EMPLOYEE RESTRICTIVE COVENANTS
ENFORCEMENT, CHALLENGE AND TRENDS

Michael Anderson and Toni Lorenzo of Lewis Silkin LLP consider the key practical, legal and commercial issues for employers in relation to post-termination restrictive covenants.

For most employers, protecting their businesses against competitive threats is a vital concern. The departure of a key employee to join a competitor, or to set up a rival business of their own, can have extremely damaging consequences. The employer may lose clients, prospects or other staff, and their valuable confidential information and strategic plans may be put at risk.

Employers therefore need to have effective protections in place from the outset of the employment relationship and keep them up-to-date. Post-termination restrictive covenants are common in employment contracts and, if carefully drafted and reasonable in scope, can provide powerful ammunition for challenging and preventing damaging competitive activity. It is important for practitioners to have not only a good understanding of the law applicable to restrictive covenants, but also the strategic considerations when they come into play.

This article considers a range of key practical, legal and commercial issues for employers looking to enforce restrictive covenants against employees who threaten to compete when they leave or go on to do so. It considers the scope of protection that restrictive covenants can offer, when and how to amend existing covenants, and how to enforce them. It also examines how businesses can manage the risks when recruiting employees with restrictive covenants from competing businesses.

GENERAL PROTECTION

Even if an employment contract does not contain explicit post-termination restrictive covenants, some terms are implied into all employment contracts and are important for employers in protecting their businesses. These include:

- The duty of fidelity. All employees owe an implied duty of fidelity to their employer, meaning that they must have regard to their employer's interests and serve the business loyally.
- Fiduciary duties. Senior and other staff, such as statutory directors and others in a position of trust in relation to the business's assets or employees, also owe fiduciary duties that require them always to act in their employer's best interests, even at the expense of their own interests.
- Confidentiality. All employees owe an implied duty of confidentiality to their employer. However, after termination of employment, this duty will only protect trade secrets from misuse, such as confidential algorithms, designs and formulae, and will not protect what is known as "mere confidential information" (*Faccenda Chicken Ltd v Fowler [1986] ICR 297*). Trade secrets are

now also protected by the Trade Secrets (Enforcement, etc) Regulations 2018 (*SI 2018/597*), which operate in parallel with the implied duty of confidentiality (*www.practicallaw.com/w-015-3958; see feature article "Trade secret protection: guarding against a global threat", www.practicallaw.com/5-637-7032*).

Employers often reinforce these implied protections by including related express terms in employment contracts, such as:

- A duty to act in the employer's best interests at all times.
- A requirement to report the employee's own actual or prospective wrongdoing and that of others.
- An obligation to disclose any information that might adversely affect the employer's interests; for example, plans to compete or approaches from competitors.
- An express provision protecting non-trade secret confidential information, both during the employment relationship and after it ends.
- Practical contractual obligations on termination of employment; for example, to return all IT equipment, memory sticks and copies of specified documents, and to delete the employer's confidential information and any company documents from the employee's own devices.

Notice periods and garden leave

In addition, it is important for employers to have well-drafted provisions in employment contracts that give them control over the departing employee's activities during their notice period. In many cases, when an employee gives or receives notice to terminate their employment, the employer may want to enforce a period of garden leave; that is, require the employee to stay away from work for all or part of their notice period.

Businesses can use garden leave in conjunction with restrictive covenants to help protect themselves from competition that might damage the business. For instance, a new executive could be brought in to manage or develop a particular client relationship while the departing employee is kept out of the market.

There is no automatic right to place employees on garden leave, so it is strongly advisable to include an express garden leave clause in the employment contract. This will avoid the employee arguing that the employer is in repudiatory breach of contract so as to release them from their ongoing obligations.

There is an important interplay between garden leave and the enforceability of post-termination restrictions. A court is likely to take any garden leave period into account in deciding to what extent to grant the employer further protection based on restrictive covenants (*Credit Suisse Asset Management v Armstrong [1996] IRLR 450*; *Tullet Prebon plc and others v BGC Brokers LP and others [2010] EWHC 484, see News brief "Jumping ship: not always a good idea?", www.practicallaw.com/8-502-1215*). Some employers address this issue directly by including a garden leave set-off clause in contracts, which reduces the amount of time that a restrictive covenant will apply (*see "Current trends" below*).

