

Employment Restrictions

Restrictions during and after Employment

During employment there are often certain restrictions placed upon you by your employer. Dismissal or resignation can often mean that your obligations to your employer continue. What are your rights and those of your employer?

Duties whilst in employment

An employee is under a duty to exercise the level of skill and care expected of someone reasonably competent to do the job.

If you are a professional or manager, different standards may apply. Professionals may have an obligation to ensure that professional standards, including professional conduct rules, are maintained.

As an employee, you will also be under a duty to act in the best interests of your employer and any act that deliberately undermines the employer's business may be a breach of contract.

You will also be under a duty to obey orders from your employer, provided that they are reasonable and proper in all the circumstances. For example, you would be justified in refusing to carry out an illegal order or one that would cause you to breach professional conduct rules.

A duty of fidelity (or loyalty) applies during employment preventing you from soliciting clients or customers, taking away your employer's business or from setting up in competition or working for a competitor, during employment. In order to be in breach of contract however you would need to have taken actual steps and not merely have expressed an intention to compete with your employer in the future.

It is very likely that your contract of employment will expressly set out the type of information that may not be disclosed by you (confidential information) and you should always familiarise yourself with such terms.

Even if there is no express obligation of confidentiality, the implied duties of confidentiality and good faith will prevent you from disclosing information, such as client lists, that could damage the employer's business.

In certain circumstances, however, you may be protected where you disclose confidential information under the provisions of the Public Interest Disclosure Act 1998 on the basis that it relates to alleged wrongdoing by your employer. This is a complex area and you should obtain expert legal advice before making such disclosure.

Finally, you will not be in breach of the duty of confidentiality if the information you disclose is already in the public domain, such as information already in the trade press for example.

Restrictions after employment.

Provided the restriction is reasonable, your employer is entitled to safeguard its proper business interests by imposing certain restrictions on your commercial activities, even after your employment has ended.

Your employer may be allowed by the courts to protect its legitimate business interests including: business secrets or confidential information, trade contacts, goodwill and workforce.

However, the interests of your employer must be balanced with an important public policy concern that free competition must be encouraged and individuals must be entitled to use their personal skills and attributes for their own benefit. A post termination restriction must not be "in restraint of trade".

An employer's interest will be legitimate if the employer has some 'proprietary right' or 'ownership' over the subject matter it wants to protect. If the information etc can be regarded as belonging to the employer it may be legitimate for the employer to protect its interest by use of a post-employment restrictive covenant.

To be enforceable, however, a restrictive covenant must also be reasonable in terms of its scope and in the public interest.

Trade connections, customers, suppliers, the workforce, trade secrets or other confidential information, have all been held to be legitimate business interests.

Your employer can legitimately prevent you from disclosing trade secrets or confidential information acquired during your employment.

It is uncertain precisely what information may legitimately be protected by an employer after employment ends. Generally, regard will be had to (a) the nature of the employment, (b) the nature of the information itself, (c) whether the employer has stressed the confidentiality of the information to the employee and (d) whether the relevant information can easily be isolated from other non-confidential information which is part of the same package of information.

If in doubt as to whether information is confidential, it should be borne in mind that an employer can only protect that which can properly be regarded as its property.

Your employer cannot protect against you utilising general knowledge, experience or skill obtained during employment as such knowledge and skills are personal to you and you should be free to make use of it in future employment.

Similarly, your employer has no proprietary right in respect of your personality or inter-personal skills and cannot therefore protect itself against losing clients who wish to follow you because their relationship with you is the reason why they have done business with your employer.

The courts in recent years have accepted that employers may have a legitimate business interest in maintaining a stable trained workforce and your employer may therefore legitimately rely on a 'non-solicitation of staff' provision, to prevent you from soliciting certain former colleagues and persuading them to leave.

Your employer may also protect itself against you poaching its customers or clients. Such a restriction may be valid even if the clients or customers came with you in the first place. Such a restraint should be limited to the customers or clients with whom you had material contact during your employment, otherwise it could be held to be wider than is reasonably necessary to protect a legitimate business interest.

If you had no or no significant contact with the customers/clients or suppliers in question, there will probably be no legitimate interest worthy of protection.

Although a restraint may well be reasonably necessary to protect a legitimate business interest, it may still be unenforceable if it is unreasonably wide. A restrictive covenant must be reasonable in terms of subject-matter, geographical location and time.

Employers need to give careful consideration to the geographical extent of the intended restriction because its reasonableness will depend on the nature of the business and

competition. The wider the geographical restriction, the less enforceable the clause.

The courts will subject a geographical restraint to close scrutiny because the effect of a wide restraint may be to indirectly prevent competition per se and this would not be in the public interest.

The intended duration of the restrictive covenant must also be reasonable. For example, a covenant purporting to restrain an employee from working for two years after employment may well be unreasonable and unenforceable.

If you have been wrongfully or constructively dismissed (in breach of your contract) you will not be bound by any post-termination restrictive covenants. The reasoning for this is that in wrongfully dismissing an employee the employer commits a breach of contract which should not entitle it to then rely on other parts of the contract.

This area of law is very complex and this note is just a basic summary. You should seek specialist advice on any particular case.

To find out more

If you have any questions or concerns, or require more information in respect of asbestos-related illnesses please contact:

0870 143 0970

Russell Jones & Walker Offices:

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Associated office:

[Edinburgh](#)

Email enquiries@rjw.co.uk
www.rjw.co.uk

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Prepared by Russell Jones & Walker
Solicitors 2005

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