



# RESTRAINT OF TRADE PROVISIONS IN SETTLEMENTS

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If an employment relationship problem develops at work, and the employer is keen to pay an employee out to leave (or to bugar off), the pay-out is often a combination of wages, non-taxable hurt and humiliation compensation, and costs for representation if the employee engaged an advocate or lawyer to help resolve the problem. There may be other benefits added on top.

The terms are almost always confidential, and the employer and employee may agree to not speak badly of each other.

This is called an exit package and is recorded in a record of settlement under Section 149 of the Employment Relations Act 2000. We've negotiated hundreds of these deals. But we've had employees come to us after they have signed a settlement without getting any advice

upfront as well. That's often the result of an HR manager pressuring the employee to sign before walking out the door. That is unfortunate. Don't sign anything without getting advice first.

There's a sneaky trick that employers' HR representatives will often try and pull off—putting in a restraint of trade clause in the record of settlement without saying anything about it or discussing it near the

end of the drafting of the settlement document.

This is mostly annoying when they do this because our client has anchored and accepted to a degree an amount of money to part ways or to end their personal grievance claim. These restraint of trade clauses are often slipped in at the end without any warning, and if the employer wants to insist on this, there should be something in exchange (i.e. more money paid) for the restraint of trade clause being inserted. If the employer wants it, they should pay for it.

A restraint of trade clause in a record of settlement is a lot more enforceable than the same clause in an employment agreement. That is because, in a settlement, if an employee agrees to a restraint of trade clause, it's automatically binding, otherwise, public confidence in

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settlements will be undermined if it is perceived that parties are permitted to not follow their agreement. It's important that the parties can have confidence in the enforceability of the terms of agreed settlements.

Compare this with a restraint of trade clause that's in an employment agreement and the tests that an employer must overcome to enforce a restraint of trade clause in the employment agreement, these tests are:

1. Clauses that purport to restrict the employment or trading activities of one or more of the parties are, on the face of it, contrary to public policy and therefore void
2. The employer must have a proprietary interest that the clause is designed to protect. A bare covenant against competition cannot be enforced.
3. The Courts will not enforce a provision that's wider than is necessary to protect the employer's business or that would prevent an employee from earning a living
4. The Courts will not enforce a restriction that applies to a wider area than is strictly necessary or which is unreasonably restrictive of the employee
5. The Courts will not enforce a restriction that's for an unreasonably long period
6. The Courts will not assist in protecting the employer from competition if the employer has no interest in justifying protection

7. A restraint of trade clause does not survive if the employer breaches the contract, for example, if there's an unjustifiable dismissal

If you're about to sign a settlement agreement, make sure you read and understand what you're signing. Get advice. Carefully consider everything: how much you're being paid out, the impact of not being able to work for the competition and for how long, and what other options you might have. For example, you don't want to walk out with a month's wages but not be permitted to work in the industry for three months. The employer should be paying more.

## What we can do for employers and employees

We're Employment Law Advocates that represent both employers and employees under Section 236 of the Employment Relations Act 2000.

That section permits advocates to represent in the employment jurisdiction. We're not practising lawyers.

We represent in direct negotiations, the Employment Mediation Service, the Employment Relations Authority, and the Employment Court. ■

**For more details, contact Lawrence Anderson on 0800 946 549 or 0276 529 529 or [Lawrence@AndersonLaw.nz](mailto:Lawrence@AndersonLaw.nz) or visit [AndersonLaw.nz](http://AndersonLaw.nz).**



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