Types of restrictive covenant

Restrictive covenants, or post-termination restrictions, are designed to protect the employer and its affiliates against competitive activities by former employees for a certain period after they leave. In summary, the main types of restrictive covenants are:

Non-compete covenant	To prevent a departing employee from engaging in certain competitive activities. For practical purposes, this will often mean not starting work with a competitor during the term of the covenant.
Non-solicitation covenant	To stop a former employee from seeking business from specified clients or prospective clients, or from assisting others (such as a new employer) in doing so.
Non-dealing covenant	To prohibit a former employee from having any dealings with clients or prospective clients. This is a broader prohibition than a non-solicitation restriction.
Non-poaching covenant	To prevent a former employee from employing, engaging or enticing away other employees, or from assisting others (such as a new employer) in doing so.
Non-team move covenant	To prevent a former employee from leaving to join a group of employees who have already left for a competitor. This type of clause is, to the authors' knowledge, yet to be tested in the courts.
Non-interference covenant	To prevent a former employee from seeking to divert supplier relationships away from their old employer, typically for the benefit of a new employer.

RESTRICTIVE COVENANTS

Post-termination restrictive covenants in employment contracts are designed to enhance the protections outlined above by preventing employees from soliciting clients, customers, prospects, suppliers or other employees, or from generally competing for a specified period after their employment has been terminated (*see box "Types of restrictive covenant"*).

Requirement of reasonableness

Any restrictive covenant will be void for being in restraint of trade and unenforceable unless it goes no further than is reasonably necessary to protect the employer's legitimate business interests.

Legitimate interests. A restrictive covenant must be aimed at protecting a legitimate proprietary interest of the employer. These interests can include protecting: confidential information and trade secrets; client contacts; goodwill; relationships with suppliers; and maintaining a stable workforce.

Reasonableness. Any restriction must be reasonable, otherwise it will be unenforceable (*Office Angels Ltd v Rainer-Thomas [1991] IRLR 214, www.practicallaw.com/6-100-5715*). Reasonableness is judged at the time the restrictive covenants were agreed (*Patsystems Holdings Ltd v Neilly [2012] EWHC 2609, www.practicallaw.com/9-521-9598*). What is reasonable will depend on the circumstances and the type of covenant (*see "Different types of covenant" below*).

No wider than necessary. For a restrictive covenant to be regarded as reasonable, having regard to the interests of the parties, it must afford the employer no more than adequate protection (*Herbert Morris Ltd v Saxelby [1916] 1 AC 688*).

Different types of covenant

What is reasonable will depend on the business, the legitimate interest being protected and the employee's role. However, there are some principles that have been established through case law for different types of covenant.

Non-compete restrictions. Non-compete restrictions are a draconian measure and, traditionally, have been difficult to enforce. However, the courts commonly uphold them where other types of restriction would be inadequate to protect the employer's legitimate interests. For example, a non-compete restriction may be necessary: to protect the employer's trade secrets and confidential information; or where an employee has such a strong relationship with clients or suppliers that only a complete prohibition on the employee being engaged in a competing business would be effective.

Non-solicitation restrictions. Non-solicitation restrictions should normally be limited to clients, customers or prospects with whom the employee had contact for a specified period before termination and should prevent solicitation for a reasonable period afterwards. One issue is what amounts to solicitation; for example, whether it includes an employee who merely informs clients that they are leaving, or whether solicitation occurs only when an employee expressly or implicitly invites a client to transact business. These questions have been arising recently in the context of solicitation through social media, such as LinkedIn.

Non-dealing restrictions. The main advantage of a non-dealing restriction is that it avoids having to show that an employee took active steps to entice clients or customers, or otherwise solicited business overtly or implicitly. The fact that non-dealing is a broader prohibition than non-solicitation means that courts are likely to be more cautious. However, this kind of clause will still be enforced in suitable circumstances; for example, where the departing employee's close personal connection with clients exposes the former employer to a particular risk of losing business.

Non-poaching restrictions. Employers have a legitimate interest in protecting a stable, trained workforce through restrictive covenants (*Dawnay Day & Co Ltd v D'Alphen [1997] EWCA Civ 1753, www.practicallaw.com/1-100-0980*). However, employers should take care to confine non-poaching restrictions to the specific categories of staff over whom the employee in question has influence. They should also consider how long that influence will last.

What will be deemed a reasonable duration for each type of covenant will vary in each case, but it is unusual for any kind of post-termination restriction lasting longer than 12 months to be upheld in the employment context.

CURRENT TRENDS

The approach of employers towards using and drafting restrictive covenants tends to evolve over time in light of developments in case law and general business practice.

Geographical extent

Geographical restrictions, which prevent an individual from carrying out activities within a specified area, used to be commonplace, particularly in non-compete covenants. While still suitable for certain types of business that are reliant on local trade, such as hairdressers, they have become rarer in recent years as business has become increasingly global, with many employers in a position to defend worldwide restraints (*Rush Hair Ltd v Gibson-Forbes and another [2016] EWHC 2589, see News brief "Restrictive covenants in commercial contracts: cutting to the chase", www.practicallaw.com/0-636-2151*).

