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Employment Law Briefing

Let the Games Begin – Working Around the Olympics

by Andrea Ward

Whether you're interested, indifferent or indignant, for seven weeks this summer (from the final torch relay on 26 July until the Parade of Heroes on 10 September) London will be an Olympic city and will welcome 10.8 million ticket holders, 55,000 athletes (and their supporters), 30,000 media staff and 100,000 'Games Makers'.

For employers, the biggest concern is keeping businesses running, which means ensuring that employees can continue to work during the Olympic period.

We know there will be 'hot spots' at major railway stations and interchanges on the tube and an additional 3 million tube journeys per day (doubling the current number). Even if avoiding the tube is an option, users of buses and taxis will be affected by delays as dedicated Olympic Route Networks take precedence, displacing ordinary traffic and causing congestion on major roads. Walking or cycling seems to be the only realistic solution.

If employees are unable to physically get to work or get home again, then other options need to be considered. Not every business can allow its staff to work from home for the full seven weeks, but it is clearly sensible to look at whether flexible working (reduced hours or varying start and finish times) or working from home could offer a temporary solution.

How employers deal with any changes is crucial and requires detailed consideration of contractual rights and employment policies. Whilst many have developed business continuity plans and improved remote access capabilities, which may assist, an event such as the Olympics creates even more issues for employers to grapple with.

Many employees have planned holidays, so employers need to manage holiday plans to accommodate competing requests and ensure fairness. They may also need to address incidents of unauthorised absence or short-term sickness under their existing policies and procedures.

Other issues arise when employees have applied for volunteer positions and have questions about their time off work and entitlements to pay and benefits. Many employees will want to watch the events at work, possibly in communal areas, or from their desktop PCs, at various times of the day; others will have no interest at all and may feel left out, or taken for granted, as they continue to work as normal.

There is undoubtedly a balance to be struck between the needs of the business and the wishes of employees during this 'once in a lifetime' event.

It is not too late to conduct an impact assessment or put plans in place to cope with the Olympics.

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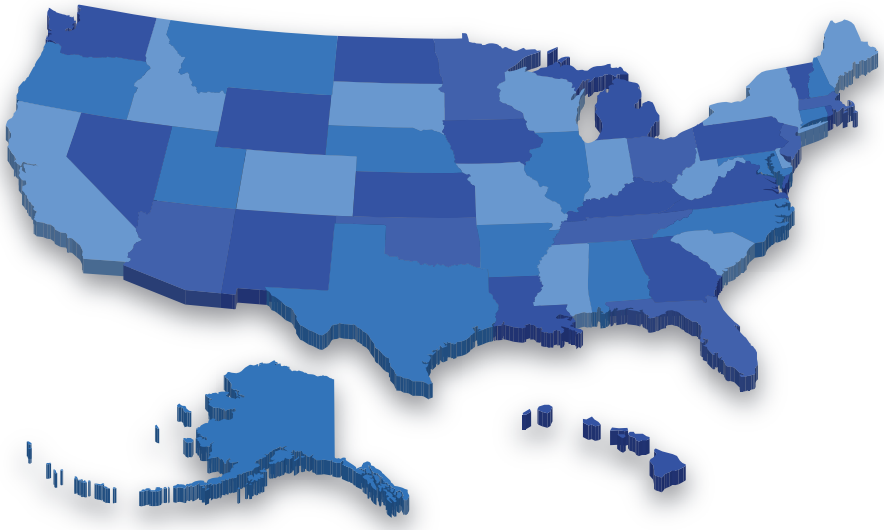
Watch Out for the Many Variations in US Restrictive Covenant Law

by Scott Cairns



The US courts will apply US law when a UK company attempts to enforce restrictive covenants in the US. This can become complicated because the laws of the 50 states vary with respect to restrictive covenants, sometimes dramatically.

Having a choice of law provision in employee agreements will help, unless the restrictions are too broad and violate the public policy of the relevant state. Because many states take a more employer-friendly approach than does English law, it may be worthwhile choosing the law of a US jurisdiction as your choice of law, as long as there is a sufficient connection to that state.

The variations from state to state can be striking. For example, Florida is very employer-friendly regarding the enforcement of restrictive covenants. Conversely, employee-friendly California will not enforce a non-competition provision, enforcing only non-solicitation provisions. In the middle of the country, Texas will enforce non-competes drafted for narrow purposes, such as the protection of confidential information. Therefore, employers in the United States should take care in choosing an appropriate state law.

