

Non-Competes: Government Proposes Far-Reaching Reforms

Earlier this month, the Government launched a consultation on measures to reform post-termination non-compete clauses in contracts of employment. It proposes two options for reform. Option one is to make non-competes enforceable only when the employer pays compensation for the period that the employee is prevented from working for a competitor or starting their own business. Complementary measures are suggested to enhance transparency where non-competes are used and to place statutory limits on the length of non-compete clauses. Option two is banning non-competes or measures short of an outright ban which limit their enforceability in the interests of spreading innovation. This consultation raises three important questions.

First, what has changed? The Conservative Government launched a similar exercise only four years ago. When it published its findings in its 2018 response to the Taylor Review of Modern Working Practices, the Government noted and accepted that the consensus view across the majority of responses to its call for evidence was that restrictive covenants are a valuable and necessary tool for employers to use to protect their business interests and do not unfairly impact on an individual's ability to find other work. It concluded then that no further action was required. Its justification for launching a fresh consultation just two years later is that Covid-19 has had a profound impact on the labour market but the Government fails to explain how this affects non-competes or justifies a fresh look at reform.

Second, is there a problem with non-competes? The Government says that non-compete clauses can act as a barrier by preventing individuals from working for a competing business, or from applying their entrepreneurial spirit to establish a competing business. But assertion is not evidence. In fact, the common law controls on restrictive covenants, which can be traced back to Magna Carta, mean that non-competes are unenforceable unless they are shown to be no more restrictive than reasonably necessary to protect the employer's legitimate business interests. This approach has stood the test of time and is adaptable to changing economic needs and aspirations.

Third, will the reforms work? Restrictive covenants are recognised globally as an appropriate means to protect business. Today's start-up is tomorrow's enterprise wishing to safeguard its trade secrets, customer connections and stable workforce. Undoubtedly, non-compete law and practice varies worldwide. Germany has long required compensation as a pre-requisite of an enforceable covenant and California bans non-competes. But there is a danger in imposing practices from elsewhere onto the settled system in the UK. The potential consequences include increased uncertainty, more litigation and additional costs for businesses and employees. The risk is that the cure is worse than the disease.

That is not to say that the status quo should not be challenged nor that it is incapable of improvement. The consultation provides an opportunity to scrutinise current orthodoxies and search for greater efficiencies for business balanced by proportionate safeguards for individual employees. Do non-competes inhibit start-ups or unduly restrict freedom to compete? What lessons can be learned from the approaches in other jurisdictions? What are the arguments for and against change? How can any changes best be implemented?

The Government consultation paper is [\[here\]](#). The closing date for responses is 26 February 2021. I encourage those with an interest and experience to respond directly. I am co-chairing the Employment Lawyers Association working party (with Jonathan Chamberlain of Gowling WLG) to prepare a response on behalf of ELA and am keen to hear a range of views.

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