

Restrictive Covenants – are changes coming?

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Restrictive covenants are widely recognised as a complex area of employment law that is of key importance to many organisations. However more recently, they have become a hot topic with the Government launching their consultation into the use of restrictive covenants, specifically focusing on non-compete clauses. Non-compete clauses usually restrict the employee from joining a competitor for a certain period following the termination of their employment, to protect the employer's legitimate business interest. The [Government consultation](#) launched in December 2020, intending to seek views on:

- Whether non-compete clauses should only be enforceable when the employer provides compensation during the non-compete period, and whether there should be transparency and statutory limits to the length of such clauses; and
- Alternatively, whether post-termination non-compete clauses should be unenforceable within employment contracts.

Whilst the consultation ended on 26 February 2021, there has been no further substantive update since then, although Paul Scully indicated earlier this month in response to a formal question that the Government was still analysing consultation responses and available data.

However, the High Court continues to deal with issues that arise from post-terminate non-compete clauses. Most recently, in the case of [Law By Design v Ali](#). The brief facts of this case were that Ms Ali ('A') worked for LBD, a boutique law firm ultimately becoming a shareholder. A's appointment was governed by a service agreement and a shareholder agreement both containing restrictive covenants.

In May 2021, A resigned with an exit date of November 2021, intending to join a much larger firm and would not provide undertakings in respect of the restrictive covenants, intimating that she did not consider these to be enforceable. LBD therefore sought an injunction, to prevent A competing with the business, in accordance with the restrictive covenants.

Ultimately, the High Court upheld this injunction and found that although the restrictive covenants contained within the shareholder agreement were too wide to be enforceable, the more limited covenants contained in her service agreement were enforceable. This decision was based on a number of significant factors, including that LBD was able to clearly evidence that they had a legitimate business interest to protect, and that the restrictive covenants were drawn no wider than necessary. Therefore, the non-compete clause will remain in force until November 2022.

This case highlights the importance of ensuring your business is protected in the event of key individuals leaving the organisation. It is important to regularly take stock of who is key to your business and review the mechanisms in place to protect your legitimate business interest, including restrictive covenants. In respect of restrictive covenants, as set out above these must be narrowed to protect a legitimate business interest, and not go further than necessary to protect this – or risk being deemed unenforceable.

It is difficult to say what impact the Government consultation will have on these non-compete clauses, however it's definitely an area to watch.

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