Almost all states will only enforce a restrictive covenant if a 'protectable interest' justifies the restriction. This means that it is generally ineffective to require all employees to sign a restrictive covenant. In general, courts in the US define protectable interest the same way as English courts, but some states are very specific. For example, in Florida, the law defines 'protectable interest' as protection of trade secrets, confidential information, substantial relationships with existing customers, goodwill and specialised training of employees. Most courts do not require the agreement to identify the protectable interest, but it is still a good practice to assist enforcement.

Virtually all jurisdictions in the US will enforce restrictive covenants only to the extent that they are reasonable in both geographic scope and duration. Geographic scope will depend upon the nature of the protectable interest. For example, a US-wide restriction might be appropriate for a national sales manager but not for a regional sales manager. However, be cautious about the differences in state law. Some states will enforce a restrictive covenant only within a certain distance of where an employee worked (such as a 50-mile radius).

Reasonable temporal restrictions depend on the nature of the protectable interest and the particularity of the state law. For an employee in a high-tech business, where the importance of a particular piece of software may only have a short lifespan, a short duration may be appropriate if the protectable interest is solely confidential information, but a longer term may be justified if the protectable interest is customer relations. Again, state laws differ: Florida law states that restrictive covenants are presumed enforceable if the duration is between six and 18 months; other states may say anything longer than 12 months is unreasonable.

Many states will not enforce an agreement that is too broad in any way. Others, such as Florida, will enforce a broad agreement to the extent the court believes reasonable. Other states take the English law approach, allowing the court to strike the overly broad provision but enforce the rest (e.g. finding a three-year non-competition covenant unreasonable but a three-year non-solicitation covenant reasonable).

Employers should review covenants regularly and be aware of changes in state law. For example, previously Georgia courts rarely enforced restrictive covenants. However, the Georgia Legislature passed new rules for restrictive covenants in 2011, and Georgia is now very pro-enforcement in respect of covenants post-dating the new law. Therefore, any company with employees in Georgia should have new covenants signed after the date of the new law.

All courts in the US require that an employee receive some consideration for agreeing to a restrictive covenant. In most jurisdictions, the employment itself is ample consideration, so long as the agreement is signed at the initiation of employment. Most states also recognise 'continued employment' as a legitimate consideration, but some will require additional pay or benefits be provided at the time the new covenants are signed.

Finally, no matter how well-drafted a covenant may be, enforcement depends on gathering evidence of the departing employee's breach. Departing employees commonly take with them tools that will be valuable in their new employment, whether customer lists or product secrets. Investing in some computer forensics immediately upon an employee's departure can be money well spent if you plan to enforce your agreements. When presented with sufficient evidence of wrongdoing, most US courts will prevent the employee from benefiting from their improper conduct, by enforcing either a restrictive covenant, a statutory provision such as a state's Trade Secrets Act or a federal law relating to computer theft.

English Law and Restrictive Covenants – Getting the Basics Right

by Dan Peyton

English law relating to post-termination restrictive covenants seems simple: covenants are unenforceable as a matter of public policy, unless they are no broader in duration, geographical scope and nature of restriction than necessary for the protection of an employer's legitimate business interests (i.e. protection of confidential information, client relationships and a stable workforce). If a covenant is too broad it will fail completely, and an English judge will not re-draft a covenant to render it reasonable. As a matter of public policy, English courts will apply English law to any covenant seeking to restrict employees within their jurisdiction, regardless of which law governs the contract.

If a restrictive covenant is breached, an employer may claim damages, an account of profits and/or an injunction.

Two recent High Court cases highlight some important issues for employers wishing to protect business assets.

1. Make sure the covenants protect your business assets.

In *Towry EJ Ltd v Bennett and others*, Towry claimed damages and an account of profits against a group of Independent Financial Advisers (IFAs) who joined a competitor, followed by many of their clients. The IFAs were subject to covenants prohibiting them from soliciting clients, but were not restricted from dealing with clients or from joining a competitor.

Towry failed to prove solicitation and its claims failed. The IFAs' clients initiated contact with the IFAs, who then discussed details of the services offered by their new employer and facilitated the transfer of accounts from Towry. Had they solicited the clients? The judge, Cox J, explained that the question of who made the first contact may be relevant, but the real question was whether *"... the Defendants' communication with Towry's clients ... contained a material element of persuasion with a view to gaining the business of those clients."* Towry's claim failed because when the IFAs spoke with the clients, the clients had already decided to transfer their business and so there was no material persuasion.

