

Employment law reforms: non-compete clauses in employment contracts

The Department for Business and Trade has recently published a paper setting out a number of measures which are intended to grow the economy and cut costs for businesses and improve regulation as a result of the UK leaving the EU. The government will be consulting on potential changes to the Working Time Regulations and TUPE, but the long-awaited outcome to a consultation on the use of non-compete clauses in employment contracts undertaken in 2020 has now been released with an outcome.

Currently, employers can determine the length of time before which ex-employees can work for a competitor through the use of non-compete clauses in contracts of employment or other documents, provided that the duration is no longer than is necessary to protect the employer's legitimate interests. The duration of non-compete clauses range from one month to twelve months (or longer in some cases) but on average the duration of restriction is 6 months.

In 2020 the government issued a consultation on possible reforms to the position on post-termination non-compete clauses for employment contracts. Initially the government wanted to explore the possibility of restricting the use of non-compete clauses around two main options: (i) making compensation mandatory for non-compete clauses; or (ii) banning the use of non-compete clauses completely.

The result of the consultation is that the government will introduce a statutory cap of three months on non-compete clauses in employment and worker contracts and will legislate on this "*when Parliamentary time allows*". The government sees this change as necessary to boost the labour market, make it easier for people to move jobs and for businesses to access the necessary talent to fill vacancies and succeed.

With no indication of when the introduction to the change in approach is likely to happen and no further guidance at this time, a number of questions remain about if and how this will be implemented.

Whilst the proposed change means that ex-employees can work for a competitor after just three months of leaving, it is anticipated that employers will still be able to rely on the other types of restrictive covenants without a statutory limit such as non-solicitation, non-dealing and non-poaching of employees.

What does this mean for employers?

A number of questions remains unanswered including when any legislation will be put to parliament (if at all) given a general election is due next year.

At this stage it is unclear whether the proposed changes will only affect new employment contracts or affect all existing contracts, or whether they would affect other types of agreement that usually include these types of restrictions (such as share option plans or shareholder agreements).

If the statutory cap does become law, employers may need to consider alternative ways to protect their business interests for new contracts. Employers may try to rely more heavily on longer notice periods and garden leave clauses to prevent employees moving to a competitor too quickly. The use of other restrictive covenants (which are expected to be unaffected by the statutory cap) and confidentiality/intellectual property provisions will also need to be re-considered.

What is also uncertain is the position with existing contracts that include non-compete clauses in excess of 3 months; will these be void or will they be enforceable up to the statutory cap. If void, employers will need to re-draft existing contracts or lose protection all together.

Employers may want to start to consider options now on how it can protect its legitimate business interests in case the law changes. However, as there is still so much uncertainty, employers may want to wait until further guidance is provided

and for a date when the legislation will pass through parliament before making any changes.

If you have any queries or need help with drafting or reviewing restrictive covenants in your contracts, please contact Jo Cullen Head of Employment at Edwards Duthie Shamash for a free initial discussion – Josephine.Cullen@edslaw.co.uk or 020 8475 7401

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