Restraint of Trade

Information and sample clause

Restraint of trade clauses are designed to prevent unfair competition after the expiry of an employment agreement or contract. Restraint of trade clauses reflect the fact that the contractor or employee will have access to information about the patients of the practice, and that it would usually be unfair for them to be able to turn that information to their personal advantage by luring patients away from the practice in the event they establish a rival practice or join another local practice.

Because restraint clauses are prima facie unlawful (as they are anti-competitive), any clause of this nature will need to be very carefully drafted, be as non-restrictive as possible and must identify a real need for a restraint in the particular circumstances. No guarantee can ever be given as to the eventual legal enforceability of any restraint of trade clause, and more often than not, provisions protecting the employer's confidential information or intellectual property are far more useful and enforceable, and achieve the same aim.

Legal advice was sought on strengthening a restraint of trade clause for our general practitioner agreements/contracts, and the clause reads as follows:

> *The employee agrees not, for a period of one year after the determination of this agreement/contract, to treat as a medical practitioner, either on his or her own account or in a firm or as an employee or independent contractor of another medical practice, any person whom he or she has treated while engaged in the practice except for his/her immediate relations, nor will he/she solicit, procure, direct or otherwise be instrumental in the diversion of any patients from the practice to any other practice. Consideration for this restraint of trade has been included in the employee's remuneration package.*

Some restraint of trade clauses are based on geographical limitations, for instance the general practitioner is prohibited from setting up a practice within a particular town or within a defined radius from the employing practice. However, such clauses are not always enforceable, and depend on how reasonable they are in the particular circumstances. Because the circumstances of medical practices differ, any practice which prefers to opt for such a clause is best advised to consult their own solicitor with a view to getting a 'tailor made' clause for their agreement/contract.

RESTRAINT OF TRADE CLAUSES

The basic nature and objective of a restraint of trade clause will be familiar to most medical practitioners in private practice. Usually, such clauses set out to prohibit a partner or employee of the medical practice from practising medicine in the same locality as the practice for a defined period after the person has ceased to be a partner or employee.

Such clauses are prima facie void, but may be justified in particular circumstances if the restriction is reasonable having regard both to the interests of the parties and to the public interest.

The Courts' approach to restraint clauses is more strict in context of employment law than it is in context of partnership law. This is partly in recognition that employees seldom have equality of bargaining strength with employers, and partly to prevent bona fide competition from being stifled.

A well drafted restraint of trade clause needs to take account of a number of considerations.

First, it is only certain interests of the partnership, contract or employment that properly qualify for protection under a restraint clause. In the case of a medical practice, the main such interest will be goodwill. In an English case, this was defined as 'the tendency of patients whom the medical practitioners have treated to continue to resort to that firm for further treatment,' *Whitehill v. Bradford* (1952). A common misconception is that such clauses can be used to prevent competition per se from ex partners or staff. That is not so. Such clauses can only be used to protect the practice's proprietary interests.

Secondly, the restraint must go no further, and extend no longer, than is necessary to protect the practice. There have been cases in which the Courts have invalidated restraint clauses which at first glance seem narrow, but which on closer inspection have been drawn wider than necessary to safeguard the firm's interests. A good example is provided by an English case, *Office Angels Limited* v *Rainer-Thomas (1991).* In this case, the agreement of certain senior employees of an employment agency precluded them from carrying on the trade of an employment agency within a radius of one thousand (1000) metres of the branch at which they were employed for a six-month period following termination of the employment. It might be thought that this was a reasonable clause both as to duration and geographic area. However, the branch office was in the centre of London and the clause would have prevented the employees from opening an agency over most of the City of London. Accordingly, the Court struck it down.

Conversely, a restraint of trade clause would be of little benefit to the practice if it is so narrowly worded that it does not give the requisite protection. This point is well shown by a New Zealand case in the printing industry where the Court of Appeal held that the effect of a restraint clause was to prevent a former employee from himself carrying on business in the printing industry or acting as a partner in a firm in the industry, but was not worded to prevent him from taking up *employment* with a competitor: *Graphic Holdings Limited* v *Dunn* (1988).

Some restraint clauses in medical practices are expressed so as to preclude the former partner, contractor or employee from soliciting patients of the practice for a defined period

after termination of the partnership or employment. Such non-solicitation clauses are more likely to be upheld as valid than clauses which would restrict the individual from practising medicine in the locality. This is because the non-solicitation clause can be regarded as directly aimed at protecting the practice's patient connection, being plainly part of the practice's goodwill.

In England, a number of cases have come before the Courts over the years concerning the question whether particular restraint covenants are wider than necessary to protect a medical practice. In a number of cases it has been held that clauses which would prevent a general practitioner from practising as a specialist go further than necessary to protect a general practice (e.g. *Routh v Jones (1947)).* In another case it was held that a life-long restriction was too long, *(Eastes v Russ (1914)).* On the other hand, however, a clause will not be invalidated by reason only of being one-sided in that it binds one partner, but not the other *(Clarke* v *Newland (1991)).* Nor can a restraint be contested on the public policy ground that the medical practitioner's patients are entitled to go to him or her for their treatment. As one of the Judges said in another case *(Kerr* v *Morris)* (1987):

> *'The doctor can go from the area at any time and I do not see why public policy should prevent him binding himself by agreement that in certain events he will go.'*

Under the Employment Relations Act 2000, the Employment Relations Authority and Employment Court have only limited ability to make an order varying a term of an employment agreement It will, therefore, be unsafe for employers to assume that any deficiency in the drafting can be put to rights by the Authority or Court making an order modifying the restraint clause. If the Authority or Court finds that it is precluded from varying an unduly wide clause, as will usually be the case with employment restraints, the clause will be invalid in its entirety.

The Employment Relations Act does not apply to partnership or independent contracts, so the much wider powers of the civil courts to modify restraint of trade clauses under the Illegal Contracts Act will continue to apply in partnership contracts.

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Need more help?

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