



Jonathan Exten-Wright on restraint of trade (part 1)

Legal advice for bosses

ANY employee who works for you is inevitably going to understand how your business runs, get to know the customers and may even discover your tricks of the trade.

Employers should anticipate that members of staff may leave and set up in competition with them, and, therefore, should take steps to prevent the employee using any such knowledge to the advantage of a new employer or even their own – new – business.

There are two key methods of preventing staff from resigning and then competing against their former employer: ‘garden leave’ (which applies before the termination date); and restrictive covenants (which apply after the termination date).

■ Do we need to have express restrictions in our employee contracts?

The benefit of including express restrictions is that they can address the specific circumstances of the employer/employee.

They may also deter employees from joining competitors and discourage potential new employers seeking to ‘poach’ those employees, for fear those restraints will be enforced. The courts will not otherwise imply such terms.

■ What is garden leave?

Where notice is given under an employment contract which contains a garden leave provision, the employer can insist that the employee does not attend work for the duration of the notice period. During this time the employee, who must remain on full pay, is not permitted to work for another employer or make contact with customers or employees.

■ What is the purpose of garden leave?

A garden leave clause keeps an employee out of the marketplace so that the business information they possess is likely to become out-of-date, so that the employee’s successor can develop relationships with customers and so that the employer’s goodwill is protected.

The clause must be drafted to protect the legitimate business interests of the employer, such as trade secrets or the customer base.

■ What happens if an

How to stop your staff leaving and competing against you!

employee breaches the garden leave provisions?

The employer can apply for a court order, an injunction, to enforce either the employee’s implied duties of honesty, loyalty and faithful service; and/or any express term such as a garden leave clause which will prohibit the employee from having other business interests during the course of employment – which includes employment with another employer.

Remember, however, that obtaining an injunction is just the start of what may become full-blown, and costly, litigation.

■ What should I do if an employee wants to leave immediately without giving notice?

By resigning without notice the employee is breaching the contract.

To enforce a garden leave clause, the employer should refuse to accept the attempted termination of the contract, hold the employee to the obligation to give notice and (assuming the contract so empowers you) suspend them for the entire notice period.

Where, however, despite these steps, the employee commences work elsewhere, injunction proceedings (see above) may be required.

■ Am I under any obligations whilst the employee is on garden leave?

As the employment contract continues during any period of garden leave, the employer must continue to perform all of the terms of the contract i.e. pay salary and provide all other contractual benefits, such as medical insurance and pension benefits.

It should be decided whether any entitlement to bonus will accrue during the garden leave period and this should be made clear either in the employment contract or under the terms of any bonus scheme.

■ What should the garden leave clause cover?

Such clauses should give the employer the right to exclude the employee from the company’s premises while promising to continue to provide them with full contractual benefits.

■ The employer may also reserve the right to ask the employee to carry out certain specified duties during the garden leave period.

Most importantly the clause should preclude the employee from contacting clients, suppliers, or employees of the employer while on garden leave and should forbid the employee from taking up alternative

employment.

■ How can I encourage the court to look favourably on the garden leave clause?

■ Exercising the garden leave provision must be done reasonably with the aim of protecting a legitimate interest of the business such as confidential information or connections with customers.

Where an employee is commencing employment with a competitor it should be possible to demonstrate that this may potentially damage the old employer’s business.

■ It should not be too long a period, as the shorter the duration of garden leave, the more likely it is to be enforced.

■ The period of garden leave should be limited to no more than approximately six months in aggregate, even where the period of notice required is in excess of six months.

■ It should be borne in mind that a court may decline to enforce a restrictive covenant after termination where a period of garden leave has already been served. **CFJ**

Next Month: Post termination clauses and how they work.

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Rob MacGregor on apprentices

Apprentices boost businesses

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