

Jumping ship: Partners and fee earners first!

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There are few matters that are more likely to make your Managing Partner wake up in a cold sweat than their key fee earners being poached (or, to use the less emotive term, being "laterally hired"). The loss of a vital partner to a competitor, with their valuable client connections, would be bad, but when the entire team jumps ship with that rainmaker,

the impact for the losing firm can be enormous.

Firstly, there's the obvious impact on the fee income. But also the former firm must ensure that client relationships are maintained and the ship is steadied. The firm will be particularly keen to send a strong message, not only to warn the departing team off breaching their obligations, but to send a message to the remaining partners and fee earners so they don't follow suit.

English law allows employers to restrain their departing employees' abilities to earn a living, but only in a way which goes no further than to protect the former employer's legitimate commercial interests. It is an area ripe for litigation and a rogue word in a contractual restriction is enough to make it held to be an unenforceable restraint of trade by the court. And who in the world is more likely to want to argue about the minutiae of contract wording than two rival law firms?

At the heart of these disputes are the post-termination restrictions that the departing team owe their former law firm. If their employment contracts were not kept up to date, there is a strong chance that the non-compete and non-soliciting restrictions contained therein are now unenforceable.

In addition, if the partner was a "traditional" partner in a "traditional" partnership (not an LLP), they will have owed fiduciary duties to their former firm. These include the duty not to let their own career interests conflict with the firm's commercial interest – perhaps by encouraging their team to leave.

Poaching firms will also be understandably concerned. Despite the best will in the world from the partner they have just hired, there will inevitably have been some breaches of their duties evidenced by one or two emails or text messages.

WhatsApp messages are not immune either – and any evidence that the poached partner tried to coax their team to join them will be potentially discoverable and definitely disclosable. That team being distracted by a High Court action from their former firm will be the last thing the poaching firm wants.

As a result, a commercial discussion commonly follows the threatening of or issuing of such a claim. Such agreements can provide for settlement terms as imaginative as the parties want and can include early release (where the poached team or partner are released early from their garden leave periods, allowing their former firm a period of calm to preserve relationships with clients), run-off (where the old firm retains entitled to receive the fees earned by the team before their move), split-off (where the team's client list is hived up between the firms) and profit-sharing, where the poaching firm agrees to split the profits they make from the new partner or team for a fixed period of time.

Paul McAleavey

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