



Employment law webinar

Protecting your organisation from people related risks

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Part 1: Before employment starts

Simon Bellm, Partner, Employment

Before employment starts

- Main business concern will be to make sure the employee starts on time and gets up and running
- How can we make sure that happens?

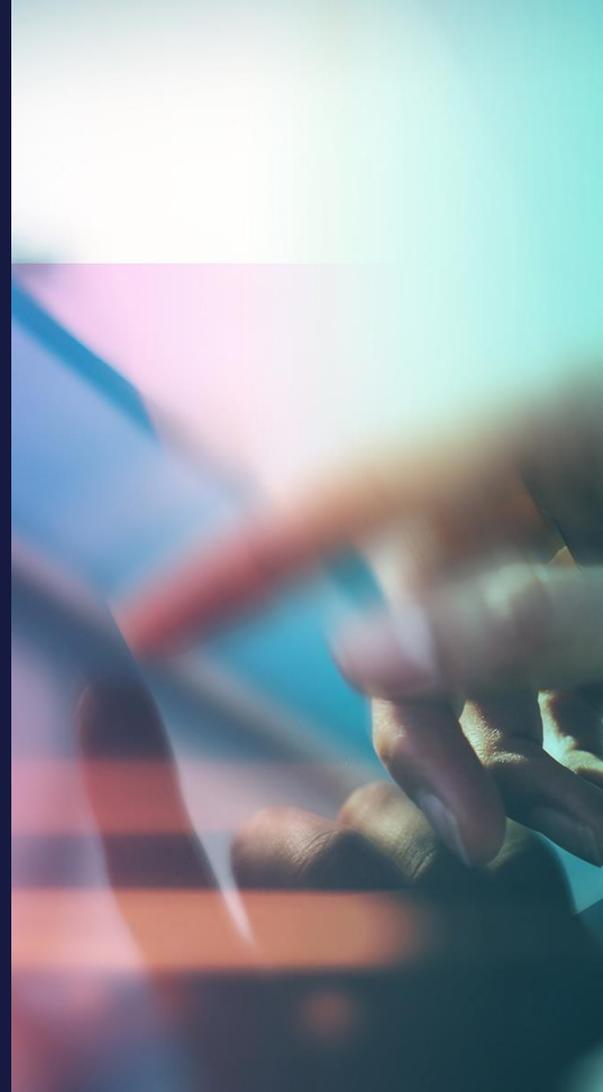


Employee changes their mind and does not show up

- Normal position. If the employee has signed a contract committing to a start date, the employee is likely to be in breach of contract
- Employer could bring a breach of contract claim but the value likely to be very low
 - Limited to notice period
 - Employer's loss probably wiped out by saving on salary
 - Possible claim for lost opportunity or additional cost of hiring replacement but difficult to establish

Employee changes their mind and does not turn up: using a no show clause

- No show clause: a clause specifying that in the event the employee does not show up the employer will be entitled to a specific sum (liquidated damages) which truly reflects employer's loss



Requirements of no show clause

- Employee needs to have entered into the contract
- The liquidated damages must not be a penalty, ie. it must be a reasonable and genuine estimate of loss
- Helps if likely losses of employer are made clear to employee in advance
- Helps if employee has taken legal advice

No show clause

- Likely to be relevant for senior employees where a failure to show will lead to significant loss
- If the employee is reluctant to agree to such a clause it might be a warning sign to the employer

Employer changes their mind

- Normal position. Again this will be a breach of contract. The employee will be entitled to compensation for lost earnings during notice period



Employer changes their mind (2)

- What can you do?
- Have a shorter notice period for the initial period of employment. Will often be a shorter notice period during any probationary period
- Make sure you carry out pre employment checks and that the offer of employment is conditional on the employer being satisfied as to the responses
- Set a time limit for responses to checks so you discover any problems sooner rather than later

Employer changes their mind: health

- Section 60 of the Equality Act: employer must not ask about the health of an applicant before offering work to the applicant
- But EHRC guidance: “Job offers can be made conditional on satisfactory responses to pre employment disability or health enquiries or satisfactory health checks”
- EHRC guidance: but the employer must not discriminate on the back of the results of such enquiries or checks

Making sure the employee can work: right to work

- General right to work checks must be carried out before the employment begins. Generally request documentation at the time of offering employment
- If immigration approval or specific working visa required make the offer conditional on necessary approval being obtained
- Possibly include flexibility in the start date
- Include warranty in the contract of employment by the employee that they have right to work – pushes some burden on to the employee

