



**Guide to restrictive covenants
and garden leave**

April 2024

Guide to restrictive covenants and garden leave

This guide covers:

- the reasons for including restrictive covenants and garden leave clauses in an employment contract;
- key principles;
- types of restrictive covenants;
- general considerations;
- enforcing restrictive covenants;
- garden leave;
- the effect of an employer's breach of contract; and
- future developments

Reasons to include restrictive covenants and garden leave clauses in an employment contract

Restrictive covenants and garden leave provisions are included in employment contracts to restrict an employee's future commercial activities as a means of allowing the employer to protect its business once an employee has given or received notice to terminate their employment and after they have left.

Restrictive covenants and garden leave are primarily used with senior executives or employees with access to confidential information, or those who have relationships with key customers, suppliers or other employees.

For the purposes of this guide, we consider only restrictive covenants that apply to activities after employment has ended or during the notice period. It is possible to have restrictions that run during employment but these are subject to different legal considerations.

Key principles

The courts traditionally view restrictions after the termination of employment as being "in restraint of trade" and, for public policy reasons, will not enforce them unless certain conditions are met.

In order to be enforceable, an employer must be able to show that the covenant in question goes no further than is reasonably necessary to protect its legitimate business interests. The courts will look to strike a balance between protecting the employer and allowing the employee the freedom to work where they choose and take advantage of their own professional skills and knowledge. Covenants included in a contract of employment only to deter an employee from leaving are unlikely to be enforceable.

Over the years, the courts have identified only a small number of legitimate interests which can be protected by restrictive covenants. These are:

- **client or customer connections** - including those with prospective clients or customers in some circumstances;
- **confidential information and trade secrets** - these may include customer lists, price lists, costings, financial details and terms and conditions of contracts with key suppliers; and
- **the stability of the workforce** - particularly in a highly competitive industry.

Case law has determined, however, that the established categories of legitimate interest are not fixed and that it may be possible for employers to justify other legitimate interests.

Types of restrictive covenants

A brief outline of the most common types of restrictive covenants is set out below. To be enforceable, it is crucial that restrictions are tailored to both the employer's business and to the employee concerned, so the notes below are only a general guide. Bear in mind that even if restrictions are limited in accordance with the principles below, the restrictions will still be unenforceable if the employer is unable to demonstrate that they go no further than is reasonably necessary to protect a legitimate interest of the particular business concerned.

Covenants relating to confidential information

After an employee's employment has ended, they remain subject to a limited implied duty of confidentiality in respect of trade secrets only. An employer will often include express contractual confidentiality obligations that apply during employment and after it has ended and cover broader categories of confidential information.

Non-compete restriction

A non-compete clause requires an employee not to work for a competing business. To be enforceable, it should be limited to:

- the particular business activities that compete with the employer's business and which the employee carries out;
- the relevant geographical area – e.g. if the employer's business only operates in England, a Europe-wide restriction would be unenforceable; and
- a reasonable period of time. The duration of the restriction should be calculated by reference to how long it is necessary for the business to be protected. For example, in a fast-moving market or industry, a shorter restriction is likely to be more reasonable as compared with a market or industry in which client relationships are traditionally established or renewed over a longer, say annual, period.

A non-compete is the most restrictive type of covenant and could prevent an employee from earning a living. It is therefore typically the hardest to enforce.

Non-dealing with customers, clients or suppliers

A non-dealing restriction is wider than a non-solicitation restriction (see below). It prevents an employee from having any dealings with any customers, clients, or suppliers of the employer, regardless of who initiates the contact.

To be enforceable, a non-dealing covenant should be limited to:

- only those customers, clients or suppliers with whom the employee dealt or for whom they had responsibility;
- particular customers, clients or suppliers. It is not usually sufficient to refer to “all customers, clients or suppliers with whom the employee dealt”. If the employee is with the employing company for a number of years, then they are likely to deal with numerous customers, clients or suppliers, many of whom will no longer be important to the company at the time when the employee leaves. The restriction should therefore be limited to those customers, clients or suppliers with whom the employee dealt or for whom they had responsibility during a specified period immediately prior to the termination of their employment (e.g. six or twelve months);
- a reasonable period of time; and
- clients, customers or suppliers in defined areas of the business (where appropriate). For example, an office manager may deal with certain key suppliers of the company but will also deal with the supplier of toilet rolls for the company’s toilets. It is clearly very unlikely to be necessary for the latter supplier to be covered by the restriction!