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Had Towry had the benefit of non-dealing or non-competition covenants, the issue of solicitation would have been irrelevant and Towry would have been more effectively protected.

2. Invest early in obtaining evidence of a breach of the covenants.

Suing on covenants requires evidence of breach (e.g. forensic examination of the IT system). Towry tried to argue the court should infer solicitation from the IFAs' close relationship with the clients and the timing and similar form of clients' requests to move their business. First, the IFAs were ordered to disclose details of the legal advice obtained when joining their new employer. This advice showed the IFAs had been careful to avoid breaching their covenants. Second, clients gave evidence at trial and were adamant they had not been solicited.

3. Make sure you regularly review and renew covenants.

In *Towry*, by the time the case came to trial, a group restructuring meant Towry itself no longer traded. Did it have any legitimate business interests to protect? Cox J confirmed that English law assesses the enforceability of covenants with reference to the time at which the covenants are entered into, not at the time they are enforced, meaning that it could seek to enforce the covenants even though it was no longer trading.

This looks like a win for the employer, but this strict approach means that if the nature of its legitimate business interests change, the meaning and scope of the covenants will be determined as at the date they were entered into and may no longer effectively protect the employer's business assets.

4. Make sure you understand what legitimate business interests need protection.

Covenants must be bespoke. They must be drafted appropriately to the employee who is restricted and the legitimate business interests in need of protection.

In another recent case (*QBE Management Services (UK) Ltd v Dymoke and others*), the employment contract expressed protection of confidential information and client contacts as the relevant legitimate business interests. The employer tried to enforce covenants to protect the stability of its workforce. This attempt failed because the contract purported to set out the relevant legitimate business interests but this was not included. The moral is, either be comprehensive (the better option) or stay silent on the issue.

Shareholder Spring – Is Cable Necessary?

by Jonathan Maude

In recent weeks shareholders have been exercising considerable muscle in relation to the approval – or not – of boardroom pay. The effect has been quite astounding, and some of the UK's largest businesses have lost leaders. Andrew Moss left Aviva; David Brennan left AstraZeneca; Sly Bailey left Trinity Mirror; and, more recently, shareholders of Tullow Oil and Cookson have indicated that they are not satisfied with the companies' remuneration reports.

The spring issue of this publication outlined the proposals put forward by Vince Cable on 23 January 2012 concerning restrictions in relation to executive pay. Since then, there have been two main developments: first, the Queen's Speech has confirmed that a bill will be introduced to regulate matters around executive pay, and second, the 'shareholder spring' has sprung.

A major plank of Cable's proposals is related to an increase in relation to shareholder power. The question must be asked, however, whether this is now necessary in view of the fact that shareholders appear to be taking matters into their own hands.

The details of any proposed bill are still unclear, but the proposals made earlier this year and the steps taken in the Queen's Speech have continued to highlight this issue and it appears that shareholders are acting where they consider it to be necessary. Cable is likely to see this as being vindication of the steps he has taken to date, and thus is likely to hasten regulation in this area. Given the current economic climate, one can only hope that the regulation is light in touch and does not impose any undue burdens upon businesses whose attentions need to be directed towards the bottom line.

In addition to this, a number of companies and remuneration committees are now running with the idea of 'clawback' provisions within service agreements or bonus arrangements. This allows businesses to recover bonuses paid should performance of individuals not continue at the level required. This provides further evidence of companies being cognisant of the need to safeguard the position around boardroom pay.

Hopefully, with shareholders taking matters into their own hands, this will mean that regulation, which is now likely, will stay on the political tightrope to the extent that on the one hand, Cable is seen to be doing something in relation to boardroom excess, but on the other hand, regulation does not impose a significant burden on business.

SAVE THE DATE

McGuireWoods' Employment Team Autumn Event

Managing Collective Redundancies

Thursday, 27 September 2012
4:00 – 6:00 p.m.

and

Tuesday, 2 October 2012
8:30 – 10:30 a.m.

Join us on either of these dates to follow members of our Employment Team as they work their way through a collective redundancy process, from an employer's perspective, highlighting some of the practical and legal issues involved.

From the 'town hall' meeting and election of employee representatives to the confirmation of termination of employment (with some role-play and audience interaction along the way), we will navigate you through the dos and don'ts.

You have been selected, there is no suitable alternative and we are giving you notice...

Save the date if you would like to attend, and then please respond to the formal invitation (which will be sent in August).

See you in the autumn!