

Recruiting from competitors – what do I need to consider?

Let's face it – it's natural to have an interest in recruiting staff from similar or competing businesses. They are likely to already have a good grasp of the industry and market and be well placed to hit the ground running from day one. But given how common post- termination restrictions have become within employment contracts, you understandably want to ensure your recruitment efforts don't land you in hot water.

There's no two ways about it - post termination restrictions are difficult to enforce. As we live in a free and competitive market, such restrictions are generally regarded as a restraint of trade and are therefore automatically void under English law. However, courts will uphold them if an employer can demonstrate they are required to achieve a legitimate proprietary interest and the restrictions go no further than is necessary and reasonable to protect that interest.

In practice, this means the drafting and scope of the restrictions is always absolutely critical as to whether they have a chance of being enforced. And just as crucially, the restrictions must actually be reasonable and appropriate for the individual involved and their role for them to be enforceable.

While the restrictions bind the individual themselves, those recruiting must be wary as they can be exposed to claims that they have induced the employee to breach their restrictions. For this reason, it's important to always ensure you have visibility of someone's restrictions before they are employed, particularly if they are coming from a competitor. With this oversight, risks can be assessed and an appropriate strategy for the recruitment can be put in place.

We've seen a surge of instructions in this area recently from clients on both sides of the fence and it would appear there is currently considerable appetite to test the waters of what might be enforceable. In our experience, few cases ever get much further than pre-action correspondence but there is often much that can be gained through such a process. It's therefore always important to be prepared for potential action before offers are made. Being on the back foot is never a good place to be.