



**Jonathan Exten-Wright on restraint of trade (part 2)**

Legal advice for bosses

# Beware of former staff with a grievance

YOUR employees are probably the biggest assets you have. Not only can they make or break your business, but they also have access to your contacts, customers and your trade secrets.

Last month we looked at how you can whittle down the influence and knowledge a departing employee has; here we finish by covering the legal conditions you can place on the employee once they've left.

Once the employee has left you need to be sure that your business is still protected and you can do this with post-termination covenants.

**There are three main types of restrictive covenants which can be imposed on employees:**

**1.** A non-compete restriction prevents an employee from working in competition with his former employer. This draconian clause is normally reserved for the most senior employees and should be drafted carefully.

**2.** A non-solicitation, or "non-poaching" clause, prevents a former employee from contacting the ex-employers' customers, clients, suppliers. Likewise non-poaching clauses can be used to prevent the ex-employee contacting former colleagues with the view to persuading them to leave.

**3.** A non-dealing restriction precludes former employees from

dealing with any client, customer or supplier, even if that former client or supplier approaches them. No persuasion or enticement on the employee's part is necessary.

These are just three examples.

**■ Are these restrictive covenants guaranteed to be enforceable?** As a general rule of public policy, post-termination restrictive covenants are unenforceable restraints of trade as they can prevent an individual from earning a living.

However, if an employer can show that it has legitimate business interests to protect (such as trade connections or goodwill) and that the restrictions are no wider than is reasonably necessary to protect those interests, they can be enforceable.

Unfortunately there is no general guidance as to what the courts will consider to be reasonable, for example in terms of the duration or geographical extent of the restriction.

Each clause is considered on the facts by reference to the business needs of the employer seeking to impose the restriction.

First, the courts will look to see if there is a legitimate business interest to protect. Only then will they consider if the restraint is 'reasonable'.

**■ What does 'no wider than reasonably necessary' mean?**

To ensure the clause is not construed as too broad, the covenant should be tailored to the position of the employee and the risks posed by them on leaving.

The covenant should therefore be limited by reference, not only to the restricted activities themselves, but also its geographical reach, the description of any third parties, and the duration.

Without these specifics the covenant may be treated as having too wide a scope and will therefore, be potentially void.

**■ If a covenant is too broad can the courts sever those parts so the rest remains enforceable?**

The courts will not re-write a covenant to make it enforceable if it is too broad, and limitations will not be implied in order to save it.

However, the court may sever unlawful provisions from the rest of the terms if, broadly speaking, the provisions can be removed without needing to add to or change the existing wording.

If the character of the contract is changed so that it becomes a different sort of contract or it would conflict with the underlying public policy of avoiding terms that are in restraint of trade, then the courts will not agree to terms being severed.

**■ Is confidential information already protected?** Employees are subject to a general implied

contractual duty of fidelity and confidentiality. This requires them to keep the affairs of their employer secret, both during employment and after they have ceased employment.

However, after termination, this duty only applies to information that is strictly confidential and in the nature of a trade secret. This means that post-termination, any information not strictly defined as a trade secret will need to be protected by an express provision in the employment contract.

**■ How do we go about enforcing a restrictive covenant?**

As a first step in the enforcement of a restrictive covenant, the employer will seek to obtain an interim injunction - a legal order prohibiting the employee from breaching the covenant.

As a further step, the employer may also seek damages from the employee for breach of the covenant.

All of this is just a start before proceeding to the cost of a full blown trial, as proceedings once begun cannot be withdrawn unilaterally. This presupposes that the terms are effective: in this area careful drafting not only pays dividends but is essential. **CFJ**

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**Rob MacGregor on financial assistance for employing apprentices**

# Up to £11,750 offered in support

MANY businesses are worried about skills shortages in the industry and taking on apprentices are a good way to tackle the problem, but we know that for many businesses, taking on an apprentice is a big decision.

Every apprentice will require time from his employers, as well as a financial commitment and no-one wants to make a commitment to training someone to find they're not a good fit for their business, or don't stay the course.

That's why it's vital that when you do decide to take on an apprentice, you're sure that they're the right person for your business.

There are many ways to ensure this. Top of the list is a respectable apprenticeship agency so you can be assured of a good standard and range of candidates to choose from.

For example ConstructionSkills apprentices

have all passed a screening test in advance and we offer them and you support throughout the apprenticeship - that's why, at over 70%, we have some of the best completion rates in the sector. However, even with that safeguard, there are still some additional tips that can help you choose the best new recruit.

**■ Firstly, don't be afraid to ask searching questions:** If your potential apprentice is straight out of school, ask about grades, punctuality and attendance. Ask for school reports to back this up or references from previous employers or teachers.

If you are taking on a Programme Led Apprentice who has completed time at college, you will automatically have access to grades, punctuality, attendance and in-house behaviour passed on via ConstructionSkills.

Also ask your potential apprentice about how

they feel about variable hours and working in all weathers, so they are aware of the hours and conditions that come with the job.

**■ Secondly, consider what kind of person would be best suited to your business:** What kind of working environment would they have to deal with? What type of work is available? What sort of person would get on with your other employees?

What type of person would impress your clients? Take someone with a clear interest in your line of work and a good personality fit. Also, consider the widest possible applicant pool - for many clients female or ethnic minority trainees might be an advantage.

**■ Thirdly, think about what sort of apprenticeship structure would suit your business best.** Traditional apprenticeships

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