RESTRAINTS OF TRADE:
What is most important?

Restraints of trade in employment contacts are controversial.

Complex matrixes of restrictions based on time and geographical areas are commonly being held by Courts not to be enforceable.

In this article, we look at the key components of your business that need to be protected in the case of a departing employee.

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To protect your business with restraints of trade that really work and that are enforceable – the most important question a business must identify is the legitimate interest that needs to be protected.

The answer, most importantly, is trade secrets and confidential information.

KNOW-HOW

But there is a further category which is "*know-how*" – which is often overlooked and not included in the usual definition of "*confidential information*" in an employment contract.

This "know how" is usually identified as:

1. Information of a trivial nature or which is so easily accessible from public sources that it cannot be regarded as confidential;
2. Information which may have originally been confidential because of its character or because the employee was told it was confidential, but which has become part of the employee's skill and knowledge;
3. Trade secrets so confidential that even though they may have been learned by heart, and even though the employee has ceased employment, can only be used for the employer's benefit.

It is very important that your business has a term in all employees' contracts to protect these 3 categories.

They are not, we repeat not protected by the implied common law duties of confidentiality.

So you have to have a contract in writing which specifically includes in the definition of confidential information a properly drafted clause which includes know how.

It is really necessary to identify and include a wide definition of "know-how" in the definition of confidential information, because it is this confidential

information when you come right down to it can damage your business if placed in the hands of a competitor.

For example, a confidential system of inventory management that your business has perfected and spent time and money developing can be very damaging in the hands of a business competitor.

The benefit of such a restraint term in a contract of employment is that it restricts the "*springboard*" this confidential information may provide former employees and establish a "*buffer zone*" until confidential information becomes progressively stale or recollection diminishes or becomes gradually irrelevant.

Please contact Jane Good if you wish to discuss any issues that arise for you out of this article.

FURTHER INFORMATION

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