Shareholdings

It is fairly standard for non-compete restrictions to include a carve-out that allows former employees to hold a small shareholding in a competitor, but the Supreme Court's decision in *Tillman v Egon Zehnder Ltd* put a new spotlight on this issue (*[2019] UKSC 32, see News brief "Restrictive covenants: wielding the blue pencil", www.practicallaw.com/w-021-3576*). The court observed that, while holding a controlling shareholding in a company clearly enables the former employee to direct the operation of the company, even a minority shareholding, such as a 25% stake in a start-up, can enable influence. Therefore, it may be reasonable for employers to prevent shareholdings in competitors, but they should be careful to avoid the situation where the drafting of a non-compete restriction operates (expressly or impliedly) as a total ban on holding shares for investment purposes.

Garden leave set-off

It has become relatively common to include an express provision in employment contracts that reduces the duration of a restrictive covenant by any period of time that the employee spent on garden leave before their departure (*see "Notice periods and garden leave" above*). The absence of a set-off clause will not, however, necessarily be fatal to the employer's ability to enforce restrictive covenants.

Team move covenants

Employment contracts are increasingly including clauses that specifically seek to limit an employee's freedom to follow former colleagues who have left to join a competitor (*see feature article "Troublesome team moves: preparation and planning", www.practicallaw.com/w-018-5778*). There do not, as yet, seem to have been any cases in which the enforceability of these terms has been tested. However, there is inevitably an argument that the courts will conclude that these covenants are unreasonably restrictive and contrary to public policy, so careful drafting will be paramount.

AMENDING RESTRICTIVE COVENANTS

Most well-established businesses will already have restrictive covenants within their standard employment contracts so, when considering if their business is adequately

The court's approach to enforcement

When considering whether to enforce a particular restrictive covenant, the court will consider a number of issues.

Interpretation. Before enforcing a restrictive covenant, the court must first decide what it means. The usual principles of interpreting a contract apply. The court will look at what a reasonable person would have understood the covenant to mean, assuming they had all the background knowledge which would reasonably have been available to the parties at the time. They will also apply the validity principle which was clarified by the Supreme Court in *Tillman v Egon Zehnder Ltd* to mean that, if a clause is capable of two meanings, one of which would result in invalidity, the court will prefer the alternative construction if it is realistic (*[2019] UKSC 32, see News brief "Restrictive covenants: wielding the blue pencil", www.practicallaw.com/w-021-3576*).

Reasonableness. Because of the inequality of bargaining power between employer and employee, the courts usually adopt a more critical approach to restrictive covenants in employment contracts than those in commercial contracts. The burden will be on the employer to prove that a covenant is reasonable and goes no further than necessary.

Severance. If parts of a covenant go too far, the court may be able to perform a type of contractual surgery known as severance or "blue-pencilling" where any unreasonable part of a covenant is removed, leaving the rest of the covenant intact and enforceable. In *Tillman*, the Supreme Court held that there is no need for a phrase to be in a separate covenant, or to be trivial or technical, for severance to apply (and overruled earlier authority to that effect). Instead, severance is possible if:

- The unreasonable part can be deleted without needing to add extra words.
- The remaining terms continue to be supported by consideration.
- Crucially, the removal of the unenforceable provision would not generate any major change in the overall effect of the restrictive covenants in the employment contract.

Incorporation. The court also needs to be satisfied that the restrictive covenant is part of the contract; in practice, it is looking for the employee's signature to demonstrate acceptance and consideration.

Repudiation. A repudiatory breach of contract by the employer which is accepted by the employee will have the effect of releasing the employee from their restrictive covenants (*General Billposting Co Ltd v Atkinson [1909] AC 118*).

Discretion. If the employer is seeking an injunction or another type of equitable remedy, the court retains the discretion to decide that an injunction should not be granted even if the restrictive covenant is reasonable and valid. This will depend, among other things, on the reasonableness of an injunction at the time of trial, looking at factors such as whether the employer has delayed and whether damages would be an adequate remedy (*TFS Derivatives Ltd v Morgan [2004] EWHC 3181, www.practicallaw.com/8-200-8279*).

protected, they will not be starting with a blank sheet of paper. For these employers, the key question is whether their existing restrictive covenants are adequate in terms of the scope of protection that they afford and the likelihood of enforceability, and, if not, when and how they should amend them.