Non-solicitation of customers, clients or suppliers

Non-solicitation covenants tend to be less restrictive than non-dealing covenants. They prevent an employee from contacting customers, clients or from suppliers with a view to obtaining their business. This means that if a customer, client or supplier approached the ex-employee of their own accord, the ex-employee would not generally speaking be in breach of a non-solicitation covenant.

Again, a non-solicitation covenant should be limited to:

- only those customers, clients or suppliers with whom the employee dealt (or for whom they had responsibility) for a specified period prior to the termination of employment; and
- a reasonable period of time; and
- clients, customers or suppliers in defined areas of the business (where appropriate).

Non-employment of employees

A non-employment of employees covenant prevents a former employee from employing another employee of the company or, usually, from engaging their services in any other way (for example, as a consultant).

To be enforceable, it should be limited to:

- key or senior employees only;
- those employees with whom the employee dealt for a specified period prior to the termination of employment. If any employee has been with the company for a long period of time, not all employees they will have dealt with during the course of their employment will be relevant to this restriction; and
- a reasonable period of time.

Non-solicitation of employees

A non-solicitation of employees restriction is not as wide as a non-employment restriction and is therefore more likely to be enforceable. However, it must still be limited to:

- key or senior employees only;
- those employees with whom the employee dealt for a specified period prior to the termination of employment; and
- a reasonable period of time.

General considerations

Acting indirectly

All restrictions should cover the employee acting directly or indirectly. Indirect action will include, for example, the ex-employee seeking to employ an employee or soliciting a supplier through their new company or using a head-hunter to approach employees of their former employer.

Updating restrictive covenants

When considering whether a restrictive covenant is enforceable, a court will judge its reasonableness at the time it was entered into taking into account the employee's position and seniority at that time. This means that employers should update contracts where employees are promoted to a more senior position or transferred to a different role otherwise there is a risk that an existing restriction will be unenforceable in the context of the new role. Requiring employees to vary their terms and conditions of employment in order to include new restrictions can be complex and advice should be taken on how this can be achieved.

Enforcing restrictive covenants

Undertakings

The first step in enforcing restrictive covenants is usually to write to the former employee (and also their new employer, if relevant) to remind them of their restrictions and to outline any alleged breaches of those restrictions. Such a letter will often state that court proceedings for an injunction (see below) will follow if the employee does not agree to abide by the restrictions (usually set out in a separate form of legal "undertaking") and to end any competing activity. Any undertakings will often include a requirement to hand over any relevant documents etc to the former employer. The undertakings may reflect negotiated modifications to the restrictions set out in the former employee's contract of employment.

Interim injunction application

If the former employee/new employer refuses to give the undertakings and any other assurances requested, the next step is to seek an urgent interim injunction from the court. An interim injunction is a court order that temporarily requires the former employee (and also the new employer, in circumstances where the new

employer has encouraged an employee to breach their restrictions) to abide by the restrictions, pending a final determination of the issues at a speedy trial (see “Speedy trial” below).

Applying for an urgent interim injunction is a serious step (not least because it may prevent the employee from working in a new job) and therefore the court must be satisfied at the interim stage that: (i) there is a serious issue to be tried, (ii) damages would be an inadequate remedy, and (iii) the balance of convenience lies in favour of an injunction being granted.

An employer typically gives a “cross-undertaking in damages”, to cover any losses the former employee (and any new employer) may suffer if it is determined at trial that an interim injunction was not appropriate.

A breach of an interim injunction would be a contempt of court, with possible criminal sanctions (including imprisonment).

Speedy trial

If an employer succeeds in persuading the court that an interim injunction is necessary to protect its business, an injunction is seen by the court as a first step in the litigation. It is likely that, together with any injunction ordered, the court would order a “speedy trial”, in which a trial judge would consider in more detail the enforceability of the restriction(s) and whether an award of damages (if any) would be appropriate.

