

Workable,
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effective solutions
for clients.



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K.C. Wysynski is an associate in the Workplace Law and Education Law groups with SimpsonWigle LAW LLP. The Workplace Law group provides advice and representation to clients on all matters arising from the employment relationship, including restructuring and downsizing, policy development, human rights, disability management, collective bargaining, grievance arbitrations, workplace safety and insurance and occupational health and safety matters.

Q

I am the owner of a small business. I would like to develop a policy that prevents my employees from soliciting business from my customers if they leave. How should I go about doing this?

A

Any term or condition of employment that limits or takes away an employee's rights must be explicitly agreed to by the employee and should be set out in an employment contract. A general workplace policy generally is not enough to bind the employee.

Wherever possible, post-employment restrictions should be considered at the beginning of the employment relationship and included in an employment contract. That being said, it is possible to implement restrictive terms after an employee starts to work by revising an existing employment contract or entering into a new contract. This new or amended contract is referred to as a mid-term contract and extra care is needed to ensure it is binding and enforceable. Most notably, the employer must provide the employee with something of value in exchange for agreeing to be bound by the new restrictive term. In the legal world, this is referred to as providing the employee with "fresh consideration" in exchange for executing the new or amended contract. Without fresh consideration, the new or amended contract will be unenforceable. A payment upon signing (i.e., a "signing bonus"), a promotion or a wage increase are a few examples of fresh consideration.

It is also important to be mindful that restrictive covenants must be narrowly drafted to be enforceable. A restrictive covenant that has an unreasonable geographic and/or temporal scope or that simply is unnecessary given the employee's role in the organization may not be enforceable. It is recommended that these issues be reviewed with an experienced employment lawyer.



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