

Tackling
The **HARD** issues
Labour Law



GEO

GUARDIAN EMPLOYERS ORGANISATION
Reg.No:LR2/6/3/316

Assisting Employers in Labour Law

NEWSLETTER

RESTRAINT OF TRADE



CAN THE RESTRAINT OF TRADE CLAUSE BE ENFORCED WITHIN AND/OR DURING AN EMPLOYEE'S EMPLOYMENT PERIOD?

Restraint of trade in the Republic of South Africa to date is not very clear and some legal arguments do arise that make interpretation difficult. Questions are raised regarding the clause itself, its fairness and whether it can be enforced legally.

A restraint of trade clause is basically a clause included in an employee's contract of employment, usually as an additional clause, depending on the type of industry or the job description.

Question: Any person has the constitutional right (Section 22 of the Constitution) to choose any career. Therefore, is a restraint of trade not an infringement of an employee's constitutional rights?

Answer: *I believe that when interpreting restraint of trade one must differentiate between skills acquired during employment, and company information or trade secrets gathered during employment.*

During the course of employment an employee will show growth in skill sets and performance. I believe that if Section 36 of the Constitution is considered from an employee's point of view, any limitations to making a living and/or finding employment that furthers the quality of work and experience in a similar field is an unjustified infringement of rights. However, I feel a clause that includes fair compensation could be enforceable.

Question: But what about the company's rights to privacy? To what extent is a restraint of trade enforceable to protect information and/or trade secrets?

Answer: *Any and all company information and/or trade secrets should be protected, but the question remains to what extent. Can the company prohibit an employee from joining the competition or simply prohibit the employee from disclosing information that is for the company's eyes only?*

On the other hand, competition in business is viewed as healthy for any nation's economy. (See Reddy v Siemens Telecommunications (Pty) Ltd (2007) for a ruling in favour of the employer and an enforcement of the clause).

Signing of an employment contract does not make the restraint of trade clause automatically enforceable as the employee probably needs to be trained and granted access to private and confidential information first before enforcement is justified. I advise the following actions to ensure minimal misinterpretation and maximum protection of the rights of all parties:

- Within the clause included in the employment contract, specify clearly the need for the restraint of trade, i.e. protection of proprietary interest, trade secrets and private and confidential company information.
- Stipulate that the clause is enforceable only after training has been received by the employee and access has been granted to private and confidential company information.

Please feel free to contact me for any assistance.

Danny Berry (GEO Labour Specialist)
Mobile: 072 946 3735

Contact us:

Email: geo@geo.org.za
Telephone: 0861 436 436

For assistance with
POPI compliance,



please contact Andre
Rabe via email:
andrerr@geo.org.za

GEO members are advised to subscribe to the CIRIS internet labour law advice site. It provides valuable information on all matters related to Labour Law. Contact Andre Rabe on 0824910708 or email him on andrerr@geo.org.za

Subscribe
to our online



Labour Law
Advice Site

Visit our site:

www.geo.org.za

CIRIS website:

www.cirisonline.net

Did you know?

A restraint of trade, prohibits a resigning employee to join a company with similar business, either in **direct or indirect** competition with the company, within a specified amount of **time** and within a specified **distance** from the employer. For example, Tony Stark is prohibited to join a similar enterprise competing directly or indirectly with the company within 1 year after his resignation and within a 50km radius from the company's place of business.