



## Restrictive Covenants

An employer may try to protect its business and the use of confidential and integral information through the inclusion of restrictive covenants in the contracts of employment of its employees.

### What is a Restrictive Covenant?

A restrictive covenant is usually a clause in a contract which prohibits an employee from competing with its employer after they have left the company, or prevents the ex-employee from soliciting customers or staff from the company.

In order for a covenant to be enforceable it must be:

- Designed to protect legitimate business interests; and
- It must not extend further than is reasonably necessary to protect those interests.

### Types of Restrictive Covenants

Restrictive covenants should be tailored to protect the specific interest of the company from individual employees who have had access to 'protectable' information. However, there are common/standard types of restrictions that can be found in contracts of employment:

1. Restrictions on the former employee working for a competitor — commonly known as area covenants
2. Non-solicitation covenants — which prevent poaching clients/customers of the former employer
3. Non-dealing covenants — which prevent a former employee from dealing with former clients/customers regardless of which party approached the other
4. Non-solicitation of staff covenants — which usually are restricted to those employees the former employee had material dealings with in a defined period prior to the termination of his employment



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When drafting restrictive covenants an employer must only restrict what is reasonably necessary in the interest of protecting the company. The employer must consider certain things :

1. The geographical area of any restriction and length of time of the post termination restriction must be justified. It is unlikely that a wide geographical area will be justified and generally enforceable restrictions only last for 6 to 12 months.
2. Consideration must also be given to the type of interest being protected, for example trade secrets may be granted a wider area of protection than information regarding customer information.
3. An employer may also be required to evidence any connection between the employee and any information that is being protected.

## Who Can Be Bound By Restrictive Covenants?

All employees can be bound by restrictive covenants. However, the extent of the restrictions must be relative to the employee's position within the business. Senior employees will generally have access to more sensitive information than junior employees and therefore it will be seen as justified to place restrictions upon them.

## Remedies for Breach of Restrictive Covenants

If an employer has reason to believe that an employee has breached the post-termination restriction, they are likely to require an injunction to stop the employee from continuing with the breach.

When granting an injunction the court will consider:

- Whether damages would be sufficient—this will not be the case where it is impossible to quantify the financial loss or the employee does not have the means to pay
- Whether more harm will be done by granting or refusing an interim injunction
- Any delay in making the application on the part of the employer
- The conduct and dealings of the parties during the proceedings.

An employer can also claim damages for its loss arising from the employee's breach and it will be expected to provide evidence of its losses. This will normally be loss of profits on contracts or loss of the opportunities due to the employees breach

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