Some further details published on proposal to limit non-compete clauses to three months

On 12 May 2023, the Government released some further details about its plans to limit the use of non-compete clauses in employment contracts. In this briefing, we round up the key points to note.

On 10 May 2023, the Government announced plans to legislate to limit the use of non-compete restrictions in employment contracts to three months. You can read our detailed briefing on that announcement here, where we outlined a number of "known unknowns" about the proposals. Since then, the Government has published its response to the consultation on reform of non-competes (Response), which closed on 26 February 2021. The Response provides more information about the proposals and answers some, but not all, of the known unknowns.

The Response confirms the following points:

- **The proposed reforms will apply to workers engaged under a worker contract.** The initial announcement referred to "employment contracts" and "employees" only and made no reference to individuals classified as "workers" who

worked under a contract to work or perform services for the employer. The Response confirms that the proposed reforms will apply to worker contracts.

- **The proposed reforms will not apply to wider types of workplace contracts.** It was unclear whether the proposed reforms would apply to other types of agreements connected to the workplace e.g. LLP agreements, shareholders' agreements or long-term incentive plans. The Response confirms that the limitation will not apply to non-compete clauses used in such agreements, on the basis that the bargaining power between the parties is different. However, it is worth noting that the Response is silent about whether the limitation will apply to a non-compete restriction contained in a settlement agreement. The Response also appears to overlook the fact that LLP members can be classified as workers depending on the circumstances.

- **The proposed reforms will apply to non-compete clauses only and not to other types of covenants.** The initial announcement suggested that the limitation would not apply to other types of post-termination restriction, such as non-solicitation, non-dealing or non-poaching clauses. The Response clarifies that this is the case. Therefore, other types of post-termination restriction may run for longer than three months and will be upheld provided that they are reasonable and go no further than necessary to protect the employer's legitimate business interests. The logic for this distinction is that such restrictions do not have such a significant impact on an individual's ability to earn a

living in their chosen profession.

- **Guidance to be published.** The Response also states that the Government plans to enhance transparency by producing guidance on the use of non-competes and the law underpinning them.

However, there are still a number of questions yet to be answered:

- **Will the law apply to existing employment contracts?** It is still not clear whether the new law will apply retrospectively or only to new contracts. In the event that it applies retrospectively, will an existing non-compete restriction which is in excess of three months be deemed to be void in its entirety? Or will it be potentially enforceable, but only up to the three-month cap? If it would be deemed void, employers will either need to agree changes to the employment contracts of affected employees or accept the loss of the non-compete protection.

- **How will the new law work alongside garden leave clauses?** The initial announcement says that the reforms will not affect an employer's ability to use paid notice periods or place employees on garden leave. However,

the risk is that employers will respond to the loss of longer non-competes by extending periods of notice in order to place the employee on garden leave and keep them out of the market that way. Further information about the interplay between non-competes and garden leave is awaited.

- **When will the reforms come into force?** The Government has said the legislation will be introduced *"when Parliamentary time allows".* At the time of writing, no timeline for the introduction of the new law has been given. With a General Election looming, it remains to be seen whether the proposal will ever make its way on to the statute books.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Managing Associate Tom McLaughlin (tommclaughlin@bdbf.co.uk), Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

Non-compete clauses: Response to the Government consultation on measures to reform post-termination non-compete clauses in contracts of employment – 12 May 2023