

Introduction

Every business has information that it considers both integral and invaluable to its success. This information can take several forms, whether it is documents or methodology generated by the business, or knowledge acquired by an employee during the period of their employment with you. It is therefore vital to ensure you have contractual provisions in place to safeguard your business in the event that an employee leaves.

How do you protect your Business?

Restricting the use of information by employees after they leave may be vital to protect your market position. An ex-employee who has had access to sensitive data, such as client details and trade secrets, may be an attractive asset to a competitor seeking to gain an advantage.

The use of Restrictive Covenants in employment contracts is the accepted and proven method of providing your business with protection. A restrictive covenant prohibits an employee from behaving in a certain way, for a certain period of time. Examples of this are to forbid the use of confidential information, joining competitors in the field or soliciting clients and current employees from your business.

However, for a Restrictive Covenant to be enforceable (and therefore act as a deterrent at the very least), it must be 'reasonable'. Restrictive Covenants should only go so far as to protect the identified legitimate business interests of the business, and only apply to those employees who could reasonably be expected to threaten the business going forward. If the Restrictive Covenant goes further than this, it is unlikely that a court will uphold the provision or for it to even work effectively as a deterrent.

Current Climate

Finding a balance between protecting your business's legitimate commercial interests and preserving the employee's right to work is particularly tricky within the current economic climate. Most businesses can ill afford to lose any type of advantage in today's market and with vacancies in many fields becoming quite scarce, employees can face situations where their Restrictive Covenants make them unmarketable.

Recommendations

With this conflict of interest in mind, we would recommend taking simple steps that provide protection, whilst not placing burdens on employees that courts might consider to be unreasonable. This might include ensuring that Restrictive Covenants that cover solicitation of clients, customers and other employees:

- Are applied for reasonable durations (generally for a maximum period of 6 months following termination but linked to 12 months contact prior to employment end)
- Are only applied to the categories of employee who, in breaching the clause, could cause damage to the business (i.e. placed in individual contracts rather than a Handbook)
- Are reasonable about the geographical territory you are seeking to protect
- Set out any specific competitor names that you may want to restrict your ex-employees working for, for a period of time.

It also might be prudent to review the options that you have available to you as an employer in the event that a key employee gives you notice of their resignation. Options you should have available to you in your Employment Contract should include the ability to place an employee on Garden Leave or to move them to alternative work for the period of their notice.

What happens if a Covenant is ignored?

If you believe an employee has breached a post-termination restriction, the most immediate remedy is to get an injunction. This will generally be made prior to a full trial and, if successful, stops the employee from continuing to breach the provision until the full trial is held (at a later date).

To be successful in getting an injunction, you will need to show that your claim is not frivolous, and is legitimate in protecting your business interests. Further, in order to claim damages for the breach, you must be able to show you have suffered some kind of loss as a result of the breach.

Can we help?

If you would like us to review your current Restrictive Covenants or we can be of help in any other way, please call us on 01708 758958. Alternatively, please visit our Website at www.hsinsight.co.uk.