

Employer Checklist - Injunctions

Introduction

If you are an employer and are concerned about breaches of contract by your staff you will need to consider and possibly take urgent court action. This note sets out some of the main issues and steps. Please complete and e-mail it to gordon@gtelaw.co.uk copying in andreea@gtelaw.co.uk or you can print it off and bring it to our meeting.

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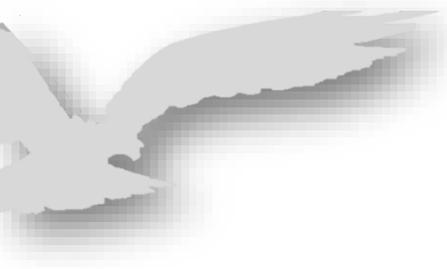
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When to apply for an injunction

Injunctions are a discretionary remedy (the judge will consider a range of factors and apply the 'balance of convenience' test). They can be ordered in the following situations:

- Breach of post-employment restrictive covenants in a contract or Service Agreement;
- Theft or misuse of confidential information;
- Action with a competing business;
- Setting up in business in competition with the employer;
- Irreparable damage to reputations;



Time is of the essence

With injunctions time is of the essence and there is a duty to put all relevant information before the judge including information which may help the other parties' case. You can work through the tick boxes below. If you need guidance, leave them blank.

Immediate steps

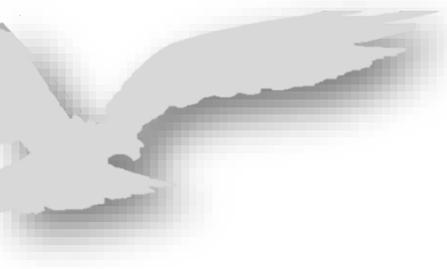
You will need to minimise damage or potential damage to your business by taking practical steps:

- Create a management team
- Investigate and approach the evidence with an open mind
- Identify the threat-what is the employee thought to be doing?
- What harm may this cause?
- Can you quantify this in financial or other terms?
- Are any other employees involved?
- Can any practical steps be taken to minimise the risks/threat caused by the breaches?
- Ensure confidentiality of IT systems: does the employee have remote access to information or communications/close this down?
- The management team will need to instruct your lawyers including your barrister
- Management instructions will need to be given to the team and other affected employees, for example to report relevant issues and to maintain confidentiality

Witness statements

The main witness statement should be taken from a manager who knows the business and the issues and anyone who has first-hand experience.

- The main witness statement should address:
 - Your business - what you do, key priorities etc.
 - The employee's role and status within the hierarchy
 - Clients or customers which the employee personally dealt with
 - The likely impact on your business of the employee's actual conduct to date
 - The likely impact of future conduct

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- Other witnesses should be capable of giving reliable and clear evidence and be able to stand up to cross-examination in court on the following:

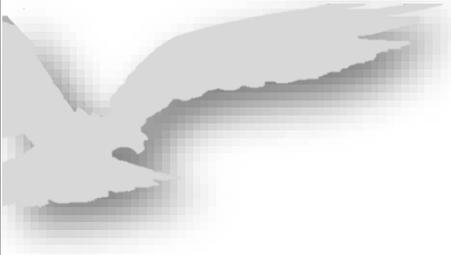
Assessing the legal issues

- Your lawyers will check the employee's contractual terms- are they correctly drafted/enforceable?
- Was the contract signed? If not did the employee agree the terms in some other way?
- In some cases, implied terms can be relied on such as: the implied term of 'trust and confidence' providing you have proof that this happened during employment. Another implied term is the duty not to misuse confidential information.
- Is there evidence of breaches of duty by the former employee?
- Are experts needed (such as computer forensic experts with court experience)?
- Do you need to quarantine the employee's hard-drive and have it examined by an expert? (take care not to corrupt any evidential trail by interfering with the system- this could obscure the employee's breaches).
- What was the geographical area in which the employee was based and carried out their duties?
- During employment, what activities did the employee carry out? The employee may have changed roles or areas in which they worked during their employment. If so, were they given any particular advice about your expectations with regard to the protection of its confidential information, or was the employee asked to enter into new post-termination restrictive covenants at that time?

