

Reform of Non-Competition Provisions

Wednesday 21 June 2023

Today's presenters



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- The established position in the UK is that post-termination restrictions are only enforceable to the extent that they **protect a legitimate business interest of the employer and go no further than is reasonably necessary to protect that interest**
- Established categories of legitimate business interests:
 - Trade connections (with customers or suppliers), and more generally, goodwill
 - Trade secrets and other confidential information
 - Maintaining the stability of the workforce
- The legitimacy of the business interest is judged at the time the covenant is entered into



- Prevent an employee joining a rival employer for a defined period after termination
- Must not go beyond what is reasonably necessary to protect the employer's legitimate business interest
- Reasonableness parameters:
 - Duration - consider "shelf-life" of confidential information. Usually max. 12 months.
 - Geography – must be limited to those areas the employee was responsible for
 - Activities – must be limited to activities the individual was concerned with or responsible for during a reasonable period prior to the termination date – e.g. 1-2 years
- No requirement to compensate employees

December 2020

- The government issued a consultation on proposals to reform post-termination non-competition clauses in employment contracts.
- The proposals included:
 - requiring employers to pay employees compensation for the duration of the restriction; and
 - introducing a ban on non-competition clauses.



The government's proposals for change

May 2023

- The government issues policy paper on "Smarter Regulation to Grow the Economy"
- Includes plan to "*reform non-compete [sic] clauses to boost competition and innovation*".
- Legislation will be introduced to limit the length of non-competition clauses to 3 months, when "*parliamentary time allows*".
- Will apply to employment contracts and "limb(b)" worker contracts
- No outright ban on non-competition restrictions
- No mandatory compensation for non-competition restrictions

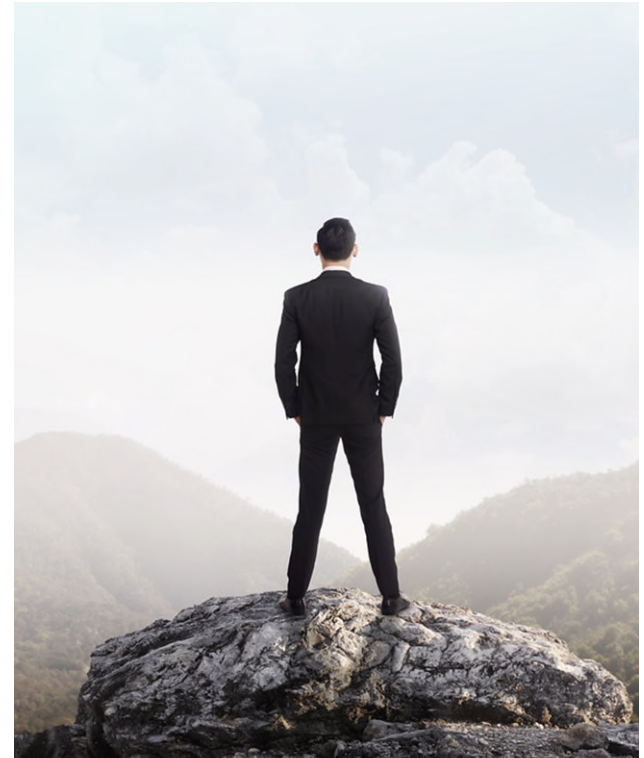


Potential benefits

- *"This will give up to 5 million UK workers greater freedom to switch jobs, apply their skills elsewhere and even earn a pay rise. The change will also provide a boost to the wider UK economy, supporting employers to grow their businesses and increase productivity by widening the talent pool, and improving the quality of candidates they can hire." (!)*
- Reduce barriers to recruitment?
- Government will publish guidance to "enhance transparency"



- Potential disincentive for inward investment into UK
- Hampers parties' freedom to contract
- Ignores significant body of case-law confirming that non-competes may be necessary to protect legitimate business interests
- Requires reliance on garden leave, confidentiality and non-solicitation clauses, which may not be sufficient
- How will implementing legislation deal with existing non-competes which exceed three months?



- Current position in the USA
- US Federal Trade Commission – proposed new rule:
 - Effectively prohibits non-competes
 - Supersedes all contrary state laws
 - Individual rescission of all non-compete provisions – not entire agreement
 - Applicable to employees, interns, contractors and volunteers
- Current status and what happens next
- How US employers protect their interests – lessons for UK employers



What should UK employers do?

- Wait and see? General Election coming up.
- Audit of current restrictions/garden leave and off-set provisions applying to key individuals?
- Focus on retention – golden handcuffs?
- Consider use of longer non-competes in equity and other incentive arrangements.



Questions



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