Protecting Business Interests:

An Employment Law Guide
Protecting Business Interests

Watson, Farley & Williams has an experienced Employment team, able to advise on all legal requirements in relation to protecting business interests in the UK.

This guide is for any employer seeking to protect its business interests using contractual terms with its employees.

Contracts of Employment

Whilst employers are only obliged to provide a written statement of the main employment particulars, it is recommended that employees are provided with written employment contracts. This not only provides for certainty of terms, and helps to avoid later disputes, but also can provide for certain “protective” measures which may assist in growing businesses in protecting its future business interests. Consideration should therefore be given to the following terms:

1. Confidentiality

Employers should consider expressly restricting employees from using and/or disclosing an employer’s confidential information both during and after the employment relationship has terminated. In particular, restrictions may apply to an employee’s ability to use or disclose to any third party (including competitors), any trade secrets or other confidential information relating to the employer’s business or services provided. Trade secrets or confidential information could include, for example, know how, financial data, pricing lists or customer lists.

In some specific circumstances Employees are protected if they make certain disclosures of confidential information.

2. Restrictive Covenants

Employers should also consider whether they wish to protect legitimate business interests by the use of post termination restrictions. Post termination restrictions are particularly important in the contracts of employment of senior or other key employees, who are not only likely to be privy to confidential information and have good relationships with important customers, but also may have influence over other members of staff. They may then be able to use their experience and customer knowledge for the benefit of a competing employer.

Some common post termination restrictions are outlined below:

> Non-Solicitation - a non-solicitation of customers clause stops employees from approaching the employer’s customers or prospective customers with a view to doing business with them;
> Non-Dealing - a non-dealing clause aims to prevent employees from actively doing business with customers or potential customers;
> Non-Compete - a non-compete clause seeks to prevent employees from working for a competitor in a competing capacity, or trying to set up a competing business; and
> Non-Poaching - a non-poaching clause is designed to prevent employees from trying to take staff with them to a new employment or business.

It should be noted that all these types of restriction are void and unenforceable in the UK, unless they can be shown to be no wider than reasonably necessary to protect the employer’s legitimate business interests. These may include trade secrets; trade connections and, the stability of
the work-force. In deciding whether or not a particular clause is reasonable the UK courts tend to consider the length and scope of the restriction. Accordingly post termination restrictions must be drafted very carefully to increase their prospects of being found to be enforceable.

3. Notice Periods
On termination of employment, employees are entitled to receive at least statutory notice which is one week if the employee has been continuously employed for at least one month but less than two years; thereafter, they must be given an additional week’s notice for each further complete year of continuous employment, up to a maximum of 12 weeks. They only have to give one week’s notice. It is open to employers to set a longer notice period. Therefore, for key employees who an employer wishes to retain, it is advised that their notice period is greater than the statutory notice period and in the region of 6 to 12 months.

4. Garden leave
A “garden leave” clause is a means of ensuring that an employee is kept out of the work place and away from the office by remaining at home during the period of all or part of his notice period. This prevents the employee from sustaining and developing relationships with customers and colleagues while away from the office. It is also a useful means of preventing an employee from working for a competitor or setting up a competing business during the notice period even if the employee is not required to work.

5. Intellectual Property
The general rule is that the employer will own the property in works created by its employees in the course of their employment. “In the course of employment” relates to the scope of an employee’s duties, rather than the period of employment itself. It is advisable, therefore, to carefully define the scope of the employee’s duties and for a written contract to fully set out the intellectual property provisions, which clearly define the employees’ obligations.

6. Data Protection
The UK has stringent data protection laws. Employers should be aware of their obligation to comply with the data protection legislation, relating in particular to the processing of employee’s records. Under the legislation employers are required to process their employee records “fairly” and “lawfully”.

The transfer of data to companies outside the EU is only permitted when the country concerned has data protection laws which are considered “adequate” by the European Commission. It is advised that international businesses requiring the transfer of data between associated companies should set out the provisions relating to the transfer of data in either the employment contract or staff handbook. The contractual documents should also confirm and seek the employee’s consent to the processing of data.

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