

## Restrictive covenants: **top tips for employers**

Top tips for employers and prospective employers when it comes to restrictive covenants.



### Periodically review covenants

Review employees' restrictive covenants following promotions or when granting new incentive arrangements. Consider requiring individuals to enter into fresh restrictive covenants if the existing restrictions would no longer be relevant and adequate to protect the business.



### Beware of constructive dismissal/breach of contract claims

If the contract is repudiatorily breached by the employer, and the employee accepts, the restrictive covenants (other than in respect of confidential information) fall away.



### Strengthen the protection in your contracts of employment

Consider:

- > Combining covenants with appropriate notice periods and express garden leave provisions to give maximum flexibility on termination.
- > Supplementing non-compete covenants with other forms of restriction, including non-solicit, non-dealing, and non-poaching covenants, as well as comprehensive confidentiality and IP restrictions.
- > Anti-team move provisions requiring an individual to notify their employer of job offers from competing businesses and provide their covenants to their prospective employer.



### Consider strategy carefully

Think about the strategy you wish to take with each departing employee. Is it more beneficial in the long run to offer a release and waiver? Is garden leave necessary, or is it possible to continue with active employment but put the employee on special projects? This may reduce any negative impact of garden leave on the rest of the team and clients.



### Introduce robust IT policies and systems

Employers should have in place robust IT policies and monitoring systems that identify any high-risk patterns of behaviour (e.g. if an individual is forwarding company documents to their personal email address or downloading documents to an external hard drive etc). Any such behaviour should be investigated to establish whether there may have been a breach.



### Don't delay

If you do suspect an employee may be in breach of their restrictions, act quickly. Delaying enforcement of the restrictions can seriously undermine an employer's case. However, litigation is not necessarily the best option in every case. Not only is it costly, but it may also adversely impact client, customer, and employee relations.



### Prospective employers should be mindful

Consider:

- > How you communicate with candidates – all correspondence will potentially be disclosable in any future litigation.
- > Requesting a copy of their existing employment contract to check any ongoing obligations (although be mindful of the risk of being subject to a claim for inducing a breach of contract).
- > Arranging legal advice for the individual on what they can and can't do. Note that they may not be able to share certain information about their current role and clients on any exit, and they should not be pushed to do so.

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