Award of damages

An award of damages would be based on the loss the employer has suffered as a result of the employee’s actions in breach of their restrictions. The employer must be able to prove this loss both through financial evidence and by way of witness evidence. Gathering this evidence can involve a significant commitment of management time and resources.

Settlement

Injunctive proceedings often settle before the initial application hearing. Where these matters proceed to an interim application hearing, that hearing is usually determinative of the issue and so the matter is settled before a speedy trial. In such situations, one of the settlement terms will usually be that the employee gives undertakings to the court which usually reflect the terms of the restrictions, possibly modified after negotiation. If the employee breaches these undertakings they will be in contempt of court. Costs will also be an important consideration because of the general rule in the civil courts that the loser pays the winner’s costs.

Garden leave

“Garden leave” can be used as an alternative, or in addition, to imposing post-termination restrictions.

What is garden leave?

An employee on “garden leave” remains employed by the employer for the duration of the leave (usually the duration of all or part of their notice period) but is not required to attend work or carry out their normal duties during that period.

What is the purpose of garden leave?

Placing an employee on garden leave is beneficial to the employer because:

- it removes the employee from the employer's business which reduces the risk of any contact with key clients or employees, etc;
- the employee continues to owe all their usual contractual duties to the employer – for example, because of the duty of loyalty all employees owe to their employer, they cannot compete with that employer; and
- the employee is often required to assist in an orderly handover of their work and/or can be required to work on special projects if the contractual provisions provide for it.

Express right is required

Save in exceptional circumstances, an employer cannot place an employee on garden leave unless it has an express contractual right to do so. If there is no such right but an employer instructs an employee to stay at home when the employee maintains that they are willing and able to work, the employer will be in breach of contract. This may mean that the employer is also unable to enforce any post-termination restrictions.

While an employee is on garden leave, the employer must continue to pay salary and provide contractual benefits. This is crucial to avoid the employer breaching the contract and rendering the restrictive covenants unenforceable. Therefore, although a garden leave provision can provide very effective protection against competition, it is often an expensive method of doing so.

The relationship between restrictive covenants and garden leave

Care must be taken in exercising a contractual garden leave clause as the court will wish to ensure that an employer is not acting unreasonably by requiring the employee to remain on garden leave for the duration of the notice period and then seeking to enforce the post-termination restrictions. For this reason, the contract of employment should typically provide that the period of the post-termination restrictions is reduced by any time spent by the employee on garden leave.

The effect of an employer's breach of contract

A court will not enforce restrictive covenants at all if the employer has wrongfully dismissed the employee. Therefore, if the employee can show that the employer committed a fundamental ("repudiatory") breach of the contract entitling the employee to treat themselves as discharged from any further obligations under it, they will not be bound by most restrictive covenants (although some confidentiality obligations may remain enforceable). This will also apply in a situation where the employee is entitled to resign and claim constructive dismissal.

An employee who intends to leave and work in competition with their current employer may therefore seek to "set up" such a fundamental breach so that they can later argue their restrictions are unenforceable. The employee may raise a grievance which should be addressed under an employer's grievance procedure. An employment tribunal can increase or reduce compensation by up to 25% where either the employer or employee has unreasonably failed to follow the [ACAS Code of Practice on disciplinary and grievance procedures](#). Please see our [Guide to unfair dismissal](#) for more information.

Future developments

In May 2023 the Government published its [response](#) to the [consultation](#) on measures to reform non-compete clauses in contracts of employment together with a detailed [impact assessment](#). The Government's proposed reform is to introduce a statutory limit of three months on non-compete clauses in employment contracts. Other restrictive covenants, such as non-dealing and non-solicitation clauses, would not be affected by the proposed reform. No date has been proposed for legislation to implement the changes.

April 2024

ACAS [Code of Practice on disciplinary and grievance procedures](#)

The content in this document is for general purposes and guidance only. It does not constitute legal or professional advice and should not be relied on or treated as a substitute for specific advice relevant to particular circumstances. For legal advice, please contact your main contact partner at the relevant CMS member firm.