



## Home care sector employers vulnerable to employees poaching clients

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In the disability and home care sector, employees naturally develop strong rapport with the clients they care for. However, there is an increasing trend of employees leaving their employers to set up their own businesses or to work for other providers, often taking their previous employers' clients with them.

Providers are already under increased pressure with the rise of gig economy competitors and an overall workforce shortage. It can be particularly damaging to a home care or disability provider when a former employee, whom the provider has invested time and resources training and has introduced to clients, poaches their clients.

Employers have a number of steps that they can take to deter such conduct. One of these steps is including a well-drafted restraint of trade clause in an employee's contract. Employers should also ensure there is a comprehensive confidentiality clause in their contracts to ensure their commercially sensitive information is protected, even after the employee has left the business.

### What is a restraint of trade?

In an employment context, a restraint of trade is an employment contract clause which prohibits an employee from engaging in activities that would damage the employer's business interests after they leave their employment.

A restraint clause may prohibit a former employee from working for a competitor, encouraging clients or other staff to leave, or interfering in their old employer's relationships with stakeholders.

If the former employee breaches their restraint, an employer may seek an injunction to prevent the conduct from continuing, make a claim for loss suffered, and in some instances may also seek that the employee or relevant business hand over the profits made.

### How should a restraint clause be drafted?

In order to ensure the effectiveness and enforceability of these clauses, it



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is critical that they are carefully drafted and tailored to individual employee roles. The clause must protect a legitimate business interest and should only go as far as reasonably necessary to protect that interest.

Due to these issues, restraint clauses often contain several different restraints, and are limited in their application to certain geographic areas, lengths of time and relevant activities and parties.

### Considerations in the disability and home care sector

Public policy may also affect the enforceability of a restraint. It is a guiding principle of the National Disability Insurance Scheme that people with disability should be supported to exercise choice in the planning and delivery of their supports.

However, a situation in which a client voluntarily follows an employee to a new organisation is distinct from one where an ex-employee solicits or encourages clients to change providers.

There is not yet any definitive case law on how such considerations might play out in the disability or home care sector. However, there is case law from other industries in which employees and workers in employee-like forms of work have a similar level of contact with the clients of the business.

In the case of *Planet Fitness Pty Limited v Dunlop* [2012] NSWSC 1425, the NSW Supreme Court considered an urgent interlocutory application from a gym, Planet Fitness, against a former gym trainer who began working with other gyms. Planet Fitness had engaged the gym trainer as an independent contractor to provide services to its clients. The contract between Planet Fitness and the gym trainer stated that she could not solicit, either directly or indirectly, the clients of Planet Fitness for three months after she ceased working with Planet Fitness.

The gym trainer had a number of these clients as friends on her Facebook page. During the three-month period after she left Planet Fitness, the gym trainer posted special deals on her Facebook page inviting people to train with her at her new gym at reduced rates. The NSW Supreme Court found this to be a breach of her restraint and ordered that she delete all offending posts and that no further such posts be made.

While the case involved an independent contractor rather than an employee, the gym trainer's work arrangements align closely with those of support workers. This case demonstrates the kind of actions, such as targeted advertising, that may amount to solicitation, and how a business can prevent former workers from engaging in such activity.

In the disability and home care sector, direct support workers usually work closely with particular clients, which may justify the reasonableness of a restraint clause. Such a clause should be tailored to each individual employee's position, with attention paid to the clients they may have influence over and the relevance of certain geographical locations.

### What can providers do?

A well-drafted restraint of trade clause in employment agreements is vital for providers who want to safeguard the goodwill that they have developed in their business and brand. Other measures, such as a well-drafted confidentiality clause, can also assist to protect relevant client and employee confidential information.

The Workplace Relations, Employment and Safety team at Russell Kennedy is well-versed in the unique challenge that employers in the disability and home care sector face in this area. We provide advice on how best to protect your business interests, including through use of restraint clauses in employment contracts.

### How we can help?

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