BEIS Non-Compete Clauses Consultation
Brahams Dutt Badrick French LLP Response

Details of the Respondent

We are a specialist employment law firm based in the City of London. We regularly advise employers and senior executives on the entire range of employee competition issues, including non-compete clauses and other forms of restrictive covenant.

We have answered those questions from the consultation where we feel our practical experience in this area may be of assistance.

General background

The law relating to non-compete clauses is complex but relatively well settled. Employment lawyers specialising in this area, armed with enough of the background information, ought to be able to advise whether or not a particular non-compete clause is enforceable. The rules concerning the enforceability of non-compete restrictions (and whether a Court will enforce such restrictions by granting an injunction) strike a careful balance between, on the one hand, the employee's right to earn in living in their chosen profession and, on the other hand, the employer's right to protect its legitimate business interests (normally, confidential information).

Viewed in a purely academic way, then, the case for reform is not strong, because employees already have significant protection against unreasonable restraints of trade in the current law. The starting position of the analysis is, of course, that such clauses are unenforceable as an unlawful restraint of trade.

However, the practical reality for the majority of employees looking to leave their employer and join a competitor is very different because:

- They may be unable to afford specialist legal advice on whether a non-compete clause in their contract of employment is enforceable; and

- Even if they are able to obtain advice that their non-compete clause is unenforceable, the vast majority of employees cannot risk the costs of litigation with their employer, particularly the risk of being ordered to pay their employer's legal fees if they lose.

The risk of unenforceable non-compete clauses deterring employees from joining a competitor of their employer is therefore significant.

Responses

Question 1: Do you think the Government should only consider requiring compensation for non-compete clauses or do you think the Government should consider requiring compensation where other restrictive covenants are used? Please indicate below.

Non-compete clauses only.

Clauses restricting, for example, solicitation or dealing with the former employer's clients do not have such a significant impact on the employee's ability to earn a living in their chosen profession.

Question 4: Do you agree with the approach to apply the requirement for compensation to contracts of employment?

Yes. Our view is that (provided the employer has the right to unilaterally waive the clause) such an approach strikes an acceptable balance between the employer's right to protect its legitimate business interests and the need to avoid non-compete clauses being used inappropriately and/or unnecessarily in relation to, for example, junior employees or those who could do only limited harm to the employer by joining a competitor.

Question 5: Do you think the Government should consider applying the requirement for compensation to wider workplace contracts?

In our view the requirement should be restricted to contracts of employment only. These are the agreements in respect of which the individual has the most limited bargaining power. The vast majority of people need to work and, other than discussions around the level of salary, have a very limited ability to negotiate the terms of their contract of employment.

Deciding to join a Limited Liability Partnership as a partner, or participating in an employee share schemes, are decisions of a different character to entering into a contract of employment and do not, in our view, necessarily warrant the same level of protection. It may be that if the protection is limited to employment that employers seek to use these different vehicles to get around the restriction. However, we consider an incremental approach is probably the best way forward.

Question 6: Do you think the proposed reform to non-compete clauses in contracts of employment could have an impact on the use of, and/or the enforceability of, non-compete clauses in wider contract law? If yes, please explain how and why.

Reform of non-compete clauses in contracts of employment will almost certainly lead to an increased focus by employers on imposing such terms in, for example, share schemes and deferred bonus plans. As a result, employers may seek to increase the number of employees participating in such schemes and/or amend their terms to be more onerous for employees.

Many share schemes which we see for US headquartered organisations contain post-termination restrictions which would be unenforceable under English law. Reform of non-compete clauses in employment contracts may lead to such companies localising their share schemes with a view to being able to enforce the restrictions contained with them more easily. There is a case for exercising greater control over the applicability of foreign law and arbitration clauses when it comes to the use of non-competes.

Question 7: Please indicate the level of compensation you think would be appropriate:

We do not have a view on the particular percentage which should be applied.

However, in relation to the definition of "average weekly earnings", the legislation should ensure that (a) the basis of calculation is clear; (b) a long reference period of 52 weeks is used to ensure that any peaks and troughs in remuneration throughout the year do not affect the calculation; and (c) it adequately takes account of long term absence such as maternity leave so as not to disadvantage the employee.

Question 8: Do you think an employer should have the flexibility to unilaterally waive a noncomplete clause or do you think that waiving a non-compete clause should be by agreement between the employer and the employee? Please indicate your answer below.

In our view, the employer should be able to unilaterally waive the clause at any point, including at the termination of employment. To provide otherwise could result in a windfall for the employee in circumstances where they leave the employer to, for example, pursue another kind of work entirely.

Question 18: Would you support this measure to improve transparency around non-compete clauses? If not, please explain why not.

We do not think that such a requirement would add to the existing law. To be enforceable a non-compete clause must be entered into at the outset of employment or at another time when the employee is provided with valuable consideration. To enter into such a clause, the employee must be provided with a copy of it.

Question 22: Would you support the inclusion of a maximum limit on the period of noncompete clauses?

No. In our view such an approach would be too arbitrary and may perversely encourage employers to lengthen restrictions to the maximum period allowed.

Question 27: Would you support a ban on non-compete clauses in contracts of employment? Please explain your answer.

No. In our view there are a large number of cases (even if they are the minority) where the imposition of a non-compete clause is necessary and fair to protect an employer's legitimate business interests.

Further, such an approach may have undesirable unintended consequences. In California, where such clauses are unenforceable, seven of the world's largest technology companies were alleged to have engaged in employee "non poaching" agreements between themselves. Although these agreements were allegedly aimed at avoiding increases in employee pay, the practical effect would also have been to achieve protection comparable to the use of non-compete restrictions but only protecting the most powerful companies. The litigation arising from these allegations was reportedly settled for $435 million.

Question 28: If the Government introduced a ban on non-compete clauses, do you think the ban should extend to wider workplace contracts?

If such a ban is introduced, it should certainly be limited to contracts of employment, for the same reasons as given at question at question 5, above. The decision to enter into an LLP agreement, for example, is much more in the nature of an "arm's length" arrangement where, in our view, it is not appropriate to regulate the kinds of post-termination restriction which can be agreed.

Question 29: Are there options short of banning non-compete clauses which would limit their enforceability in the interests of spreading innovation? Please explain your answer.

Other options worthy of investigation include:

- Making non-complete clauses unenforceable where the employee earns less than a particular salary; and

- Requiring that employee to obtain independent legal advice before entering into the non-compete clause, as is the case, for example, with employee shareholder status. If this is adopted, the employer should have to pay the employee's reasonable legal fees.

Question 33: If you are aware of any literature, research, or evidence from your own business experience that looks at the impact of non-compete clauses on competition, innovation, or economic growth please list the publications below.

US Department of the Treasury – The Effects of Non-compete Agreements- March 2016: https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf

Other comments

Very careful consideration should be given to whether, and the extent to which, any new law in this field would apply to existing contracts at the time the law came into force. We would

not advocate an approach under which any new law had retroactive effect, because a requirement to audit and renegotiate existing employment contracts would likely place a disproportionate burden on employers.

Contact details

If you wish to discuss any aspect of this response then please contact:

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