

Contractor doctor: are restrictive contract clauses enforceable?

Dear Contractor Doctor,

Having secured a contract, the agency I am dealing with has inserted a clause in my contract that stipulates that upon finishing the contract, I can only, for a period of 12 months after my contract, go back to the end-client through them. This clause covers all sites and all subsidiaries. I myself feel that this is unreasonable and want to delete the clause. What do most contractors do?

Thanks

A Contractor from London.

Contractor Doctor says:

The clause you refer to is called a "restrictive covenant," and is often inserted by agencies into their agreements with contractors to prevent them from working directly for a company (and effectively cutting out the agency, or, the middleman). This is called a "non-dealing" covenant.

You won't be able to delete it from your contract, because the agency wants to keep its position as supplier of contractors to the company. But you may well be able to negotiate a solution with the agency, and if not, the clause will only be enforced by the courts under very specific conditions.

The clause is valid, however. You will hear from time to time that the clause isn't 'legal,' because it unfairly restricts the freedom of employment or causes restraint of trade.

"That's not the case," says Faisal Saifee, a lawyer specialising in employment issues with the London-based firm [Thomas More Chambers](#). "The courts have in the past not accepted this argument, so contractors should not proceed on the basis that the courts will invalidate these clauses. Courts dislike these clauses, but that doesn't mean they will never enforce them."

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The Courts are sensitive to the issue that these non-dealing covenants can restrict freedom of employment, and will only enforce them when they are very clearly protecting the business interests of the agency.

And the agencies tend not to be specific enough. Agencies have a tendency to make these clauses very broad. But, as Saifee points out, the courts have a tendency to read these clauses down, so that they only apply to the conditions which directly affect the agency and the contractor.

First, there should be a clear limitation on the time in which the clause applies. This time period should usually not be longer than six months.

Then the clause should be limited to the specific competition relationship that would affect the agency's business: a specific workplace, a specific area of work. The clause should limit the prohibition of dealing to those with whom the contractor had contact in, say, the six months prior to the end of the contract. That is, if you worked in Section A of the company, the courts won't enforce a clause that says you can't work in Section B (unless there is a very clear reason for it).

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Faisal Saifee - Thomas More
Chambers

"Crucial to the argument for restricting the contractor's rights is the 'reasonableness' of the claim," says David Royden, a partner with the employment law specialist firm Layton's Solicitors in Manchester.

"Agencies must bear in mind that restrictive covenants must go no further than is reasonably necessary to protect their legitimate business interests as otherwise the covenants will be unenforceable. Defining what is 'reasonable' or not can involve complex considerations, as can 'what is a legitimate business interest.' A covenant that restricts a national sales director may not apply to a local sales representative, yet the agency may use the same clause."

Experts feel strongly that the contractor and client should discuss any proposed breach of the clause with the agency involved and come to some mutual arrangement. The agency may not be concerned about applying the clause in a given case; they may be open to negotiation with their client or former client; they may also not wish to displease a client by preventing them from dealing with you.

So our advice is: talk the matter over before you act. If the agency feels very strongly that its business interests are at risk, they may well have an enforceable clause. If the matter is peripheral to their interests, they may well just give you the go-ahead.

Good luck with your contracting!

Contractor Doctor

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