

Post termination restrictions: How useful is a stick without a Carrot?

May 2013

Such employees will undoubtedly be aware of an abundance of commercially sensitive information. In that context, restricting the post-termination activities of employees is a necessary part of the business landscape today. It is however debatable how useful restrictive covenants are and to what extent they can really provide any protection. Moreover, it is questionable whether there are any incentives for employees in the UAE who are subject to post-termination restrictions to abide by them particularly since enforcement options are limited. We consider these issues in relation to employees in the UAE. For the purposes of this article, we do not consider post-termination restrictions in the context of the DIFC.

What is a post-termination restriction?

In simple terms, post-termination restrictions are contractual provisions which seek to [protect an employer's business by limiting the activities](#) of employees after termination of employment. The most well-known category of post-termination restriction is the non-compete clause. Such clauses aim to prevent an employee from working with or setting up a business which may be in competition with his employer. However, this is not the only type of post-termination restriction.

Whilst arguably less relied upon, non-poaching, non-dealing and non-solicitation clauses can be very useful to an employer. Those clauses have the following effect:

1. Non-poaching clauses - prevent a former employee from taking other employees with them upon termination;
2. Non-dealing clauses - prevent a former employee from dealing with clients/customers/suppliers, regardless of which party approached the other; and
3. Non-solicitation clauses - prevent poaching of clients/customers/suppliers of the former employer.

Legal Position

In many jurisdictions, the general position in relation to post-termination restrictions is that they are unlawful since they attempt to restrain trade. The starting point in the UAE however is that post termination restrictions (and specifically non-compete clauses) are lawful.

Article 127 of Federal Law No. 8 of 1980 (as amended) (the "Labour Law") expressly states that where an employee performs a role which allows him to become acquainted with confidential information, the employer may put in place an agreement or include in the employee's employment contract a provision which prevents an employee from working with a competing business after termination. This does not however give an employer freedom to unnecessarily restrict an ex-employee's activities. Articles 909 and 910 of the Civil Code reiterate this position and go further than the [Labour Law](#). Unlike the Labour Law, the Civil Code contains guidance as to the circumstances in which a restriction will be valid.

Generally, a non-compete provision must be reasonable, and should only restrain conduct to the extent necessary to protect the employer's legitimate business and legal interests. It must therefore be limited in:

- a. Time/duration;

b. Place/geographical scope; and

c. Nature/business sought to be restricted.

A non-compete provision which is limited to 6 months in duration, the Emirate in which the employee worked and includes a sufficiently defined business scope is likely to be enforceable in the UAE. However, in the event that post-termination restrictions are deemed to be unenforceable (due to an excessive length for example) such provisions will not automatically be struck out in their entirety. More likely, the courts will “blue pencil” the provision. This means that the courts will ‘edit’ the clause by removing the wording that renders a clause unenforceable, leaving the remaining part enforceable.

Even in cases where the above criteria are met, the ex-employer must also be able to prove that any restrictions upon which it intends to rely are necessary to protect a legitimate business interest – for example, a client connection, confidential information or a stable workforce – and that the restrictions are not being used simply to stifle or prevent competition.

Bearing this in mind, it is prudent for employers to approach post-termination restrictions with some caution.

Who should have post-termination restrictions in their contracts?

Since post-termination restrictions must be necessary to protect a legitimate interest, it follows that only certain employees will be in a position whereby their conduct after termination could pose a risk to the business. A very junior employee who is not working in a client facing role and does not deal with very sensitive information is unlikely to be held to the same standard in terms of post-termination restrictions as a senior, client-facing employee who deals regularly with confidential or commercially sensitive information. In this context, the abovementioned junior employee could argue that post-termination restrictions in his contract are void since there is no underlying desire to protect a genuine business interest.

Enforcement

In the event that an employee is subject to contractual post-termination restrictions which an employer considers have been breached, an employer’s remedies are limited

In circumstances where an employee intends to breach or has breached post-termination restrictions, the most effective remedy is an injunction since this is a preventative measure and can essentially mean that damages or other remedies are irrelevant (since the breach is stopped before it takes place or very quickly after the event). However, injunctive relief is not provided in the UAE (outside of the DIFC). In practice therefore, an employer cannot prevent an ex-employee from acting in breach of a post-termination restriction. The effect of this is that any other relief in terms of civil action can be compensatory only (i.e. a claim for damages). This is not ideal since, for many employers, loss cannot be proven or quantified and the employer would prefer to stop the breach before it occurs.

In order to bring a claim for damages, a court will initially consider whether the relevant restrictions are reasonable. Furthermore, an employer must adduce evidence to show that the employer has suffered direct and actual financial loss as a result of the employee’s breach of the post-termination restrictions. This is often very difficult if not impossible to prove.

Moreover, even in the event that an employer is successful with litigation dealing with post-termination restrictions, a costs award will not be given. Instead, each party bears his own costs irrespective of the outcome of the matter. This is a distinct disadvantage for both parties.

Alternative Options

It is clear that an ex-employer's remedies are limited and taking enforcement action is a lengthy and costly process.

However, liquidated damages clauses are useful to some extent. A liquidated damages clause sets out a pre-estimate of the likely loss suffered by the employer in the event of a breach of a restriction. Ordinarily, in the event of a dispute regarding post-termination restrictions, the burden of proof is on the employer to evidence its loss (and prove that such loss arose as a direct result of the breach). Where a liquidated damages clause is used, the burden shifts to the employee to prove that the amount claimed in the clause has not actually been suffered by the employer.

In terms of additional measures that an employer can consider, garden leave is commonly used in conjunction with restrictive covenants for maximum effect. The inclusion of a garden leave clause in a contract of employment allows an employer to require the employee to spend all or part of the notice of termination period at home whilst continuing to receive his usual salary and benefits. The benefit of this is that it delays the employee from taking up other employment with a competitor. If the employer can show that the employee is undertaking other work in this period this is in breach of immigration regulations which has potentially serious consequences.

In addition to the above, the issue of breach of confidentiality is commonly intertwined with non-compete clauses. Where a breach in confidentiality can be proven, criminal complaints can be filed against the employee and this is obviously a serious deterrent for employees.

Conclusion

Post-termination restrictions are difficult to enforce in the UAE. Employers should therefore consider the full menu of options available to them to include utilisation of garden leave, insertion of a liquidated damages provision and where appropriate filing criminal complaints. In all cases, [post-termination restrictions](#) act as a valuable deterrent for the employer.

We would recommend that careful drafting is used in all circumstances to ensure the value of post-termination restrictions and to put employers in the strongest possible position to protect their businesses.