When to amend

Many employers have multiple versions of restrictive covenants in place, coming from different sources and times. Ideally, they should carry out an audit to try to identify all signed versions of the existing covenants and then consider whether:

- The wording makes sense in the context of this business and its wider sector. Too often, businesses find that they are using boilerplate wording that has not been tailored for them.
- The duration of each covenant is reasonable. This is a critical issue because an unreasonable duration cannot be rescued by severance (*see box "The courts' approach to enforcement"*).
- Each covenant includes reasonable limits. Since *Tillman*, employers can be a little more relaxed about parts of covenants that may go too far, as these are now more likely to be severable and not have an impact on the enforceability of the rest of the covenant. The remaining core part of the covenant must, however, contain reasonable limits or there will be nothing to survive severance.
- The right types of restrictive covenant are in place for different types of employee. There could, for example, be a problem if the business has adopted a one-size-fits-all-employees approach, or if employees are promoted or move roles without signing new covenants or affirming existing ones.
- All relevant employees have been asked to sign restrictive covenants and whether all the signed versions are on file.

If an employer identifies any issues, it will need new restrictive covenants if it might want to take proactive steps (including court action) to enforce the restrictions later. These are important issues that will inevitably arise in any attempt at enforcement.

How to amend

An employer may need to consider amending or replacing restrictive covenants for some or all of its employees if the existing covenants are flawed or unsuitable, or if there is insufficient evidence that they have been fully executed.

For new joiners, introducing new or updated restrictive covenants is relatively straightforward. In theory, the fact that an employer has introduced different restrictive covenants for new joiners is an argument that could be deployed to suggest that old restrictive covenants for existing employees are unreasonable. In practice, however, this tends to be a risk that employers are willing to bear.

Amending restrictive covenants in contracts of existing employees is more difficult. The employer must provide valid consideration in return for the new covenants. It is not advisable to attempt to rely on the employee's continued employment as the consideration (*Re-Use Collections Ltd v Sendall [2014] EWHC 3852*). Nor is it advisable to introduce new restrictive covenants by a deed that is unsupported by consideration. An actual benefit should be offered in return.

An obvious approach is to make a planned bonus or pay increase conditional on agreement to new restrictive covenants. Employees may, however, see the bonus as a reward for past performance and legitimately expect a pay rise each year in line with the market. Attaching new conditions to routine payments can leave employees feeling resentful.

The ideal solution is to link the new covenants to a positive change or good news, the classic example being a promotion. Employees expect new terms and conditions on promotion and will usually approach them in a receptive frame of mind. Clearly, a business cannot promote all of its employees to introduce new restrictive covenants but sometimes an incremental approach suffices.

Another strategy is to offer specific financial compensation in return for new restrictive covenants. This often works well in conjunction with other changes but it is important to be able to show what consideration was offered in return for the new restrictive covenants.

Occasionally, some employees may refuse to sign up to the new restrictions. For employers, it is important not to get boxed into a corner but to have a plan from the outset. This might involve simply leaving the employee on their existing contractual terms or it might involve going so far as to dismiss the employee with an offer of re-engagement on the new terms.

It is not advisable to leave the issue unresolved or to unilaterally impose new restrictive covenants and try to argue that the employee has implicitly agreed to them. When new terms have no immediate impact on an employee, the fact that they have carried on working will not usually be taken to mean that they have agreed to them (*Solectron Scotland Ltd v Roper and others [2003] UKEAT 0305/03/3107*). Therefore, to be certain that the new restrictive covenants are incorporated into the employment contract, the employer should make sure that the employee signs the relevant document.

ENFORCEMENT

If an employee breaches, or threatens to breach, their restrictive covenants, the employer will need to decide whether to seek court enforcement or adopt some other strategy for protecting its interests.

Responding to an employee's breach

An employer may have several months' notice that the employee intends to breach their restrictive covenants; for example, if they resign on notice saying that they are going to a competitor in breach of their non-compete restriction. Often, however, the employer will not know about the breach until it is imminent or has already happened. While acting quickly is crucial, litigation is not necessarily the best strategy in every case. When deciding what to do, employers should consider:

- The scale of the business threat; that is, whether the employee's actions or threatened actions pose a genuine threat to the business. Employers should consider the employee's role, and the nature and scope of the proposed competitive activity.
- Whether the restrictive covenants are likely to be enforceable (*see box "The court's approach to enforcement"*).
- Whether there is clear evidence of a breach and what further evidence can be obtained.
- What impact litigation would have on clients, competitors and the sector in which the employer operates. Employers should also consider the effect on other employees, whether the employer wants to set a precedent, and whether litigation is worthwhile, bearing in mind the significant financial costs and management time typically involved.
- The business's commercial objectives and whether they can be achieved in ways other than litigation; for example, the employee might be persuaded to stay, rather than resign; or the employee could be suspended, or put on garden leave or restricted duties. There may also be other mitigation strategies, such as taking steps to protect client relationships.

