

## Employers increasing vigilance for trade secret and restraint breaches

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### Why is there a current focus on restraints of trade and protection of confidential information issues?

With COVID-19 making market conditions tight, employers aim to protect their businesses from competition. They want to ensure that confidential information is not misused, and that employees don't breach restraint of trade obligations by soliciting their customers, suppliers or other employees. Businesses shifting to working from home arrangements face increased risk that employees may expose confidential information to parties outside the employer's business.

### What are 'restraint of trade' clauses and how do they protect employers?

Restraint of trade provisions allow employers to protect their legitimate proprietary interests after the employment relationship has ended. They cover trade secrets and customer and supplier relationships. The main types of restraint clauses prevent employees from working for a competitor or trying to entice customers/suppliers or other employees away from their employer. However, they must be reasonable, or they will unlawfully stifle competition, which is usually where debate arises.

### Why is it so important for employers to protect confidential information and restrict trade?

A breach of confidentiality or of a restraint of trade can be incredibly damaging to a company's goodwill and client relationships. Also, if a business experiences a data breach, it could lose the trust of its existing clients and its reputation could be damaged. These effects can result in a dramatic and immediate impact on the employer's bottom line, which can sometime be so severe it can lead to the employer's downfall.

### What damage can employers face?

Two courier drivers in the case of *Tradies Ladies Ltd v McKay [2019] NZERA 651* breached the non-competition and non-solicitation clauses in their employment agreements. They set up a business in competition and soliciting key clients. Tradies Ladies said that these actions led to a drop in company sales by \$22,000 and that the company was considering making two employees redundant as a result. While Tradies Ladies suffered a considerable decline in income, it was able to seek interim restraining orders to prevent further damage.

### What makes a good RoT or protection of information clause?

Drafting is key to ensuring a restraint of trade clause is enforceable (and that consideration is paid by the employer for the employee's agreement). It must only go so far as is reasonably necessary to protect the employer's legitimate proprietary interests, both in time and geographical coverage. While there is an implied duty of confidentiality in all employment agreements, this narrows considerably on termination, so it is important to define the specific confidential information that the employer wants protected.

### What can trip people up or slow down the process in enforcing the law?

The key is to act quickly, as the period of the restraints will be running and the damage may have already begun. However, the ex-employee and their new employer will want to slow down the process and will be reluctant to provide any information that may assist. Being alive to this and not letting the process drift is important. Also gathering evidence of the breaches can take time, so often employers will want to proceed anyway. Taking time to do so will hold the employer in good stead to force the ex-employee to comply or if court proceedings are filed.

*This article was written by [Sherridan Cook](#) and [Legalwise](#) (July 2020).*

**Sherridan has put together a helpful resource to guide you through restraints of trade and protection of confidential information. [Download here:](#)**

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