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Employment spotlight: Post-termination restraints

Restriction on Employee's Activities Post-termination

It is common to find employers imposing post-termination restraints ("PTRs") on employees in order to restrict the post-termination activities of the employees with the aim of protecting the employer's businesses. Post-termination restrictions are often used by employers to restrict an employee from:

- joining competitors;
- poaching employees;
- soliciting clients or customers; or
- dealing with clients or suppliers.

Whether or not a PTR is enforceable is a common question posed by clients such as employees who are considering joining a competitor, a competitor seeking to poach an employee as well as employers wishing to seek enforcement of the PTR against a recently departed employee.

Enforceability of PTRs

It is trite that PTRs which amount to restraint on trade are prima facie void and unenforceable. The courts will enforce such PTRs only where it can be shown such restrictions are for the reasonable protection of the employer's legitimate interests and are no wider than reasonably necessary.

The courts have emphasised that the application of familiar principles is highly sensitive to the individual facts of each case. Accordingly, precedents are a helpful barometer of enforceability but are not determinative.

Consequences of a PTR being held unreasonable

If a PTR is held to be unreasonable, it will be struck down and will not be enforced unless the offending parts can be severed without changing the character of the clause. The courts cannot enforce a restriction of lesser extent which would have been reasonable or rewrite a defective covenant so that it becomes enforceable.

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Guidelines for drafting

The parties should ensure that the PTRs are carefully drafted to mitigate the risk that they are open to challenge or held unenforceable. The following should be kept in mind when drafting PTRs:

- The onus is on the party seeking to rely on the PTR to show that it is reasonable and enforceable.
- Any ambiguity or uncertainty in the drafting of the PTR gives rise to significant risk that a party against whom the PTR is enforced may choose to challenge its enforceability.
- The language used in the PTR should be crafted keeping in mind the specific position, seniority and influence of the departed employee, as well as the connections and the shelf-life of the confidential information and knowledge retained by that departed employee.
- Any requirement for the departed employee to serve a period of gardening leave may reduce the length of the PTRs considered to be reasonable.
- The PTR should be clear, precise and reasonable as to duration and geographic scope.

For further information on PTRs and other employment law related matters, please do not hesitate to contact our solicitors.

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