

Employment contracts and their clauses – protecting your business assets

Adequate protection of company's assets is often a key factor in determining whether a business will achieve success in today's competitive business environment. Yet, surprisingly, business owners often overlook the importance of additional clauses in employment contracts when considering whether a business is adequately protected.

With employees, client lists and confidential information being key business assets, it is essential that employment contracts cover all these areas, safeguarding your business both now and in the future.

In this edition, brought to you by Jane Fowler, Managing Director of Aquila Advisory, the boutique forensic accounting company, we consider the additional clauses in employment contracts which could protect your most important company assets and help you stay ahead of the competition.

Restrictive Covenants

A contract of employment is the agreement between employer and employee which governs the relationship between both parties by outlining the precise extent of their respective rights, duties and obligations.

A restrictive covenant is a clause in a contract which prohibits an employee from competing with his ex-employer after the employee has parted company with the business. In turn, it prevents the ex-employee from soliciting or dealing with customers of the business by using knowledge of those customers gained during prior employment.

There are various types of restrictive covenants:

- Non-competition covenants - restrictions on the former employee working in similar employment for a competitor;
- Non-solicitation covenants – preventing poaching of clients from the former employer;
- Non-dealing covenants – preventing a former employee from dealing with former clients, no matter who approached who;
- Non-poaching covenants – losing employees can have a significant detrimental impact on a business. This covenant will prevent an employee poaching former colleagues.

The restrictions within the covenants must be reasonable with respect to both the geographical area and the time limit imposed. If either of these limitations is unreasonable, a court will not enforce the terms of the restrictive covenant.

Intellectual Property and Confidentiality clauses

Whilst the law in the United Kingdom states that the employer retains the ownership rights to any intellectual property (IP) developed by an employee during their employment (E.g. databases compiled, photographs taken, material created or documents produced etc), it is still important to include an IP clause in employment contracts. This will help to avoid

confusion - perhaps over work created outside office hours or as a by-product of specified work - which could leave your business exposed.

In turn, your employees may also have access to sensitive information about IP, making it good business sense to include a Confidentiality clause in your employment contracts.

Where inventing is likely to form part of an employee's job, employers need to remember that under patent law if an invention is patented the employee may, in certain circumstances, be entitled to statutory compensation in respect of the invention. The employer cannot contract out of this right and therefore any terms in the employment contract that purport to remove this right will not be effective. However, the employer can still successfully ensure that it owns the rights to any invention, in preference to the inventing employee, by specifying in the employee's job description that their role includes inventing or conceiving of new products and product development ideas.

Mobility / Relocation clauses

Employment contracts usually include the employee's place of work, which can be one specific location or several different places. However, if you would prefer not to specify a location, you can include a Mobility or Relocation clause in the contract which, subject to certain terms, allows you to change where the employee will work. However, as an employer you must:

- Give adequate notice of a proposed move;
- Make it possible for the employee to comply with the request to move;
- Not operate the clause in an impulsive way or act in bad faith so as to destroy the implied duty of trust and confidence between you and the employee.

If there is a Mobility clause in the contract, but the employee refuses to obey a lawful request from their employer to move in accordance with the contractual term, then the dismissal may have to be dealt with as a misconduct issue.

Flexibility clauses

A flexibility clause enables you as the employer to change the employee's main duties, such as asking them to carry out any additional duties. This must be done within reason and discretion must be exercised so that the implied term of mutual trust and confidence between the employer and the employee is not breached. This will include consulting with employees and any employee representatives about the nature and scope of any change, the reason it is required, the proposed timing of the change and the likely outcome if it is not implemented.

Failure by the employer to consult could result in an employee resigning and bringing claims for breach of contract, wrongful dismissal and constructive dismissal.

Pay in Lieu of Notice clauses

These are commonly referred to as PILON clauses. A PILON clause is where the employee is paid their notice money in one lump sum. They don't work their notice and their employment ends with immediate effect.

A PILON clause may be express or discretionary:

- An express PILON clause will state that the employer must make payment in lieu of notice and will therefore contain such language as 'will' or 'must'. A clause of this type will immediately terminate an employment contract;
- A discretionary PILON clause allows you to use your discretion as to whether or not you wish to make payment in lieu of notice. A clause of this type will contain such language as 'the employer may make a payment in lieu of notice to the employee'.

Without a PILON clause, however, you have no contractual right to make a payment in lieu of notice. And if, for example, you pay the employee their notice money in lieu but there was PILON clause in the contract, then the employment contract will have been breached and all other contractual obligations, such as restrictive covenants, will fall away.

Garden Leave clauses

A Garden Leave clause in a contract of employment will give you the right as an employer to send an employee home on full pay whilst they are serving out their notice period. The aim of garden leave is to get the employee out of the office so that you can either investigate alleged misconduct or so as to protect your business interests where, for example, the employee is going to work for a competitor or is setting up a competing business.

If the contract does not contain a clause allowing the employer to place the employee on garden leave, to do so would amount to breach of contract and the employee would not be bound by any other terms of the contract, such as post-termination restrictions.

Anti-corruption and Bribery clauses

One of the key features of the Bribery Act 2010 is that it takes a robust approach to bribery in businesses and introduces the offence of 'failing to prevent bribery', whereby the employer is liable to prosecution if an employee bribes another person intending to obtain or retain business or a business advantage.

There is only one defense that your business will have against such a charge - if you can show that, as an employee, you had 'adequate procedures' in place to prevent the commission of an offence.

An anti-bribery policy in each employment contract is an essential statement from the board or senior management that your business has zero tolerance of bribery in all its business dealings.

In summary

By taking the time to carefully prepare a contract of employment for each employee, disputes and ambiguity about the employment relationship can be minimised.

To find out more about how Aquila Advisory can help to protect you and your business, speak to us today. Our specialists are on hand to advise you of your options and to help you make the right decisions for you and your business.

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