SUPERCENTRAL

Employees can undermine your business sale

- The goal then should be to ensure that your employees have an appropriately drafted restraint that is reasonable and enforceable.
- Thought also needs to be given to ensuring that the introduction of the restraint into the employment contract of an existing employee is done properly and effectively.
- It's dangerous to try to sell your business without these employee restraints being in place.

The buyer of your business will not only want to be sure that you don't compete with the business after the purchase, but that your employees don't either.

Employees aren't cattle. That's a somewhat brutal statement but also an obvious one.

What we mean is that they can't be pushed around, either legally or personally.

So, what happens when you come to sell your professional practice or business?

Answer: the potential buyer wants to be sure that not only you as the seller is prevented from competing with the practice or business after the sale, but that your employees won't take the opportunity to 'go out on their own' and become a competitor overnight.

You ask your employees to sign a non-compete agreement with the buyer and after they check with their spouse's uncle (who's a solicitor) they tell you: "thanks but no thanks". Why would they – there's nothing in it for them. They're not getting anything out of the sale except a new boss who they may or may not like and who they may or may not agree to stay with.

You then tell the buyer that the employees won't sign a non-compete and they now say "no deal then".

To prevent this happening, you need to arrange for your key employees to sign non-compete clauses with you before you put the practice or business up for sale and before they realise that they might have a point of leverage.

Non-compete clauses (more legalistically often referred to as 'restraints of trade') are a source of much urban myth. Surprisingly it is often said that they are not enforceable. Nothing could be further from the truth. There are many cases where judges have enforced reasonable restraints of trade.

That's the thing – they must be reasonable.

What is reasonable depends on each fact situation which makes it hellishly difficult for solicitors to advise on. There are, though, a couple of general parameters.

One of those is that you cannot expect an employee to be bound for as long a restraint as, say, might be expected of the seller of a business. Fundamentally that's because of the imbalance in the negotiating power of the business owner and the employee, particularly where the restraint is imposed after the employee has been working in the business for a while and so wasn't told before they accepted the job that they'd have to sign a non-compete agreement.

But just because the restraint can't be for as long doesn't mean the business owner shouldn't bother putting one in place at all. If a buyer of the business were to have a one-year head start on the business' former employee they'd have a great opportunity to cement their relationship with the clients or customers before the employee left the blocks.

Employee restraints also can't be as wide as some other types. You can certainly limit their ability to work for clients or customers of the business but imposing a restraint on them from working in the industry at all, particularly in a wide area like, say, the whole of Australia, just won't fly – too broad to be considered reasonable. Any geographical limitation on an employee could face a successful challenge.

The goal then should be to ensure that your employees have an appropriately drafted restraint that is reasonable and enforceable. Thought also needs to be given to ensuring that the introduction of the restraint into the employment contract of an existing employee is done properly and effectively.

It's dangerous to try to sell your business without these employee restraints being in place.

For more information on any aspect covered in this article, please call SUPERCentral on 02 8296 6266 or email info@supercentral.com.au.