Making sure employee can work: freedom to work

- Include warranty in the contract of employment that by working for you the employee will not be in breach of any Court Order or express or implied terms of any contract or legal obligation
- Reduces the risk that you will be liable if it turns out that the employee is subject to some restriction



Making sure the employee can work: qualifications

- Include a warranty in the contract of employment that employee possesses any necessary qualification for carrying out their role, and that they will maintain qualifications and / or registration
- Ranges from simple examples such as possession of a driving licence to holding professional qualifications, eg. nurse or doctor
- Helps ensure the employee is adequately equipped for their role, reduces risk if employee subsequently found not to be properly qualified
- Important to require employee to declare if they should lose their qualification or registration

Part 2: Once employment gets underway

Rustom Tata, Head of Employment

If you use probationary periods –
how useful do you think they are in
focussing line managers on
identifying poor
performers/inappropriate hires?

Poll



Suitability for / capability in the role

- Probationary period
 - How long?
 - What assessment tools do you use?
 - Careful contractual wording

Suitability / capability in the role (2)

- Ongoing performance management
 - Collecting and retaining meaningful data
 - Proper assessment
 - Occupational Health input – GDPR issues
 - Ensuring clear focus on the work of your organisation – working time, external interests

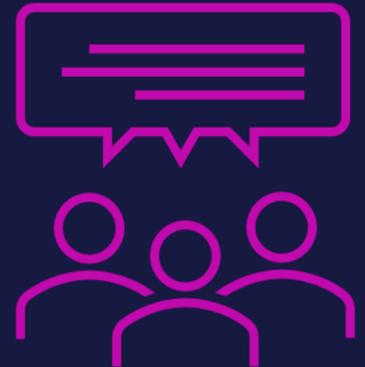


Focus on the business

- While working and not?
 - Express contractual provisions – whole working time and attention
 - Duty of good faith and obligations to further employer's interests
 - Codes of Conduct / Behaviour
 - Relationships with colleagues
 - Duty to notify of possible conflicts (inc. family)

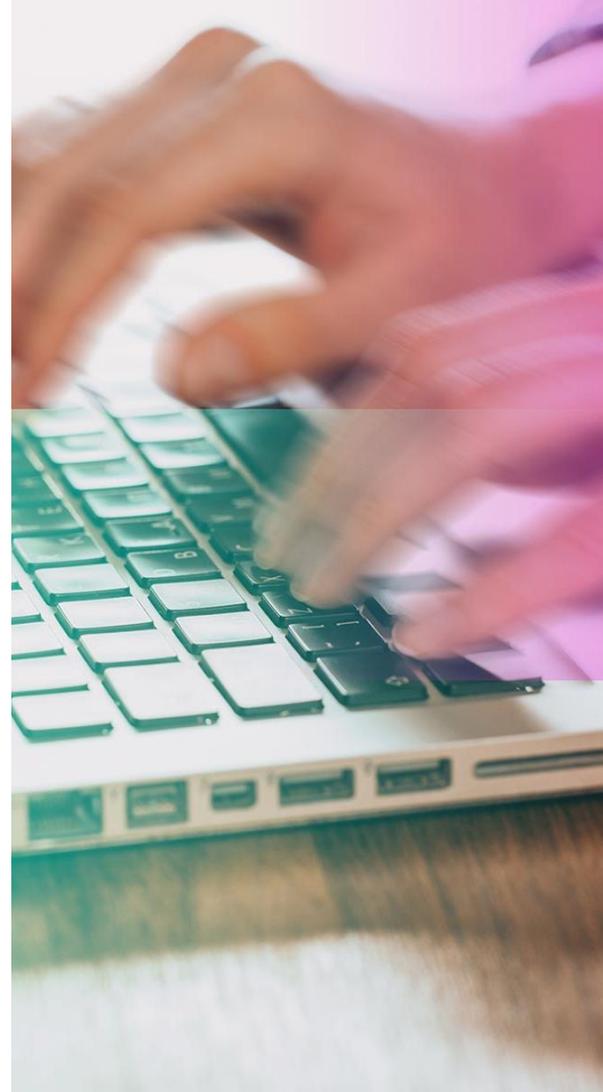
If you enter into training agreements requiring repayment of costs when they leave, how often do you recover money from the employee?

