

PROPOSED 3-MONTH LIMIT ON NON-COMPETE CLAUSES TO BOOST THE ECONOMY

As part of recent Government proposals to introduce "[Smarter regulation to grow the economy](#)", post termination non-compete clauses in employment contracts will be subject to a statutory time limit of 3 months.

Post-termination restrictions in employment contracts

Non-compete clauses are one type of post-termination restriction which may be included in an employment contract, to prevent an employee from undertaking certain activities which compete with their former employer for a specified period after they leave a role.

There are different types of post-termination restrictions that may be included in an employment contract.

- Non-compete clauses prevent an employee from joining a competitor business or setting up their own business in competition with the former employer or from engaging in activities which are competitive with those of their former employer.
- Non-solicitation clauses prevent an employee from contacting customers or clients or prospective customers or clients of the former employer with a view to providing services or goods to them in competition with the former employer.
- Non-dealing clauses are similar to non-solicitation clauses, but are more restrictive, as they prevent the provision of services or goods to clients or customers or prospective customers or clients of the former employer, even if the customer approached the former employee of its own accord, without any solicitation on the part of the former employee.
- Non-poaching and non-employment clauses seek to prevent a former employee from soliciting key employees away from the former employer or from employing or engaging them directly or helping their new employer to do so.

Non-compete clauses

The Government's proposed intervention relates to non-compete clauses only, which are the most draconian restriction, as they effectively keep the former employee out of the market for a defined period. The government considers that non-compete restrictions are being used too often, stifling employees' abilities to find new work or start businesses. Government research estimated that 5 million employees have non-compete clauses in their contracts.

As part of a [consultation](#) on the use of these clauses and possible interventions, the Government considered banning them altogether, or requiring employers to pay compensation to the employee for the period that they are prevented from working for a competitor. An outright ban was considered to be too restrictive, whilst a requirement to pay compensation was ruled out, given that this would be an added direct cost for businesses (which is counter-intuitive to the Government's wider goal of reducing business costs).

Instead, the government wishes to introduce a statutory limit of three months on non-compete clauses in employment and worker contracts. It describes this as "bold action" to boost labour market flexibility and ease recruitment challenges.

Comment

This will be a significant change, as it is the first time the Government has intervened in post-termination restrictions. The statutory limitation period will apply to the contracts of all employees and workers, regardless of their role or level of seniority.

However, this change will have no impact on the other types of post-termination restrictions that can be used to protect employer's legitimate business interests.

Whilst non-compete restrictions that are longer than three months will not be enforceable, the existing principles around the enforcement of restrictive covenants will still apply to non-compete clauses which are three months long or less and to all other types of post-termination restrictions.

It will remain the case that post- termination restrictions will only be enforceable if they are reasonable in scope, which means that they go no further than is necessary to protect a legitimate business interest, such as an employer's business connections, confidential information and maintaining the stability of its workforce. The period of restraint will be a relevant factor, as well as the 'look-back' period, e.g. the period prior to termination during which customers are caught.

It is not known at this stage whether existing non-compete clauses which are longer than 3 months duration will be automatically reduced to 3 months, or if they will be void in their entirety.

Restrictive covenants that are included within wider workplace agreements which are **not** employment or worker contracts are not within the scope of the proposed 3-month limitation period. Therefore, it will still be possible to include longer non-compete clauses in agreements such as partnership and LLP agreements, as well as share purchase agreements ("SPA's") to prevent former partners or the sellers of a business from joining a competitor or setting up in competition for a restricted period. Restrictions in agreements which are not employment contracts are still subject to the reasonableness test. However, they are generally easier to enforce as the courts consider that the parties are in a more equal bargaining position. Non-compete restrictions in SPA's tend to be much longer than in employment contracts and often apply for example, for 3 years' post completion of a share sale.

Primary legislation will be required to implement the statutory limit on non-compete clauses and no timescale has been published, so it is possible that these proposals may not come to fruition before the next election.

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