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Employment, Workplace Relations & Safety

Albanese Labor Government reignites Better Pay reforms in move to ban non-compete clauses

By Ben Duggan & Nicholas De Pasquale

In Labor's fourth budget, Treasurer Jim Chalmers has confirmed the Government's desire to prohibit non-compete clauses for employees earning below the higher income threshold under the Fair Work laws.

The aim of the Government's measure, consistent with its initial reforms to the Fair Work laws known as the 'Better Pay, Secure Jobs' reforms, is to enhance mobility of Australia's workforce, leading to increased wages for affected employees of up to \$2,500 annually.

Over the last decade, it has become increasingly common for employers to include restraints in contracts of employment that a departing employee must comply with for a period after their employment.

The type of activities that these restraints seek to prohibit include working for a competitor, soliciting the former employer's clients or employees or setting up a business that competes with the former employer.

Commonly, these restraints are limited in their scope by reference to time (generally they apply for between 3 and 12 months) and geography (generally they apply in the same city or State of the employer).

A key reason that employers limit the scope of their restraints is to enhance their enforceability with Courts only prepared to impose prohibitions on former employees that are reasonable because they involve a legitimate protection of the interests of the former employer.

At this stage Labor's proposed prohibition on non-compete clauses appears to be limited to those that place restrictions on an employee from leaving an employer to work for a competitor in the same industry.

Courts have become increasingly reluctant to enforce this type of restraint, which is viewed as extreme, unless the employee has left a very senior role or for some other special reason.

The proposed prohibition does not affect other common types of restraints that prevent the former employee from the following activities:

- Performing work for the former employer's clients; or
- The solicitation of the former employer's clients; or
- The solicitation of the former employer's employees.

Treasurer Jim Chalmers, in a joint statement with Senator Murray Watt and Dr Andrew Leigh, said that Labor will consult on the detail of its proposed prohibition, including whether it should apply to these other common types of restraints related to a former employer's clients and employees.

Prior to the Government's statement, as part of its fourth budget, it had consulted widely with industry and unions, with the Australian Council of Trade Unions (ACTU) indicating its support for the measure.

The Australian Chamber of Commerce and Industry argued that restraint clauses could assist employers including to protect legitimate business interests such as inventions or other confidential information.

Curiously, though Treasurer Jim Chalmers used the current budget process to propose this prohibition on non-compete clauses, Labor does not intend to introduce this proposed prohibition until 2027.

Employers have some time to consider their options and prepare for this proposed prohibition.

Should you wish to discuss your options or have any questions in relation to your non-compete clauses please contact one of our employment law experts.



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