Poll



ROI for training

- Separate training agreement
- Basis of calculation of sum for repayment?
- Sliding scale for recovery
- Can be problematic in application
- Reminder of s1 Statement requirements



Part 3: Ongoing risks

Simon Bellm, Partner, Employment

Protecting the business: intellectual property

- An employer's intellectual property will typically include trade secrets, ideas, innovations and inventions, copyright, photos, design, styles, names and brands



Protecting the business: employer's intellectual property

- Confidentiality clauses are an important way of protecting IP
- An implied duty to maintain confidentiality exists as part of the contract of employment
- However this only exists during employment unless the information concerned is genuinely a trade secret
- An express clause extends protection beyond the end of the employment and removes any argument as to whether the information is protected
- The confidentiality clause should make clear what information is confidential
- It should include an obligation not to use or disclose confidential information
- It should cover confidential information belonging to customers / clients the employee may deal with

Protecting your investment: employee's intellectual property

- The general position is that an employer will be the owner of intellectual property created by an employee during their employment
- The position in relation to inventions is more complicated. Under the Patents Act inventions will generally belong to the employer if made in the course of normal duties
- Often a doubt or argument will arise as to whether any invention has been developed in the course of an employee's duties. It is sensible to include an express clause to make sure that all intellectual property belongs to the employer

Intellectual property clause

- Typically the employee agrees to:
 - Hand over details of IP
 - Not attempt to register the IP in their name
 - Keep the IP confidential
 - Waive their rights in relation to the IP
 - Assign rights in relation to the IP to the employer
 - Assist the employer in defending any third party claims

Employer's reputation

- There are a number of ways in which an employer can protect its reputation



Employer's reputation: using general contractual duties

- The contract of employment should include a general duty on the part of the employee not to bring the employer into disrepute
- More specific duties such as a duty not to make any public comment can be legitimately included

Employer's reputation: social media policy

- A social media policy is an effective way of helping to protect an employer's reputation from damage caused by careless use of social media
- The aim of any policy should be to strike a balance between the employer's concerns as to how an employee's postings may affect the employer whilst allowing the employee some level of freedom
- The policy should define what is and is not allowed in terms of social media use and how the employee's use of social media outside of work is governed
- Where an employee uses social media as part of their work the policy should set out clearly what is permissible
- A social media policy will also help the employer protect its intellectual property and help the employer avoid liability for defamatory or discriminatory comments made by the employee

Protecting employer's reputation: anti bribery provisions

- Normally the contract of employment should include a provision that the employee will not be involved in any form of tax evasion, bribery and / or corruption and that they will report any concerns, requests, or demands that are made to them
- Helps comply with anti tax avoidance and bribery legislation



Protecting the employer's business: IT systems

- An employer should have an effective IT usage policy put in place to protect its IT systems
- Such a policy will help prevent:
 - Potential unauthorised disclosure of confidential information
 - Infringement of third party intellectual property rights
 - Unlawful harassment of employees
 - Reputational damage
 - Time wasting and lost productivity
 - Damage to IT systems

Protecting the employer's business: IT usage policy

- Typically an IT usage policy will cover:
 - Equipment security and passwords
 - Systems and data security
 - Email use
 - Internet use
 - Personal use of employer's systems
 - Monitoring
 - Prohibited use

Protecting the employer's business: wrongdoing

- There is a limited implied duty on the part of an employee to disclose their own wrongdoing, generally applying to senior employees only
- There is no duty to disclose the wrongdoing of colleagues
- Include an express duty on the part of the employee to disclose their own wrongdoing and the wrongdoing of others immediately on becoming aware of it

Protecting the employer's business: whistleblowing

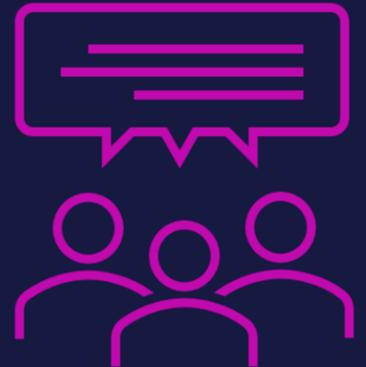
- There is no general obligation to have a whistleblowing policy. Why might an employer choose to have one?
 - Compliance and internal control. Encouraging internal reporting at an early stage makes it easier to address problems and to avoid regulatory involvement and reputational damage
 - It discourages external disclosure. An employee who fails to disclose internally when a policy exists and instead chooses to go to the press for example is less likely to be protected
 - It assists avoiding criminal liability for bribery and tax evasion
 - Whistleblowing policies are a key component of compliance with slavery and human trafficking obligations for large employers
 - It is a requirement to have a whistleblowing policy where the employer is a public body, a listed company or subject to the regulation of FCA and/or PRA

