Catriona Watt, Senior Associate at specialist employment and partnership law firm Fox, discusses how lawyers can help headhunters place candidates swiftly.

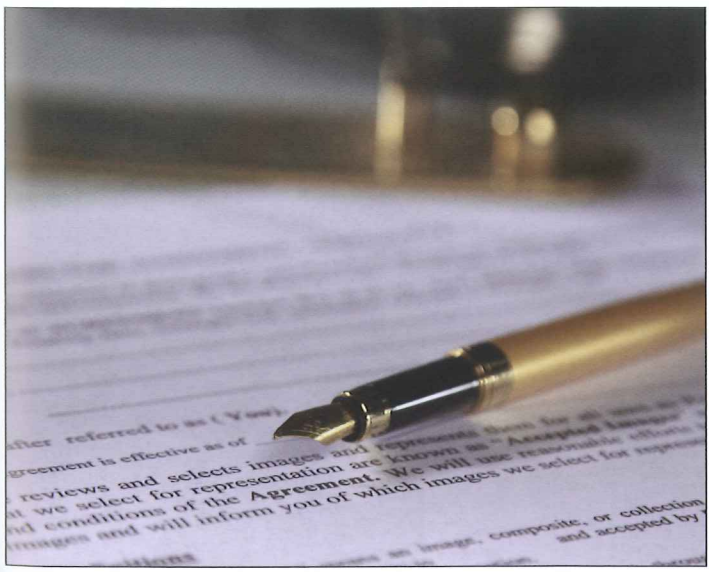
LAW ON YOUR SIDE

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 prevents him from working for a competitor and with current clients. Sound familiar? As lawyers specialising in the law relating to employment and partnership 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. Below, I'm going to discuss six ways in which employment lawyers help.

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" such as confidential information, client connections and stability of the workforce. They must be no wider in scope than reasonably necessary to protect such legitimate business interest. Some factors to which the court will have regard when considering the reasonableness of restrictive covenants are the periods for which they apply and the geographical area to which they apply, as well as if they prevent the person from working at all. The employer relying on the restrictive covenant must also show that there was indeed a legitimate business interest to protect.



Restrictive covenants are judged at the time they are entered into, not when they come to being scrutinised. Frivolous or irrelevant claims against an ex-employee for breach of restrictive covenants are likely to fall at the first hurdle.

Where an ex-employer has fundamentally breached an employee's employment contract allowing the employee to "constructively dismiss" himself, any post-termination restrictions in the employee's employment contract will fall away and cease to apply. However, courts are particularly attuned to identify manufactured and artificial constructive dismissal claims where the sole aim of the claim is for the employee to cease to be subject to a post-termination restrictive covenant. Employment lawyers can advise a candidate on the merits and strategy if the candidate considers that he may have a potential constructive dismissal claim against his employer.

In an employment context, if possible the courts tend to try to interpret restrictive covenants in favour of the employee. However the situation is often different in a partnership context (for example, a partner in a law firm). In our experience, the courts often view restrictive covenants in this context differently, on the basis that partners are deemed to have equality of bargaining power. The courts are therefore usually more willing to uphold covenants given by partners to each other on a mutual basis, than those given by an employee for the benefit of its employer. The courts' traditional attitude towards restrictive covenants in a partnership context ignores the reality that large firms have many partners who have no real say on the terms of the partnership or LLP agreement.

Any lawyer specialising in employment or partnership law will be able to guide a candidate (and its potential new employer or firm) through recent case law to advise on the enforceability and scope of the particular restrictions and the likelihood of the ex-employer or firm succeeding with a claim if there is a breach. Sometimes an ex-employer or firm will try to add the new employer or firm as a party to any legal proceedings on the basis that it has induced the candidate to breach the covenants. An employment lawyer will be able to advise on ways to minimise this risk whilst ensuring that the employee joins the new employer as soon as possible. →

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Advise on Team Moves

Often a whole team will wish to move to a new employer or firm together. There is a particular body of law surrounding team moves and recent landmark court decisions have established principles for what is and what is not unlawful when a team decides to move to a new employer together. It is important to take advice at an early stage on the risks of a team move and the steps which are and which are not permitted in the context of a team move.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) can apply in the context of a team move. It is important to consider the application and implications of TUPE carefully or a new employer could find itself inadvertently liable to pay compensation under the regulations.

In order to sue an ex-employee or group of ex-employees for breach of restrictive covenants the ex-employer must be able to show that it has suffered loss as a result of the alleged breach. There are ways of minimising the loss that can be shown has been suffered.

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.

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 and/or restrictive covenants in an employment contract or partnership agreement 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 particular where senior executives are concerned, it is often important to an ex-employer that a positive message is sent to the market about the employee's departure. A 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.

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.

Where an exit of a candidate is likely to be contentious, new employers can offer to provide the candidate with an indemnity in respect of any legal claim brought against the employee by the ex-employer alleging a breach of their employment contract.

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.

We are also asked what financial terms can be agreed between a candidate and new employer and when it can be agreed. For example, the financial services sector is subject to strict regulation as to what a new employer can offer a new employee upon joining whether to entice them to join or to compensate them for something they are leaving behind at their ex-employer. Employment lawyers can help to structure an offer package which complies with those regulations but still incentivises the new employee. ■