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People Management



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Tackling conflicts of interest when a key employee leaves

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Chris Weaver outlines how employers can best protect their confidential information

One of the principal sources of competition to any business is the people who work for it, since they have access to its confidential information and contact with its customers. What can employers do to protect themselves from former employees engaging in activities damaging to their interests?

In determining what protections may be appropriate, employers should consider the seniority of the employee, the information they are likely to have access to during their employment and the risks they may pose to the business after they have left.

A well-drafted employment contract tailored to these risks should include provisions that bolster and supplement the implied duties of fidelity and confidence (and any fiduciary duties), giving the employer more effective means of protecting itself against competition both during the employee's employment and after it ends.

Express provisions protecting confidential information and allowing the employer to place the employee on garden leave during their notice period are essential. Where the risk of significant damage to the business is apparent, it may also be appropriate to include restrictive covenants that seek to restrict an employee's activities for a defined period after their employment has ended. This can be by preventing the former employee from joining a competitor, soliciting or dealing with clients, interfering with suppliers or poaching employees, for example.

Restrictive covenants

However, any contractual term restricting an employee's activities after termination of their employment will be void as a restraint of trade, unless the employer can show that it goes no further than is reasonably necessary to protect its legitimate business interests.

The enforceability of a restriction is very fact-sensitive and will depend on the particular circumstances. The more senior the employee, or the more likely they are to acquire information that could harm the employer if used by a competitor, the more likely the restrictive covenants will be held to be enforceable. Restrictions must be carefully drafted so they are no wider than necessary in terms of scope and duration, otherwise they risk being held unenforceable.

Restrictive covenants will no longer be binding if the employer is in fundamental breach of the employee's employment contract. This can happen when the employer terminates the

employment contract in breach of its terms by not giving notice – for example, where the employer makes a payment in lieu of notice without an express contractual right to do so. The problem can also arise where the employer's actions allow the employee to claim they have been constructively dismissed.

Remedies

Where an employer suspects a former employee is in breach of restrictive covenants, the employer can take steps to obtain an injunction preventing the former employee from continuing to breach the restrictions. Alternatively, or if not successful in obtaining an injunction, the employer may seek damages from the employee for breach of the covenants. If the former employee's new employer has induced or conspired with the employee to breach the restrictions then a claim can also be brought against the new employer. This can be attractive as the new employer may well have 'deeper pockets' with which to pay any damages.

Generally, in all but the most urgent of cases, the first step will be to write to the former employee seeking undertakings not to breach the restrictions. This may avoid the need to go to court, and applications for injunctions are both costly and uncertain. Many cases settle as the stakes are high for both the former employee and the new employer.

Well-drafted restrictive covenants can therefore act as a deterrent against an employee engaging in competitive activities for a period after they have left their employment and provide employers with a range of options should the employee breach those restrictions.

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