

17 May 2023

# Weekly Blog

By: Rob Tice



Another day, another proposed reform to employment law and HR best practices: non-compete restrictions to be limited to 3 months maximum

Hi folks, Doctor Detail (Rob Tice) here.

I hope your week is going well. The summer finally seems to have got started and I for one have been enjoying the beautiful sunny days we have been having. Whilst I love working at Precept, as I may have mentioned before I also love family holidays and being at the beach. The thought of long summer days on the beach are at the front of my mind so it's good that summer holidays are not far away (I'm sure there are lots of you out there who are feeling exactly the same isn't there?!)

Back to work now though!! One thing is for sure: as 2023 progresses, it's becoming increasingly difficult to keep up with what the Government have got planned in terms of employment law and HR best practice at the moment.

You'll have seen our recent article about changes to the proposed changes to the law on harassment and you can't really escape the fact that there's been another U-turn from the government on the deadline for scrapping any retained EU-laws (did you see that testy exchange between the Speaker of the House of Commons and Kemi Badenoch recently? Ouch!)

In another employment and HR-related development, the Government has now announced that it intends to bring in legislation limiting the length of non-compete clauses in contracts of employment to a maximum of 3 months. This is despite the fact they never actually got round to responding to a consultation on proposed changes to non-compete restrictions that took place in 2020.

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There's currently a lack of detail from the government on this latest announcement so let me try and enlighten you with the information we do currently have.

First - and this has nothing to do with the Government's latest announcement but it's still important for you to know - non-compete clauses are notoriously difficult to enforce.

Remember, any post-termination restriction should be designed to protect specific legitimate business interests and should only go so far as is reasonable to do so. Any restriction that goes even the slightest bit further than is reasonable to protect a legitimate business interest is going to be unenforceable. So, any non-compete clause that effectively prevents an ex-employee from working for a period after their employment ends is very unlikely to be enforceable. These restrictions need to be really tightly drafted, limiting both the length that they remain active for and the sort of activities that they restrict.

Might be helpful if I give you a specific example? Let's say you have... an Employment lawyer. You put a restriction in their employment contract saying that they can't join any other law firm in any other capacity for 6 months after their employment ends. That means they can't join a law firm as say, a Family lawyer or even as a cleaner (times are tough!) That's not going to be an enforceable restriction because it goes way too far.

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Second, very kindly, the Government has confirmed that their latest intended reforms don't impact non-solicitation clauses (i.e. those clauses that prevent employees from soliciting their former employee's clients for a period after their employment ends). Subject to the usual rules around enforcement that I've summarised above, non-solicitation will still be able to last for more than three months.

Finally, the Government have (again, ever so kindly) confirmed that their latest intended reforms don't affect an employer's ability to use paid notice periods or place departing employees on garden leave to prevent an employee working for a competitor for longer than three months. So employers will still be able to put somebody on garden leave (subject to them having the contractual right to do so) effectively taking the departing employee out of their particular industry for the period of their notice.

The Government intend to introduce this legislation restricting non-compete clauses to three months "when Parliamentary time allows." That phrase has become quite familiar recently to us employment lawyers and HR professionals. Actually, there's a wide range of employment reforms that we're waiting to come through "when Parliamentary time allows" some of which seem to have fallen off the legislative cliff face altogether.

Whether and when these latest proposed reforms go through, you can count on us at Precept to keep you up to date.

In the meantime, as I've said, getting post-termination restrictions right is a tricky business. If you want to include any such restrictions in your employment contracts or if you want to check whether existing restrictions are enforceable you need to be taking expert advice. That's where we can help. Give us a call to speak to one of our expert team.