

Can contractors legally work for a subsidiary?

Contractors often have contracts with agencies that include restrictions on working directly for the client. Often those contracts include restrictions on working for that client's subsidiaries as well.

But does that include all subsidiaries? And is the restriction fair and valid?

Learn the Rules

As with all matters in law, the answer depends on a great many conditions, and one must be careful in generalising about such subjects.

It's important to learn the overall rules that apply to 'restrictive covenants,' as they are referred to by lawyers and the courts. We can paint a clear picture of the general situation so that you know the facts. But do seek professional advice if you want an answer.

The Restriction May or May Not Apply

First, there is no question that the restriction is valid, but whether or not it applies to you personally may not be clear. The first thing to do is to simply ask the agency how they feel about your working for a given subsidiary. Quite often, the agency won't mind because the assignment does not affect the agency's relationship with their client.

"Asking the agency should always be your first step," says David Royden, a lawyer and head of employment law at the Manchester office of Layton's Solicitors.

"If not, then the contractor who has an agency agreement containing restrictive covenants with the parent company may be in breach of them if he works for the subsidiary. However, if he works for the subsidiary through a limited company he may try to argue that he is not directly in breach," Royden explains.

This is why the restriction in most restrictive covenants in agency agreements are framed to extend to both direct and indirect employment and extend to cover not just the parent company but any company within the group, Royden says.

"Much depends, however, on the wording of the restrictive covenant," Royden continues. Often they can be very badly drafted and then they are simply not enforceable. For example, if the RC does not expressly extend to all companies within the Group of companies it will not prevent the contractor from working for the Agency," Royden points out.

"The bottom line is that a restrictive covenant will only go so far as to protect the legitimate business interests of the agency," Royden adds. "Agencies have a legitimate business interest in preventing those whom they introduce to a company from gaining a benefit from that introduction without compensating the agency in return - usually by means of a further payment to the agency - and usually detailed in the agency's terms and conditions."

The more remote the connection the harder it will be for the agency to demonstrate it had a legitimate business interest in preventing you from working.

For example, an agency who introduces a R&D person to a given company may well have an interest in preventing an that person from securing further work in R&D from a subsidiary of that company - that is unless further payments are made to the agency. But that probably should not extend to the same person applying to a subsidiary in an entirely different role (e.g. sales) - perhaps as a result of the subsidiary placing a general ad in the press.

"Nor do I think it should extend to other jurisdictions, that is, quite remote places where the agency does not operate," Royden says.

So legitimate business interest is one factor, reasonableness and remoteness are also factors (i.e. how directly or indirectly was the agency responsible for the new employment), jurisdiction is a third factor and, of course, practically, how well the agency or its lawyer actually drafted the restrictive covenant.

In relation to the latter Royden gives an example. A restrictive covenant imposing a 1 year restriction on working within a 12 mile radius of Bristol was found to be unenforceable. Why?

Was 1 year too long? No. Was 12 miles too wide? No.

"The answer is no one can define where Bristol actually is with sufficient certainty. If it had said Bristol town hall it would have been okay!" Royden points out.

This is why you need to seek professional advice if you intend to go against a restrictive covenant clause in your contract. Interpreting the wording is

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everything, and only a lawyer with a good knowledge of case law can do that.

But if you really want the job with the subsidiary, you should be aware that the restrictive covenant may not prevent you from getting it.

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