



**Restrictive Covenants:
practical considerations**

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Why?

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Why are they looking to compete?

- Was/is the employee motivated?
- Do/did they have an appropriate work/life balance?
- Leisure time, family commitments, outside business interests
- Career structure?



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Long term incentives

- Shares; Cash; Holiday; Sabbatical

N.B. may need to comply with specific sector regulations (e.g. finance and pharmaceutical sectors).

- Promotion and/or management responsibilities (motivates but also enhances implied duty of fidelity and may even create a fiduciary duty)



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SPOTTING THE SIGNS

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Practical steps to detect competitive activity

Any approach depends upon:

- Nature of business
- How the business operates
- Likely competing activities
- Time, money and resources of the client



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Dangers in approach

- Wrongful/unfair dismissal – don't appear unduly distrustful
- Data protection and privacy – workplace privacy issues are complex:
 1. Data Protection Act 2018 (+ GDPR)
 2. Regulatory of Investigatory Powers Act 2000
 3. Telecommunications (Lawful Business Practice)(Interception of Communications) Regs 2000; Human Rights Act 1998
- Inducing a breach of contract



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Monitoring employee behaviour

- Requesting a copy of their contract (particularly by more than one employee).
- Changes in work patterns:
 - Starting early/finishing late
 - Unusual requests for time off/absences
 - Changes to who individuals are socialising with.
- Communications:
 - Setting up group chats/group emails on messaging platforms
 - Using personal email accounts
 - Unusual amount or timing of calls between team members
 - Communication between staff who do not usually communicate.



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Monitoring employee behaviour (cont'd)

- Removal of confidential information:
 - Emailing work documents to private email addresses (on pretext of needing to work from home)
 - Remotely accessing work (where the employee does not usually do so).
- Resignations:
 - Artificial reasons for resigning
 - Refusal to disclose identity of new employer.
- Refusal to give contractual undertakings post resignation



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Proper recording and restriction of information

- Proper processes for recording client interaction and data
- Daily activity log
- Identify (sensitive) information to be controlled, who should have access and how
- Use document management systems
- Restrict employees to using company equipment only
- Have more than one employee working with each client.



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Monitor communications and equipment

- Up to date policy on email and electronic messaging platforms
- Policy must permit monitoring (NB: GDPR issues)
- Limit personal use
- Specify who owns LinkedIn, Twitter, Facebook accounts
- Set clear rules regarding use of such external accounts:
 - Surrender/cancel social media accounts on termination
 - Add new business contacts to database when added to LinkedIn and have these deleted from external account on termination
- Have proxy access to email



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Monitor communications and equipment (cont'd)

- Telephone protocols:
 - Call recording
 - Automatic monitoring of numbers, duration and cost
- Monitor use of photocopiers and printers.



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Work practices

- Ensure staff take proper holidays of at least two weeks
- Ensure groups of employees deal with each customer.



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Contractual protection

- Enforceable PTRCs
- Express garden leave clauses
- Disciplinary and suspension provisions
- Express fiduciary duties
- Expand confidential information.



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REMEDIES

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Injunctions

- Garden leave
- Enforcing PTRCs
- Future harm ("springboard")
- Breach of confidentiality
- Destruction/preservation and delivering up of documents
- Search orders



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Damages

- Loss of profits from lost business
- Cost of retaining staff and establishing stability
- Cost of investigating wrongdoing
- Account of profits (gain by wrongdoing of a fiduciary)
- 'Negotiating damages'



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Written/contractual undertakings

- Pre-issue request
- Value – strengthens interim application:
 - Refusal to give them infers intention to breach
 - Harder for ex-employee to argue PTRCs too wide if later breached.



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Undertakings to the Court

- Breaches will be contempt
- Sought where ex-employee cannot be trusted to comply with contractual undertakings
- Given where ex-employee/poacher wants to avoid contested application



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OBTAINING EVIDENCE

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Sources and methods

- Platform as discussed already
- Require employee to return phone/laptop
- Lock down IT system before alerting employee to investigation
- Have details of forensic IT experts to hand
- Rigorous but responsible exit interviews (n.b. breach of T&C)
- Encourage others to spill the beans



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Options

- Persuasion/seek a change of heart
- Garden leave - express clause (or no duty to provide work)
- Suspension/disciplinary investigation and procedure

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Options (cont'd)

- Report to ICO – potential criminal proceedings for breach of GDPR
- Springboard relief – may hamper proof of loss; does injunctive relief save anything for the business?
- General injunctive relief/damages

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Managing confidential information in evidence

- CPR 31.22(1) – Confidential Club protocol
- CPR 31.22(2) – seek order prohibiting use
- CPR 39.2(3) - Apply for order that part of hearing be in private (high hurdle given importance of open justice)
- CPR 5.4D(2) – seek order that notice is given to parties if someone seeks copies of documents on the court record
- Use redactions in exhibits to witness statements



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ADVISING EX-EMPLOYERS AND NEW EMPLOYEES

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Professional duties

- Be alive to torts of conspiracy and inducing breach of contract
- Confirm what is lawful/not lawful in writing
- Identify your client and limit advice to them only
- Establish the extent of information to be shared with others (by written agreement between them and your client)
- Do not participate in meetings with groups of ex-employees or ex-employee and ‘poacher’



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Soon to be ex-employees – what is permissible?

- Seeking work with a competitor
- Acquiring premises, purchasing equipment and identifying partners
- Setting up a company
- Contacting potential suppliers for details of products and prices (within limits)



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Soon to be ex-employees – what is impermissible?

- Preparing to compete during working hours
- Soliciting customers (requires element of persuasion)
- Disrupting the employer's supply by soliciting supplier
- Soliciting colleagues to leave
- Assisting a competitor to recruit colleagues
- Providing financial support to a new competitor
- Copying or memorising confidential info (need it be said)



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New employers – the boundaries

- Appoint a headhunter/independent recruiter (with written remit)
- Use former employees to recruit others if outside PTRCs and not using trade secrets or inducing any unlawful activity
- (Almost always) obtain contracts of potential employees to assess potential liability – balance fixed knowledge with judicial scepticism of any pleaded ignorance of PTRCs
- Keep period between approach and appointment short
- Limit information shared (particularly if more than one employee involved)



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Responding to the (threatened) proceedings

- Fight interim injunction or give undertakings?
 - How persuasive is evidence for the defence?
 - Is any new employer a true threat?
 - Have individuals already given contractual undertakings?
 - Will the court grant the relief sought to the extent demanded?
 - Is any undertaking sufficiently precise?
 - Resist split trials for liability and remedy – proving loss is harder
 - Consider admitting breaches if there is a strong case on quantum and causation.



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