Part 4: At the end

Rustom Tata, Head of Employment

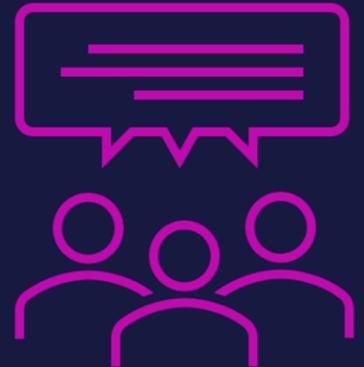
Do you include restrictive covenants for staff below director level?

Poll



How often do you get involved with reminding departing employees of the restraints to which they are subject?

Poll

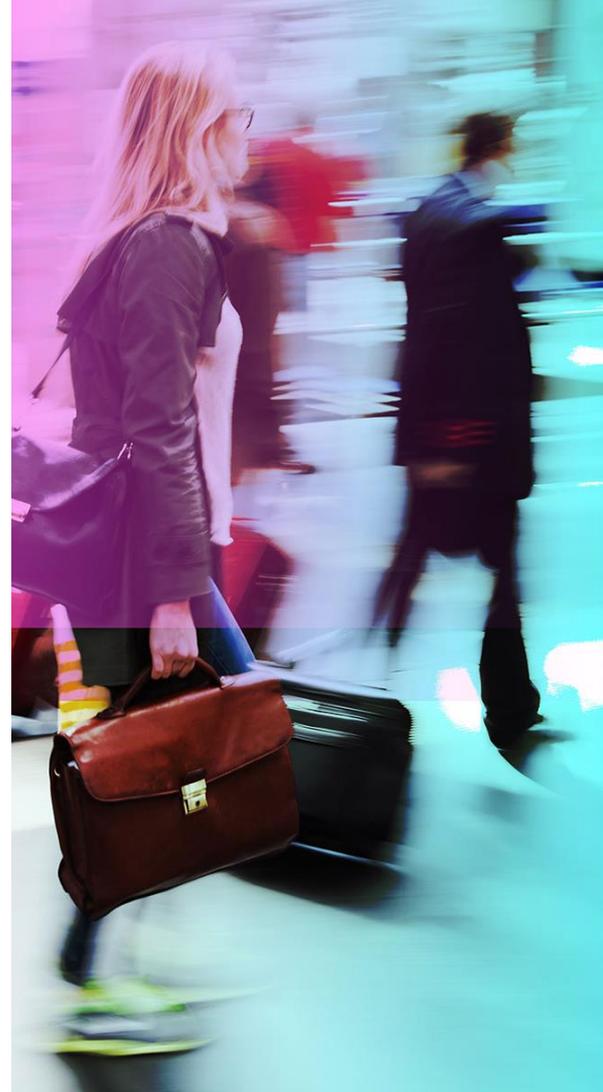


Regulating post termination behaviour

- Colleagues
- Customers
- Suppliers
- Other trade connections

Regulating post termination behaviour (2)

- Restrictive covenants
- What is capable of protection?
- Duration
- Geography
- Scope and extent
- Tailored provisions



Regulating post termination behaviour (3)

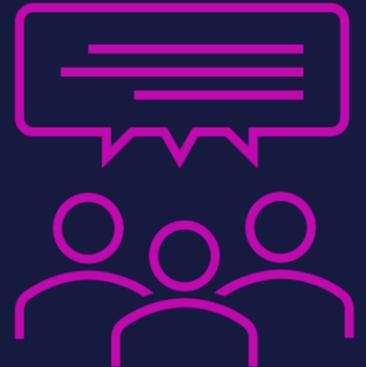
- Commercial effectiveness
- Interplay with other terms (notice and garden leave)
- Government reform?

Confidentiality and reputation

- Confidential information
- Reputation management
- Mixed effectiveness – ability to show financial harm, enforceability
- Whistleblowing: originally a shield, but increasingly a sword

How confident are you that
your restrictive covenants are
enforceable?

Poll



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