LAW & ORDER

Poaching: are employee restrictions fair game?

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Employee restrictions designed to "kick in" after employment ends regularly create some of the hottest disputes between employers, employees and competitors.

These "post-termination restrictions", often referred to as "non-compete" or "non-poaching" clauses, can apply to a wide range of situations, such as, for example, where senior executives want to change employer to pursue new opportunities or where the employer wants to end the employment relationship but still wants to protect its clients from the competition.

In the context of the UK insurance market where client relationships are paramount, legal advice is regularly sought from underwriters and brokers about the enforceability of these restrictions.

In the changing economic landscape, where restructuring is continuing in particular lines of business, and merger and acquisition activity is predicted to increase, senior executives who are unhappy with the reshaped business may be considering a change in employer. Insurers and brokers will be keener than ever to protect their business.

On a practical level, it is perhaps understandable why employees regularly express the view they believe post-termination restrictions are not enforceable, or at least should not be out of a sense of fairness.

Typically the employee is not paid during the length of the restriction, which may be for as long as 12 months after the end of employment, and he or she needs to earn a living. The restrictions will probably try to prevent the employee from contacting clients, but those client contacts will often be long-standing social as well as business acquaintances of the employee. In fact, the employee may have introduced the clients to the employer's business in the first place and so thinks of them as "his" clients.

From the employer's perspective, significant company resources in terms of time and money will have been invested into developing the client relationships, to which significant revenue streams attach, and the employer is in no doubt that it must do whatever it takes to protect its investment.

Given these competing viewpoints, it is easy to see how there can be tensions between employers and former employees who may each believe they "own" a particular piece of business or client. In that situation the employer's legal ability to enforce the restrictions against the employee, and perhaps also the new employer, takes centre stage.

It is important to bear in mind employers' ability to enforce post-termination restrictions in most cases is by no means a given.

Some basic legal principles will apply. The starting point is where the restrictions seek to prevent the employee from competing altogether with the employer in his next job they will usually be unenforceable because they are "restraints of trade".

Carefully drafted restrictions tailored to the particular employee's employment are more likely to be enforced. By contrast, generic "one-size-fits-all" restrictions that are applied to all employees of the employer are less so.

However, where the restrictions are more limited the court will more usually allow the employer to enforce them.

In considering whether the restrictions are reasonable, the court will look at all aspects of the way they are drafted, including the length of the restrictions and their geographical area.

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The old lawyers' adage "each case turns on its own facts" is never truer than when it comes to the assessment of enforceability.

As a rough rule of thumb, the greater the seniority of the employee, and the greater and more regular his access to the employer's trade secrets, confidential information, senior staff and client connections, the more likely the restrictions are to be enforceable.

Importantly though, restrictions in an employment contract signed years ago, perhaps when the employee began in a junior role, may well be unenforceable or insufficiently extensive if they have not been refreshed as the employee progressed through the hierarchy of the company.

The law relating to post-termination restrictions has been around for many years. An early case dates back to 1894 and was about an arms manufacturer and a restriction that stated the individual "would not make guns or ammunition anywhere in the world, and would not compete in any way for 25 years".

However, the law remains a complex area that has evolved over time. The frequency with which cases go to court means there can be some unusual decisions on occasion.

For example, in the recent case of *Prophet plc v Huggett* an injunction was granted to enforce a 12-month non-compete restriction, which, on its literal wording, did not make sense and would not protect the employer.

The restriction contained an apparent drafting error that sought to prevent the employee, a sales manager, from being employed by a competitor in connection with the products he had sold during his employment. The difficulty was no competitor would be selling the employer's products, and so the clause did not work.

It is an established legal principle if a restriction is too broadly drafted the court may delete the offending words (with its proverbial "blue pencil") with the result that it becomes narrower and enforceable, but it will not re-write the restriction by adding words.

However, in *Prophet* the court was rather surprisingly prepared to do so. This was not to make the restriction narrower but to broaden it so it would be wide enough to catch the activity the restriction was intended to stop. The court corrected the drafting error by looking at what a reasonable person would have understood the parties to mean when they entered into the restriction to produce a workable commercial result, which was to prevent the employee not only selling the employer's products but also products similar to them.

Given the complexity and unpredictability of the law surrounding non-compete and non-poach restrictions, employees concerned about post-termination restrictions are well advised to take legal advice early on, ideally before they enter into them, so they can determine the prospects of enforcement and consequently how they will impact on their chances of getting another job. ■

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