

## What to do if you suspect employees are preparing to compete



Post termination restrictions are clauses in an employment contract that prevent an employee from doing something after their employment has terminated. They can be used to temporarily restrict a former employee from joining a competitor, soliciting and dealing with customers and clients, and poaching staff, to the extent this would give an unfair advantage by exploiting these for their own or a new employer's advantage

Many employers ensure that the contracts of employment of their staff contain post termination restrictive covenants such as the ones mentioned above, but very few know what they should do in the event that they uncover evidence that shows that a former employee has breached or is preparing to breach their contractual obligations.

We set out below our top tips for employers when they suspect a departing employee has “gone rogue”.

### Remember “prevention is better than cure”

Having appropriate business protection clauses in the employment contracts of key employees is essential. If you don't include express restrictive covenants (or these are badly drafted or out of date) then your business could be left in a vulnerable position.

If an employee's contract contains well drafted restrictive covenants, the situation is much easier. Restrictions should be designed to protect an employer's legitimate business interests and go no further than is reasonably necessary in the circumstances. This means that they should be reasonable in their duration and their scope.



It is worth remembering that restrictive covenants need to be drafted taking into account the seniority and responsibilities of the employee at the time the restrictions were entered into, rather than the point in time when you want to enforce them. Restrictions can become out of date, unreasonable, and unenforceable as your business and the employee's role changes, so you should review them on a regular basis.

Other useful terms to include in a contract of employment to protect your business include:

- A garden leave clause;
- Clauses to protect confidential information and intellectual property;
- An express obligation to act in the best interests of the employer;
- Limiting activities of the employee outside their job for their employer without express permission; and
- An appropriate notice period, including scope for the employer to pay in lieu of notice.

## Act quickly

If you suspect that an employee has breached, or is preparing to breach their contractual obligations, then it is essential that you act quickly because time is of the essence.

If your suspicions are aroused whilst the individual remains in employment then, as a first step, you should consider meeting with the employee and reminding them of their contractual obligations and that you do not intend to waive these requirements. This can often be done at an "exit interview" if the employee has handed in their notice.

Exit interviews may also be an opportunity to delve into the reasons for the employee's resignation and obtain some valuable information about their future work plans or new business venture. It may be a red flag if they may remain tight lipped about their future plans.

If the employee has handed in their notice or is already in their notice period when you uncover the evidence, then you could consider putting them on garden leave to keep them away from confidential information, your clients, customers and staff.

If you have concrete evidence that an employee has breached their contractual obligations then you could consider suspending the employee pending a disciplinary investigation into their actions.

A final option, if you think the employment relationship is salvageable, is to consider whether you want to encourage / incentivise the employee to stay i.e. by offering a pay increase, or some other benefit.

If you have suspicions about an employee but no concrete evidence, then once they have left the business, you should keep a close eye on them. This way you can make sure that, if it becomes evident they may be breaching their covenants to you, you are ready to act.

## Gather evidence

This is where you must play detective and go on a fact-finding mission.

As an employer, you will normally have the right to conduct workplace monitoring in a number of ways, for example:

- Reviewing CCTV footage of your premises' cameras
- Opening mail or emails that concern the business, regardless of the recipient
- Using automated software to check emails
- Checking phone logs and recording phone calls



You should inform your staff in writing (usually in an IT & Communications or Data Protection policy), before you begin or introduce a method of monitoring that you *will* be monitoring them. By doing this, your actions and your intentions, as an employer, remain transparent.

You should also consider appointing a forensic IT expert who may be able to recover information on an employee's computer that has been deleted or hidden.

## “Sure up” relationships with key clients, employees, suppliers

An important step that employers often forget to take is to keep an eye on their remaining employees. If there are employees with whom the ex-employee worked closely, who hand in their notice to join them at their new workplace in the relevant period of the ex-employee's restrictive covenants, you may be able to enforce a non-solicitation of employees' clause.

If you manage to speak to employees before they have definitely made up their minds to leave to join their former colleague then you may also be able to incentivise them to stay.

Going to meet or speaking to key clients and suppliers that you know have had good relationships with the former employee can also be invaluable. Firming up and managing these relationships can often be more fruitful than taking legal action against a former employee.

You could also ask trusted clients or customers in the marketplace to report back to you in the event that they are contacted by your ex-employee.

## Seek legal advice

It is essential that you take legal advice as soon as you suspect that an employee has acted, or is preparing to act, in breach of their restrictive covenants.

As a first step, it is likely that your solicitor will write to the employee and their new employer (if applicable). In this communication, your solicitor will be letting the employee know that you believe them to be breaching their restrictive covenants to you. They will reiterate the relevant covenants (and any other relevant legal obligations such a confidentiality clause) and let them know you intend to take action if they carry on in the same way.

They may seek formal undertakings from the employee that they will not / have not breached their covenants and a new employer that they will not / have not induced a breach of contract or in any way facilitated the employee's breach of contract.

Typical undertakings including:

- To destroy or deliver up confidential information;
- Not to use confidential information in the future;
- To disclose information about how confidential information has been used to date or the extent of the unlawful conduct;
- Continue to comply with all (or some) of the relevant restrictions; and
- To preserve disclosable documents.

If this type of letter does not achieve the desired outcome then you can consider applying to the court for an emergency injunction to stop the employee working in their new role and / or using your confidential information or acting in ways that are directly impacting your business.

Injunctions are expensive and the evidential bar is high, so you will need to have a convincing case against your



employee and evidence of loss to proceed with this approach.

You could also bring a claim against your employee and seek recompense for losses directly arising from the employee's breach of contract. If you bring court proceedings and are successful, you may also receive some or all your costs for bringing the action.

## Further advice

If you have any questions or would like advice regarding the drafting or enforcement of post termination restrictions in employment contracts please contact [Camilla Beamish](#) or another member of our [employment team](#).

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