

Don't Let Restrictive Covenants Stifle Your Business Start-Up

Andrew Egan, an employment specialist with Wantage lawyers, Charles Lucas & Marshall, says employers facing redundancy should check their employment contracts carefully if they are considering setting up a rival business.

I have recently been seeing a large number of clients who are being made redundant and are looking at various options in terms of future employment.

Many are looking to start out in business on their own, perhaps as partners or directors of a new business start up, providing services as a consultant, or buying an existing business, franchise or distribution agency.

One of the first things to check is whether you are bound by any restrictions in your employment contract with your previous employer. These are often stated as continuing to be legally binding on you despite the termination of your employment for any reason. They may also be included in, or restated, in any compromise agreement you sign dealing with the termination of your employment.

Any breach of such restrictive covenants is essentially a breach of contract, although your former employer would have to convince a court that the restrictive covenants were valid and enforceable. A court will consider the matter from the initial standpoint of such terms being unenforceable because they are in restraint of trade, as they prevent you as an individual from earning a living.

This presumption of unenforceability can be overcome, however, if your employer can demonstrate that such clauses in your contract do no more than is necessary to protect their legitimate business interests.

Non-competition-type restrictive covenants have traditionally been harder to enforce than other types, such as non-solicitation of customers or clients. This is because they may be so widely drafted that they are seen as likely to prevent you from being able to work. However, the courts have, in recent years, given some encouragement to businesses to use them.



Once you have confirmed you are free to do what you want, you will find that starting a new business involves important decisions, most of which have legal implications in terms of your costs, responsibilities and potential liabilities. You will need to carefully consider the appropriate legal structure for your business and ensure that you have complied with any legal requirements such as business registration or licensing.

The business or trading name you choose can become an important marketing asset. If you are working with other partners or directors in the business, you are best advised to have a partnership agreement or shareholders agreement setting out each person's responsibilities rights and liabilities to avoid or at least pre-empt any possible disputes.

Many new business owners incorporate as a limited company, which may involve significant costs and administrative burdens but can provide some legal protection and looks more established from the point of view of borrowing money for the business, dealing with clients and customers and establishing a business plan and identity. Operating on a self-employed basis as a sole trader or in partnership may be more straightforward or a better option in the initial period of operation. In some circumstances, a limited liability

partnership (LLP) can be a better alternative to forming a limited company.

You will need to have terms and conditions of trading for your business, which form the basis of your contracts with clients and customers. If you sell goods or supply services on-line, then you will need terms and conditions of business for dealing over the internet.

You may want to register your business name as a trade mark and take steps to protect any other forms of intellectual property, such as patents or copyright material, which may be a valuable business asset which needs legal protection.

Some types of new business will also need a licence or other form of registration. Other important legal issues to consider include ensuring that you comply with health, safety and environmental requirements, taking on a lease of business premises, having employment contracts for staff or contractors agreements for those whom you sub-contract work to.

If you are buying a franchise or taking on an existing business, you should take legal advice regarding the sale and purchase agreement or franchise documentation so that you know exactly what you are buying, what your obligations are, how you can sell the business or get out of the lease or franchise if things don't work out. It is vital to check exactly what you are agreeing to.

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