In addition, while outside the scope of this article, employers should look at:

- Whether the breach or threatened breach of restrictive covenant is part of a bigger picture involving a team move or the misuse of the employer's confidential information. In practice, a court will be more inclined to enforce restrictive covenants at a preliminary stage where there is evidence of general wrongdoing.
- Obtaining evidence of the employee's breach. This may involve: launching an in-depth investigation; interviews with colleagues, clients and other third parties as appropriate; a trawl of records and documents ranging from security footage through to forensic investigation of the employee's work computer and mobile devices; and, potentially, surveillance. It is becoming increasingly important to consider the employee's privacy rights when investigating, particularly in certain regulated sectors. Legal professional privilege, and how the business is going to maintain it, should also be considered. Litigation privilege may apply but this needs to be considered from the outset and a protocol put in place.

Taking legal action

The courts have broad powers to grant a variety of orders in employee competition situations, including to enforce restrictive covenants and any other obligations owed to the employer (*see box "Types of interim relief"*). Each part of an order will be either:

- Mandatory; that is, requiring a party to do something.
- Prohibitory; that is, requiring a party to refrain from doing something.

While it can typically take months to reach a full High Court hearing, it is possible to apply for a mandatory order requiring an employee or former employee to abide by their restrictive covenants until the full hearing. This is called an interim injunction and can be obtained on an urgent basis, sometimes within a matter of days. Indeed, delay may defeat the application.

The purpose of an interim injunction is essentially to pause the situation and maintain the status quo until a return date

when the court can fully hear the issues in the case. It is only after a full trial that the High Court will decide whether to make an order for final injunctive relief.

Seeking an injunction does not limit other legal action that may be available, such as a claim for damages or an account of profits. It might also be possible to claim so-called "negotiating damages" (formerly known as *Wrotham Park* damages), representing what the employee would have needed to pay to negotiate their release from the restrictive covenants (*Wrotham Park Estate Co v Parkside Homes Ltd [1974] 1 WLR 798*). However, following the Supreme Court's decision in *Morris Garner v One-Step (Support) Ltd*, the scope of negotiating damages has been reduced in employment cases (*[2018] UKSC 20, see News brief "Negotiating damages: no checklist, but much-needed clarity", www.practicallaw.com/w-014-5323*).

When considering whether to grant an interim injunction, the starting point for the High Court is usually the standard approach set out in *American Cyanamid Co v Ethicon ([1975] AC 396*). This requires the employer (or former employer) to show that:

- There is a serious issue to be tried. This is a relatively low hurdle. If there is limited time left to run on the restrictive covenant and little prospect of a trial before it expires, the High Court will accept that applying a low hurdle may be unfair because the interim injunction application will generally dispose of the whole claim, and in these circumstances it will look in more depth at the merits of the case (*Lansing Linde v Kerr [1981] IRLR 80*). Nowadays, however, most cases can be listed for a speedy trial to take place before the end of the restricted period, meaning that the High Court will set a low bar for granting the interim injunction.

- Damages would not provide an adequate remedy. This would be the case, for example, if the potential financial loss to the employer's business is unquantifiable or beyond what the employee would be able to pay.

- The balance of convenience favours an interim injunction. This involves looking at who would be most prejudiced by granting, or not granting, the injunction. The court will often err on the side of preserving the status quo.

Types of interim relief

The courts may make a variety of orders for different types of interim relief in employee competition situations. These include:

- Garden leave injunctions, which prevent the employee from working for a competitor during a period of garden leave in circumstances where they threaten to leave before the end of their notice period.

- Confidential information injunctions, which prohibit a former employee from using their former employer's confidential information. A court may also order that an affidavit be provided setting out what misuse has been made of confidential information, including to whom it has been disclosed.

- Delivery up, which requires the return of documents and devices containing the employer's confidential information to prevent misuse, secure evidence and avoid their potential destruction.

- Preservation or detention of property, where the former employee is ordered to preserve evidence or to give instructions to the providers of any relevant online accounts, such as LinkedIn, to do so. The order may allow the employer's IT experts to take a forensic image of relevant data.

- Destruction, which requires the permanent destruction of any hard-copy documents and the forensic deletion of any electronic documents containing the employer's confidential information.

- Search and seizure orders, which are an intrusive form of order that are applied for without notice to allow searches of the respondents' property, such as premises or vehicles, for prescribed documents or devices in order to preserve evidence or recover property. Due to their draconian nature, standard-form search orders put in place certain protections, such as the appointment of a supervising solicitor.

- Springboard relief, which is designed to cancel out an unfair advantage gained as a result of a former employee's breach of legal obligations to their old employer (*Forse & others v Secarma Ltd & Others [2019] EWCA Civ 215*).

