

Protecting Your UK Business Against Departing Employees

By Sharon Tan and Paul McGrath

Departing employees can represent a significant threat to a business. This is particularly so in the case of senior managers and employees who have access to confidential information or who exert influence over key relationships with actual or prospective customers, suppliers or key members of staff.

Many employers seek to manage this threat by obtaining an employee's agreement to a broad range of contractual post-termination restrictions (PTRs), often referred to as restrictive covenants.

PTRs are generally designed to protect a business against a range of threats: former employees working for competitors, soliciting clients and poaching employees, *etc.* When they work, PTRs can be a very

effective weapon in an employer's arsenal, but there are potentially significant hurdles that must be overcome before they will be enforced by the UK courts.

The Path to Enforcement

A PTR will only be enforced by the UK courts if an employer can show that it restricts the departing employee's activities only so far as is reasonably necessary to protect the employer's legitimate business interests. If the PTR is drafted more widely, it will be struck down entirely.

In considering what is reasonably necessary, the UK courts will examine both the scope and duration of the PTR.

It is important to note that a UK court will consider what is reasonable based

on how matters stood at the time the restriction was entered into, not at the time enforcement is sought. A UK court therefore may not enforce a PTR against a senior employee, even if the PTR is shown to be reasonably necessary at the time employment terminates, if the court does not consider the PTR to have been reasonable at the time the contract was entered into. Employers who want to protect their position, therefore, ought to ensure that PTRs are updated as and when an employee's role changes.

The powers of the UK courts to amend the drafting of a poorly worded PTR are very limited. They may delete words from a PTR, but may not, generally speaking, add or replace ill-considered drafting to give effect to what the parties intended, unless



the meaning of the PTR is ambiguous. A UK court will not, therefore, reduce a 12-month non-compete to six months based on its own assessment that this would be a reasonable period.

This all or nothing approach means it is worth investing time and effort into the drafting of PTRs, particularly when they are being used in key employees' contracts.

Individually Tailored PTRs

Given the approach taken by the UK courts, employers who wish to protect their business in the United Kingdom should ensure that the nature and scope of each PTR is carefully considered on an individual basis or, at the very least, by reference to grade or job type.

The starting point is to identify the extent of the threat that would be posed by the particular individual in question if he or she were to leave, and how long it would reasonably take the business to protect its interests against that threat. PTRs should then be carefully drafted to closely mirror these specific risks.

In undertaking this analysis, employers might want to consider the following questions: Can the non-compete clause be limited to a particular product or line of business? Can the geographical area be limited? Can customers be restricted only to those with whom the employee has had material contact within a set period prior to the termination of the employment contract? Are there certain key employees or groups over whom the individual has particular influence?

There are also wider considerations for an employer to bear in mind when tailoring individual PTRs, e.g.,

- *The scope and duration of PTRs imposed on employees at other levels of the organisation.* It may be more difficult to enforce PTRs against a middle manager if it can be shown that senior management are subject to exactly the same restrictions.
- *The relative duration of different PTRs in the employee's contract.* The UK courts have shown themselves more willing to uphold a PTR that prohibits the departing employee from soliciting the employer's clients for longer than a non-compete clause that is designed to prevent the employee from having free access to the job market. Opting for different periods can occasionally increase the likelihood of the PTRs being enforced.
- *Standards across the wider industry in which the employer operates.* A 12-month PTR that seeks to prevent solicitation of the employer's customers is more likely to be enforceable in an industry where client contact is infrequent, such as the insurance industry, where renewals normally take place annually.
- *The extent to which the PTRs are consistent with other provisions in the contract.* The context in which the PTRs arise can sometimes be of relevance. If, for instance, an employee is permitted to resign on very short notice, a court might be less inclined to uphold a lengthy non-compete clause.

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Getting the Wider Contract Right

In addition to PTRs, there are a number of other key contractual provisions that can help employers to insulate their business interests against such threats. Employers should consider including the following in their UK employment contracts:

- *Payment in lieu of notice (PILON).* PTRs will fall away if a contract is wrongfully terminated, i.e., without the employee being given the required amount of notice. By including a contractual PILON provision, an employer is able to achieve an immediate clean break without acting in breach of contract, thus leaving the PTRs intact.
- *Garden leave.* Garden leave contractually obliges the employee not to attend the office or contact clients, customers or staff. Such provisions are particularly effective, because the UK courts are much more willing to enforce this kind of market isolation on the basis that the individual continues to be paid and, in exchange, remains subject to the control of the business. Time spent on garden leave should, however, be discounted from the restricted period under the PTRs, as the courts consider the two provisions to achieve the same

effect. This prevents an increase in the ex-employee's overall length of time spent out of the market, which might otherwise render a PTR void and unenforceable.

- *Confidentiality.* A robustly drafted confidentiality clause will protect the employer's business both during and beyond the life of any PTR.

Implementation Strategy

Introducing PTRs can sometimes be a challenge. Junior employees may not consider them appropriate given their relative lack of importance to the business. Senior employees, whilst recognising the business' legitimate need to protect its interests, may not wish their future activities to be unduly restricted and may possess sufficient leverage to create a challenging negotiation.

It is often easier to obtain agreement to PTRs at the time of hiring, when the employee has not yet secured a role he or she wants, rather than during an ongoing employment relationship. In any event, once obtained, the suitability of any existing PTRs should be kept under review on an ongoing basis. Where appropriate, employers may want to use the leverage presented by a positive change in the employment relationship, such as a promotion or proposed pay rise, to update or reaffirm a key employee's PTRs.



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