

EMPLOYMENT

Restrictive Covenants

How to draft non-compete, non-solicitation and confidentiality clauses that a court is likely to enforce as reasonable.

What a restrictive covenant is

A restrictive covenant limits what a person may do after they leave a business, or after they sell it. In employment and in business sales, the most common are non-compete clauses, non-solicitation clauses and confidentiality clauses.

English law starts from the position that such clauses are void as a restraint of trade. They are enforceable only if the business can show a legitimate interest worth protecting and the restriction goes no further than is reasonable to protect it. A clause that is too wide in time, area or scope can fail entirely, because the court will not normally rewrite it.

The main types

- **Non-compete.** Stops the person working for a competitor or setting up in competition. It is the hardest to enforce, because it limits the person's livelihood.
- **Non-dealing.** Stops the person doing business with the company's clients, whether or not they approach them.
- **Non-solicitation of clients.** Stops the person actively approaching clients. Easier to justify than a non-compete.
- **Non-solicitation of staff.** Stops the person encouraging colleagues to leave.
- **Confidentiality.** Protects trade secrets and confidential information, with no end date for genuine secrets.

Key points

- A covenant is enforceable only to protect a legitimate business interest.
- The wider the restriction, the harder it is to defend.
- Courts will not rewrite a clause that is too wide.
- A non-solicit is easier to enforce than a non-compete.
- Tailor each covenant to the role.
- The law on non-competes is under review.

What a legitimate interest looks like

The usual interests are client connections and goodwill, confidential information and trade secrets, and a stable workforce. A general wish to avoid competition is not enough. The interest must also relate to the person: a junior administrator with no client contact is unlikely to be bound by a wide non-compete, while a senior adviser who holds client relationships may be.

Employees and others

Covenants appear in employment contracts, in the agreements between partners and between members and shareholders, and in sale documents. A court looks at each in its setting. The bargaining position of the parties matters: an employee has less freedom to negotiate than a seller of a business, and the court is more cautious with employment covenants.

Drafting for enforceability

- **Match the role.** Tailor the clause to what the person does and knows. A single template for every employee is likely to be too wide for most.
- **Keep the period short.** Six to twelve months is common in practice, but the right figure depends on the role. Where there is a notice period or garden leave, the court may take account of it.
- **Limit the area.** A geographic limit only works if the business operates there. Tie the clause to the clients the person dealt with, not all clients.
- **Define terms.** Say who is a client, what counts as a competitor and what is confidential. Avoid vague words.
- **Separate the clauses.** List each restriction on its own, so that one failing does not take the others with it.
- **Give something in return.** For existing staff, consider consideration such as a pay rise or bonus when adding covenants.

Before you start

- What is the interest to protect?
- What does this role know and do?
- Are the period and area proportionate?
- Is consideration needed?
- Is there a sale of the business involved?
- Has the position been reviewed recently?

On the sale of a business

Covenants given by a seller to a buyer are judged more generously than employment covenants, because the buyer is paying for goodwill. Even so, they must go no further than is needed to protect it.

Law reform

The Government has consulted on limiting the length of non-compete clauses. Check the position before drafting.

Practical steps

Put covenants in the contract at the start, not later. Record why each is needed. If the employee leaves, remind them in writing of their obligations. Act quickly if a breach is suspected, as delay can lose the right to an injunction.

Enforcing a covenant

If a person breaches a covenant, the business can ask the court for an injunction, which stops the conduct, or damages for the loss. An injunction is a discretionary remedy and speed matters. Collect evidence early, write to the person and their new employer if appropriate, and take legal advice before issuing proceedings. MTM does not conduct litigation.

Alternatives to a non-compete

Sometimes the real aim can be met by less restrictive means. Longer notice periods, garden leave, a clear confidentiality clause, a non-dealing clause limited to named clients, and a clause protecting key staff can protect most of the value without limiting the person's ability to work. Bonuses or deferred pay that depend on staying loyal can also help.

How MTM can help

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We draft and review restrictive covenants in employment contracts, service agreements, partnership and members' agreements, and sale documents. We tailor each clause to the role and keep them current. We do not conduct litigation, so where a covenant must be enforced in court, we will work with your client's solicitor.