- Freezing orders, which preserve the defendant's assets until judgment can be enforced (*see feature article "Freezing orders in practice: going nuclear", www.practicallaw.com/w-020-2043*). However, these are relatively unusual in employee competition cases.

The employer will be expected to give a cross-undertaking in damages to the employee. This is a binding promise to compensate the employee for financial loss resulting from the interim injunction if the court eventually concludes, after the full hearing, that the employer was not entitled to any interim relief granted; for example, because the restrictive covenants were unreasonable or the employee was not in breach of them.

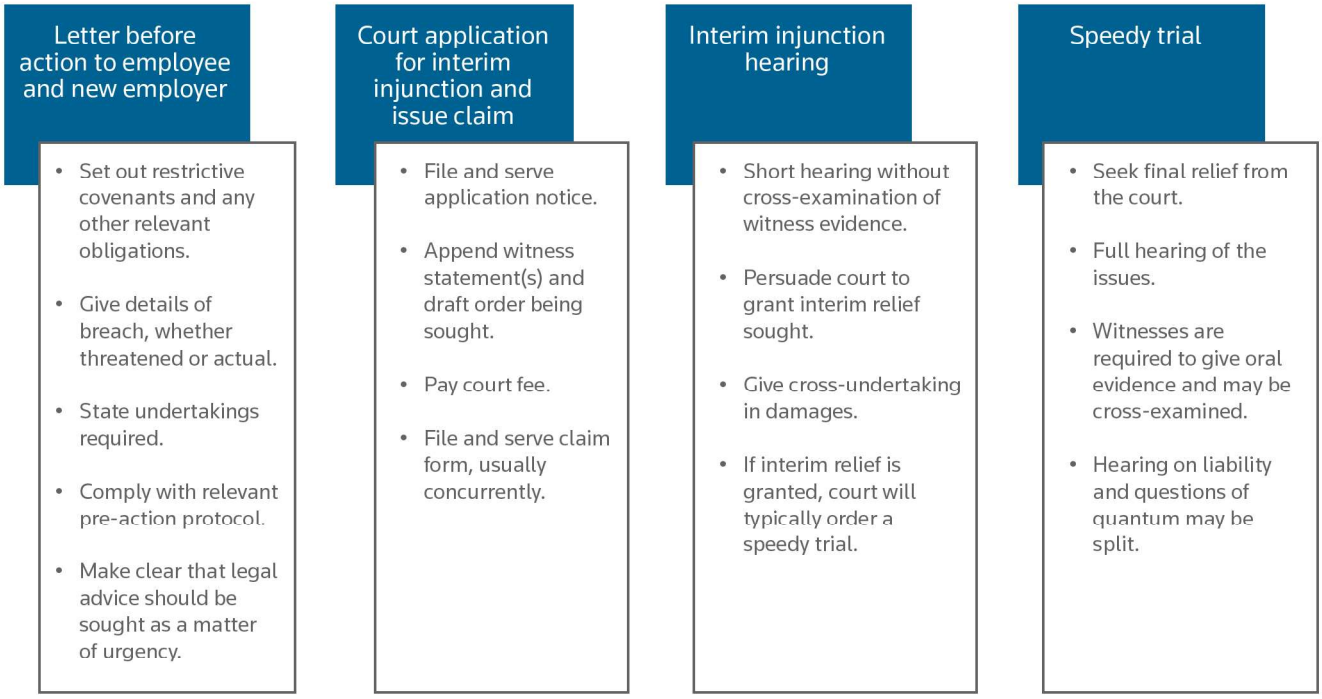
The litigation process

The employer will need to decide whether to commence litigation, with time being of the essence (*see "Responding to an employee's breach" above*). As injunctive relief is an equitable remedy, the court may refuse to grant it if the employer delays too long before applying to court.

An important tactical decision is whether to initiate action only against the departing employee (or employees), or against the new employer as well. This would typically be for inducing or conspiring with the employee to breach their restrictive covenants. At the interim stage, there may be limited or no evidence that the new employer is involved in any wrongdoing but the former employer should still write to the new employer, putting it on formal notice of any restrictive covenants and other continuing obligations owed by

Typical court process for enforcing restrictive covenants

Summary of a typical court process showing the key steps for an employer seeking to enforce restrictive covenants by injunction, assuming that the action is on notice and no settlement is reached.



the former employee(s). If evidence of the new employer's wrongdoing subsequently emerges, it may be possible to join it as a defendant at a later stage.

