

HRM Guide

How can employment lawyers help headhunters place candidates more swiftly?

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December 21 2012 - Picture the scenario: an ideal candidate for a role is found, the candidate can't wait to start and your client is eager to announce his joining. Then the candidate mentions in passing that he has a 12 month garden leave clause and post-termination restrictive covenant in his contract which prevent him from working for a competitor. Sound familiar?

As lawyers specialising in the law relating to employment we are always looking for ways of overcoming the obstacles and helping to place a candidate more quickly. There has been a raft of recent case law on restrictive covenants and business protection which has clarified some aspects of the law on the post-termination activities of employees and partners. So it is now even more crucial to understand the potential pitfalls and, more importantly, the loopholes, so a candidate can be placed quickly and safely.

5 ways in which employment lawyers can help:

1. Reduce impact of restrictive covenants

Senior executives and partners in particular tend to be subject to onerous post-termination restrictions on what they are allowed to do when they leave a firm or company. Despite recent court decisions, the law relating to restrictive covenants is complex and often uncertain and, unhelpfully, the majority of cases continue to turn on their individual facts.

The starting point is that restrictive covenants are void as they are in restraint of trade but are allowed when they go no further than is necessary to protect a 'legitimate business interest'. Restrictive covenants are judged at the time they are entered into, not when they come to being scrutinized. Frivolous or irrelevant claims against an ex-employee for breach of restrictive covenants are likely to fall at the first hurdle.

An employment lawyer will be able to guide a candidate (and its potential new employer) through recent case law to advise on the enforceability and scope of the particular restrictions and the likelihood of the ex-employer succeeding with a claim if there is a breach.

2. Draft compromise or exit agreements to free up candidates more swiftly

A well-drafted and carefully thought out compromise or settlement agreement can expedite the transition process. Under such an agreement, all parties know where they stand. Employment lawyers have experience in what tends to be important to candidates and to their former employers and can negotiate on this basis. Properly drafted compromise agreements help to avoid the time and money wasted on the threat and bringing of legal claims.

3. Negotiate reduction of notice and garden leave periods

In our experience, often employers will agree to a reduction in the period of notice or garden leave if an employee agrees to go quickly and quietly and agrees, for example, not to take particular clients. A candidate can offer to sacrifice part of his notice pay (which their new employer may offer to reimburse) in exchange for a waiver of the restrictions. In addition the candidate can offer to agree to a consistent joint message being sent to the market regarding their departure in exchange for a reduction in scope or duration of their restrictions.

4. Ensure a smooth exit by sign-off on existing compromise or exit agreements

Where a candidate has been provided with a compromise or settlement agreement, employment lawyers can advise the candidate on their rights and entitlements and, most importantly, what they are allowed to do next. The terms of compromise agreements can be negotiated on behalf of the candidate to allow them greater freedom to join a competitor.

5. Advise on what can and cannot be said to a candidate's clients and colleagues

A question we are often asked is "What can I tell my clients? What can I say to my colleagues?" We are constantly working with candidates, recruitment agents and new employers to devise a strategy for client management which reduces the risk of a breach of the candidate's employment terms.