



## **Do your employment agreements include a restraint provision?**

I see many employment agreements that include some form of restraint provision. However, sometimes a restraint of trade clause has been put into an agreement for a role which is unlikely to warrant such a provision, or the restraints in the clause are unlikely to be deemed reasonable if tested.

In this blog post, we'll delve into the use of restraint provisions in employment agreements, examining their legal framework, common issues, and recent developments, including the Employment Relations (Restraint of Trade) Amendment Bill.

Restraint provisions, also known as restraint of trade clauses, are contractual terms that limit an employee's ability to engage in certain activities after leaving their job e.g. working for a competitor or soliciting clients.

### **Common Issues with Restraint Provisions**

Over time, the use of restraint provisions has raised concerns, and the courts have addressed several key issues:

**Duration:** Courts have held that restraint periods must be reasonable. An excessively long restraint period may render the provision unenforceable.

**Geographical Scope:** The geographical area in which the restraint applies must also be reasonable. A restraint with an overly broad geographic scope may also be deemed unenforceable.

Interest Protection: Restraint provisions must protect a legitimate business interest (or proprietary right), such as trade secrets or strategy. So, they do not apply to all roles. A restraint of trade cannot be used to simply try to curtail competition. An overly broad restraint that doesn't serve a genuine business interest may not hold up in court.

## **The Tova O'Brien Case and the Employment Relations (Restraint of Trade) Amendment Bill**

In 2021, journalist Tova O'Brien's departure from her media company highlighted issues related to restraint provisions. O'Brien's case sparked public interest and led to the introduction of the Employment Relations (Restraint of Trade) Amendment Bill by Labour MP Helen White.

### Key Changes Proposed by the Bill

The Employment Relations (Restraint of Trade) Amendment Bill aims to address concerns and create a fairer balance between employers and employees regarding restraint provisions.

Key changes include:

- preventing the use of restraint of trade clauses for employees who earn less than three times the minimum wage (which would currently equate to \$68.10 per hour);
- restricting restraint of trade clauses to situations where an employer has a proprietary interest to protect (which must be described in the employment agreement);
- requiring employers to pay those employees subject to a restraint of trade 'reasonable compensation', which is at minimum an amount equal to half the employee's weekly earnings for each week that the restraint of trade is in effect; and
- preventing the duration of a restraint of trade to endure beyond 6 months.

## Next Steps for the Bill

It is not yet clear whether the bill might be enacted ahead of the upcoming election. National have indicated they would make changes to many things, should the result of the election be a National-led government, and they have shared their concerns about this bill, including that it may have an adverse impact on businesses. Before becoming law, the Employment Relations (Restraint of Trade) Amendment Bill must go through a few more stages:

- ✓ First Reading: The bill was introduced and debated in Parliament on 26 July 2023.
  
- ✓ Select Committee: The bill is examined in detail, and the public were able to make submissions. The Education and Workforce Committee called for submissions with a closing date of 11.59pm on Monday, 18 September 2023.

Second Reading: Further debates and potential amendments occur.

Committee of the Whole House: More detailed consideration and amendments if needed.

Third Reading: A final vote is taken on the bill.

Royal Assent: The bill receives formal approval from the Governor-General to become law.

It's important to note that legislative processes can be lengthy and may involve further revisions. Stay updated on the progress of this bill here:

<https://bills.parliament.nz/v/6/78a64dc5-e4cb-49a2-b464-98f09742b962?Tab=history>

## **Conclusion**

Restraint provisions in employment agreements can be a useful tool for employers in certain situations. Recent developments, such as the Employment Relations (Restraint of Trade) Amendment Bill, aim to better strike a balance between protecting employers' interests and ensuring fairness for employees.

If you have questions about a restraint of trade clause in your organisation's employment agreements, don't hesitate to contact me.