The usual first step in the litigation process is to write a letter before action to the employee (or former employee) setting out the restrictive covenants, why the employer considers them to be in breach and seeking undertakings to comply with the covenants and cease all non-compliant activity by a specified deadline (*see box "Typical court process for enforcing restrictive covenants"*). If the employer is committed to pursuing court action if necessary, the contents of the letter must comply with requirements of the Practice Direction on Pre-action Conduct and Protocols contained in the Civil Procedure Rules (CPR). Once the letter is sent, the onus is on the employee to take action but the employer should consider moving immediately and preparing the court application rather than regarding this as a breathing space.

For an interim injunction application, the employer will need to file a notice in the appropriate form, along with evidence in support and a copy of the draft order for interim relief that the court is being asked to make. The employer must also pay the appropriate court fee. The application should be served on the employee and, if being joined to proceedings, their new employer at least three clear days before the application hearing, unless there are good reasons for no notice being given. The employer will normally also issue a claim form setting out the final remedies it is seeking, which will usually include a final injunction and may include some form of financial remedy, such as damages or an account of profits, depending on the circumstances.

As evidence in support of its application, the employer will usually need to produce a written witness statement from at least one individual who is well placed to give information about:

- The business.
- The employee's role.
- The evidence of any alleged threatened or actual breach of the employee's restrictive covenants and of any other obligations to the employer.
- Why the employee's activity threatens the business.

The witness need not necessarily be the most senior person in the business and they will not normally need to give oral evidence in court at the interim injunction stage. The employer must also provide evidence in support of its cross-undertaking in damages to demonstrate its ability to make good on any award.

In certain circumstances, the employer may decide to apply for a without notice (ex parte) interim injunction; that is, without giving notice to the employee or former employee (and, if relevant, the new employer). This typically happens where there is a real concern that the employee may conceal or destroy evidence of wrongdoing if put on notice. In this scenario, the court will grant the interim relief sought only if the employer has good reasons for not giving notice (*CPR 25.3*). If the employer makes an application without notice, it owes the court a duty of full and frank disclosure. This means it must draw to the court's attention all material factual, legal and procedural matters relevant to whether the court should grant the order, including arguments adverse to its own case.

The hearing of an application for an interim injunction on notice will generally be short: typically, a matter of a day at most. If both parties are represented, their lawyers will make submissions to the court usually based

on skeleton arguments that are exchanged and filed in advance. No witnesses will typically be required to give oral evidence at this stage: the court will decide on the papers and arguments from counsel whether to grant any interim relief.

Any relief granted will be set out in a binding court order. This will normally also set out case management directions for the steps that the parties must take in terms of disclosure, exchange of witness statements and costs budgeting through to the final hearing. Where a speedy trial is ordered, the deadlines will often be tight. Typically, any decision as to who should pay the costs of the interim application will be deferred until the final hearing when the court has the benefit of all the facts.

It is advisable to have a negotiation strategy throughout the process. Litigation is expensive and there may be a deal to be done to achieve a satisfactory commercial outcome. Most employers will be motivated to protect certain relationships or assets but may be willing to compromise on others.

CHALLENGING RESTRICTIVE COVENANTS

Practitioners should also consider the position and perspective of the departing employee and their new employer.

Employer liability

An employer that knowingly or intentionally procures or induces an employee to breach restrictive covenants can be liable in tort to the employee's former employer. The restrictive covenants must be enforceable, and the new employer must have known about them or turned a blind eye towards their existence and realised that the employee would be in breach of them (*OBG Ltd and others v Allan and others [2007] UKHL 21, www.practicallaw.com/6-364-4986; Aerostar Maintenance International Ltd v Wilson [2010] EWHC 2032*).

The new employer may also be liable for various other torts, most commonly conspiring with the employee to injure the former employer through use of unlawful means.

Mitigating risk

To reduce the risks when recruiting any employee from a competitor, and particularly senior employees who are most likely to have restrictive covenants in place, the new employer should:

- Build robust retainers with external recruiters that clearly set out the employer's position on restrictive covenants and confidential information. The terms of the retainer should, for example, make clear that the employer will expect any new recruit to comply with their post-termination obligations and not disclose any confidential information concerning their current employer.

- Ask about the employee's restrictive covenants. Both in-house and external recruiters should ensure that copies of a potential new employee's restrictive covenants are obtained before a job offer is made. There should be a clearly defined process for taking legal advice on the scope and effect of any restrictive covenants.

- Find out if the employee has already crossed the line. Too often, employees begin breaching their implied or express obligations while still employed by their former employer; for example, they may be making copies of confidential materials or starting to solicit clients. Although any protection afforded by post-termination restrictive covenants will not be triggered until employment ends, the factual background will be highly relevant to the overall picture of wrongdoing. Covenants are rarely litigated in isolation and breaches of legal obligations by the individual before termination will increase the risk for the new employer.

