

Restrictive Covenants

Are you shackled by a Restrictive Covenant? Many employees willingly sign an employment contract when they start work without fully reading it, only to find several years later when they come to resign that they have a restrictive covenant in there that prevents them joining Company X and taking that dream job. We often find when recruiting from a competitor that many are not aware of this clause in their contract until we ask them to go look!

So what is a restrictive covenant and can you, as an employee, get around it?

A restrictive covenant is used by an employer to protect its knowledge, technology and strategic information, thereby preventing an ex-employee giving it to a competitor. This can be done during their employment and also after they leave. Having these clauses in an employment contract should deter an employee from joining a competitor and also help prevent the competitor approaching them!

Typically, these clauses will prevent an employee from joining a competitor for a period of time after they leave, usually 6 to 12 months, or prevent them from approaching or dealing with customers of the business after they leave, again for a period of time, or prevent them from trying to poach colleagues after they leave. There may also be a 'garden leave' clause in there as well.

You may think that if you have such a clause in your contract then that is that. However, you need to get it checked by an employment lawyer since many such covenants are not enforceable or enforced due to the way they are written and the motivation of the employer to take action to show the clause is justified. The clause cannot be used to stop you working in your chosen profession or trade – a restraint of trade – which will be taken seriously by any court.

What is unlikely to be justified? A wide geographical area, a restriction of more than 12 months, too wide a sector and the same 'one size' clause for all employees at all levels.

If the employer feels that you have breached one of these clauses they can take out an injunction against you to stop you working or force you to return/destroy confidential information and the consequences of this can be harsh and expensive, both to you and your new employer.

Do restrictive covenants act as a deterrent? Yes, they do. We have lost candidates who get nervous about their contract and who know that their employer has a policy of enforcing them. On the flip side certain employers have never been known to enforce them!

So if you are looking to move to a competitor our advice is to get your contract checked by an employment lawyer before you get too far down the interview and offer route.

