

July 2008

HOW TO STOP EMPLOYEES TAKING YOUR BUSINESS AWAY

Losing an employee can be costly. Immediate expenses include payment of accrued entitlements and recruiting and training a replacement. There may also be losses to the collective wisdom of the organisation. All these are largely unavoidable once an employee has decided to leave.

However, when an employee walks out the door, often they also take with them important client relationships, confidential information and information about the other staff in the business. Loss or misuse of these 'assets' can have long term repercussions – but there are steps an employer can take to protect them.

In this edition of the Employment Alert, we look at:

- Confidential information – why written agreements are required;
- Confidentiality clauses – essential components;
- Restraint of trade clauses - key interests that can be protected;
- Limits on post-employment restraints.

Confidential Information

Even without a written agreement, employees are obliged to keep their employer's *trade secrets* confidential, both during employment and after the employment relationship ceases. A trade secret may be described as commercial information that is not public knowledge and that a reasonable person would recognise as the employer's property.

However, there is often scope for debate as to what is a trade secret in a particular business, and there are types of information which an employer may wish to protect, that are not classified as trade secrets. Written agreements can define the information which is protected, and can protect *know-how* as well as trade secrets.

In a recent NSW case (*Digital Products Group v Opferkuch*), the employer had a Confidential Information clause in its offer of employment. However, the clause was not worded carefully enough to protect information other than secret documents – and the offer of employment was never signed by the employee, so the clause may not have been binding.

The employer obtained orders against the former employee based on common law obligations. The Court ordered that the employee should not use, copy or show any documents containing certain information relating to sales and pricing. However, the Court refused to order that he should not use unwritten information relating to the employer. The Judge stated that the employee would be entitled to make use of his general knowledge of the employer's sales and pricing in his new employment.

If an appropriately worded contractual obligation had been in place, the employer may have been able to obtain broader protection.

Confidentiality Clauses – Essential Components

Employers should ensure that all employees with access to sensitive information agree in writing to keep that information confidential. The clause should include the following matters:

- a definition of confidential information specifying the documents and information the employer wishes to protect – including any exceptions such as information forming part of the employee's general skill and knowledge;
- details as to the things an employee must not do – such as use, copy or disclose the confidential information;
- any limits on the confidentiality obligation – such as time-frames beyond which certain information ceases to be sensitive;
- clear obligations regarding the return of documents and information upon termination of employment;
- agreement that it may be necessary for the employer to obtain an injunction as well as damages.

July 2008

Restraint of Trade Clauses – What Interests May be Protected

Often it is difficult to show that a former employee is using confidential information, but it can be more easily shown that he or she is working for a competitor, or approaching clients or staff of the former employer. However, once an employment relationship ends, the former employee is free to do these things, unless the employee has signed an agreement containing a restraint of trade clause.

Restraint clauses must be carefully worded to ensure they are enforceable. The courts start from the position that restraints of trade are against public policy and void. The employer must show that the restraints are no more than is necessary for the protection of its legitimate interest.

The key issue for employers to consider is what 'legitimate interest' they wish to protect. For example, they may have a legitimate interest in:

- Protecting confidential information (eg in circumstances where an employee cannot work in the same field without using such information);
- Maintaining certain client relationships;
- Maintaining a stable, trained workforce.

Limits on Post-Employment Restraints

A restraint clause cannot be used simply to prevent an employee from working in competition with the employer. The clause must be reasonable and must not restrict the employee any more than necessary to protect the employer's interests.

The employer must be able to show that the restraint is reasonable in scope, time and geographical area. A restraint clause may be drafted so as to provide for various options in each of these categories. For example:

- The *scope* of the restraint may cover – performing work in the same industry; performing work for the employer's clients; soliciting work from clients; and/or soliciting other staff to leave the employer.
- The clause may include different *timeframes* for which the restraint applies – such as 12 months, 9 months, 6 months or 3 months. The timeframe should be decided by reference to the time during which the former employee will have an unfair amount of inside information, or influence over clients or staff.
- The *geographical area* in which the restraint applies may cover – the areas in which the employee worked; the areas in which the clients operate; and/or the areas in which the employer's business operates. The area should be defined by reference to the interest that is to be protected, and should not cover areas in which the former employee would have no influence in any event.

In a Victorian case decided in April 2008, an employer (Bearing Point Australia Pty Ltd) with a restraint clause 5 pages long was unable to obtain an injunction to stop a former senior employee (Robert Hillard) from working for another company. In that case, the court considered the restraint clause to be unreasonable because it:

- extended for too long (12 months);
- covered too large a range of clients; and
- prohibited employing any staff even if they left the employer of their own accord.

Implications for Employers

Employers should ensure their employment agreements provide adequate protection for business assets such as confidential information, client relationships and goodwill. Once an employment relationship has deteriorated or ended, it is often too late to put these protections in place.

For assistance in preparing employment agreements including confidentiality and restraint of trade provisions, contact our Workplace Relations Group.

The Moores Legal Workplace Relations Team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations, contact the Workplace Relations team at Moores Legal.

Tim Adam
Principal
Tel: (03) 9843 2105
Email: tadam@mooreslegal.com.au

Peter Andrew
Consultant
Tel: (03) 9843 2108
Email: pandrew@mooreslegal.com.au

Frances Anderson
Senior Lawyer
Tel: (03) 9843 2122
Email: fanderson@mooreslegal.com.au

Leanne Tully
Senior Lawyer
Tel: (03) 9843 2127
Email: ltully@mooreslegal.com.au

DISCLAIMER: This Employment Alert is of a general nature only. Specific legal advice should be sought rather than relying on this Alert.

MOORESLEGAL