- Be clear in instructions to new employees. Employers should make clear to new employees that they have no interest in their former employer's confidential information, nor do they want the employee to breach their restrictive covenants. It is vital to make this equally clear to anyone in management. The courts will not be impressed by general statements about compliance if the managers on the ground are actively trying to encourage a new employee to breach their obligations.

There are some common traps that new employers should take particular care not to fall into. For example, if the new recruit is asked to draft a business plan, the employer should make clear in advance that it must not include or rely on their former employer's confidential information, nor involve diverting clients or prospects away from the former employer in breach of any non-solicitation or non-dealing covenants. If the new employee is asked to make revenue projections, the employer should verify that they properly take account of the duration of any restrictive covenants.

Challenging and negotiating release

In some circumstances, an employer may not accept the validity of restrictive covenants included in the employment contract of an employee who it wants to recruit. This issue often arises while the employee is still employed by the former employer; for example, when they are working out their notice period or on garden leave. One option is for the employee to put the former employer on early notice that they consider the restrictive covenants to be unenforceable and so intend to breach them, inviting the former employer to seek an injunction before the notice period ends if it disagrees. This strategy is designed to flush out a dispute at an early stage, although it could be argued that the former employer is entitled to delay its response in order to wait and see what the employee does after termination.

Another option is for the employee, and potentially also the new employer, to apply to the High Court for a declaration that the restrictive covenants are unenforceable. This is an unusual, but available, course of action.

In situations where the validity of the restrictive covenants is unclear, or where the new employer considers that only part of them is enforceable, it is not uncommon for the new employer to negotiate with the former employer, often on a without prejudice basis, with a view to agreeing a mutually acceptable compromise.

Practical and strategic considerations

If the former employer is considering court action to enforce restrictive covenants, the new employer will usually first hear of this when the business or the employee receives a letter before action from the former employer.

In practice, there will then be very little time to act. The former employer will typically ask for satisfactory undertakings to be given within a very short window of time, usually no more than a few days, failing which court proceedings will be issued. While this can be

a stressful situation for the new employer and its in-house counsel, injunction applications are often threatened but not always pursued. It is possible that a reasonable response and explanation will be the end of the matter.

In this type of scenario, the new employer will have certain key priorities and should take the following practical steps:

- Set up a strategy for legal advice and privilege. It is best practice for the employee to have separate legal representation, as there is usually a clear risk of conflict of interest. A common interest privilege agreement should be considered.

- Carry out as much investigation as possible into the alleged breaches, while also researching the likely enforceability of the restrictive covenants. If the employer is advised that the restrictive covenants in question are likely to be unenforceable, this should be recorded in writing to reduce its exposure (*Allen t/a David Allen Chartered Accountants v Dodd & Co Ltd [2020] EWCA Civ 258*).

- If it appears likely that the former employer will issue proceedings, weigh up the legal risks and potential adverse publicity, and give serious consideration to what undertakings could be offered. One option may be to offer interim undertakings. For example, if the employee is alleged to be in breach of a non-compete clause by working for the new employer, it could offer to send the employee home temporarily to buy time.

- Bear in mind there are two forms of undertakings: contractual undertakings, which are given to the former employer; and court undertakings, which are given to the court. Breach of a court undertaking carries criminal sanctions, so compliance must be policed proactively. The new employer should generally not offer undertakings to the court unless there is no realistic alternative.

- Keep focused on the commercial objectives. Litigation is expensive and disruptive, and the optimum solution is often to negotiate a compromise.

If the situation cannot be resolved, and the former employer is intent on applying to court for an interim injunction, the employee and any new employer will have to decide whether to contest the application. They should remember that, in many cases, the former employer need only clear the relatively low *American Cyanamid* hurdle to obtain its interim remedy. Resisting the former employer's application will also be costly and require the filing of one or more witness statements supported by a statement of truth, which the witnesses will then be reliant on when it comes to the full hearing. This can be problematic in practice because the new employer may not have had the time to carry out a thorough investigation by the time it must file its witness evidence.

Unless the restrictive covenants are obviously flawed, they have clearly not been breached, or there are other strong grounds for resisting the application, the new employer and the employee may be better off negotiating a consent order involving an interim injunction, a cross-undertaking in damages and speedy trial. It will typically be in the new employer's interests for a speedy trial to take place as soon as possible to have the matter resolved. At the trial, the new employer will attack the enforceability of the restrictive covenants, dispute that there have been any breaches and contest its liability for any breaches that might have occurred.

Michael Anderson and Toni Lorenzo are partners in Lewis Silkin LLP's specialist employment litigation team.

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