Tips

The most important piece of advice we can give you is not to use standard clauses for all staff members no matter what their position and situation; this is giving no consideration to the test 'necessary in all the circumstances'.

You need to be able to explain why the covenants are for a certain period, cover a specific geographical area or are in relation to a set of customers and why that is necessary for the employee in question.

It is also worth periodically reviewing the covenants to ensure they are still fit for purpose. If you do seek to change the covenants part way through employment, recent case law has confirmed that unless you give some consideration to the other party for signing the new covenants, such as a pay rise,

Employment contracts: are your business interests protected?



the covenants may not be enforceable even if signed.

No article can ever replace legal advice, and this is even more so in the case of restrictive covenants, which are highly specific to the facts and circumstances at hand. If you are considering using restrictive covenants, we strongly recommend that you seek legal advice. As the text above demonstrates, merely having them in place will not necessarily protect you.

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About this writer:

Laura is a senior solicitor at JFH Law advising businesses and dental practices on a wide range of matters, including employment law, HR issues, contracts, consumer and commercial disputes, professional disciplinary and regulatory. Laura can assist you at every step of the way; draft documents, advising on disputes, seeking resolutions and preparing for court proceedings.

Laura's approach is professional but friendly. She will guide you through any issue offering robust legal advice along with practical solutions for your problem.