Did the former employee require any specialist skills to undertake these roles and, if so, were these skills specific to the employer or the particular business in which it operates?

- If the employee dealt with confidential information or trade secrets, exactly what information did they have access to? How long does that information remain confidential and what is the risk to the employer's business if it is disclosed?
- How much of the revenue was the former employee directly responsible for generating?
- Of your current and potential clients or customers and suppliers, who were the employee's key contacts, where were they based, how senior were they and how often was there contact between them?

Can you pinpoint any particular business or prospective business that is at risk of being taken by the employee?



- Of your remaining workforce, are there any employees who might leave as a result of the employee's activities? Are there any key employees that the employee had contact with or access to and who, perhaps because the employee had access to their salary and personal details, they might be able to influence?
- Important** - What were the circumstances of the employee's departure? In particular, was the employee's employment terminated in accordance with their contract terms? Might it be alleged that you were guilty of a repudiatory breach of contract and, if so, will it be able to rely on post-termination restraints in the former employee's contract?

Reputational risk

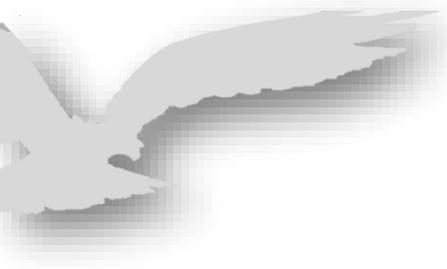
- Is Public Relations advice needed?
- Internal communications- how will the problem be addressed with relevant employees?
- Are management instructions needed to relevant personnel?

Evidence

An application for an injunction must normally be supported by witness statements:

- Identify and secure the necessary evidence
- Normally the evidence will involve the following:
 - The part of its business which is threatened by the employee's activities.
 - The importance of the employee as demonstrated by their role and employment terms.
 - The nature and scope of the employee's competitive activities whilst employed (these are easier to enforce).
 - Breaches after employment has ended.
 - Whether the competitive activities have involved, or might involve, a breach of the employee's obligations to you.
 - The threat to your business posed by the competitive activities.

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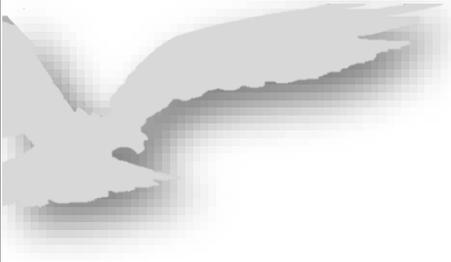
Examples of evidence

Please think about the following sources of information/evidence:

- The employee may have been preparing to compete whilst they were still employed
- Members of your existing workforce, or other former employees, may have been assisting or working with the former employee
- The employee may have misused confidential information, for example by sending confidential information to their home e-mail address
- The employee's close colleagues and secretary (or personal assistant).
- The employee's computer (in particular, their electronic diary, e-mails and internet usage including use of social networking sites, and searches done on the company database or document management system)
- Telephone records from the employee's mobile phone, SIM cards, itemised telephone bills as well as any logs the employer keeps of telephone calls and, if made, tapes of telephone calls
- Photocopying records, unusual requests for information or use of customer or supplier files
- Security videos, signing-in records or colleagues' recollections of unusual or unexplained behaviour, such as late-night or weekend working or an unexpected period of client entertainment
- Your clients, customers or suppliers (if the employer is prepared to alert them to and possibly involve them in its dispute)
- Companies House records, trade journals and Internet searches
- Mechanical and physical surveillance. These are extreme and expensive options to consider using, and there should be a realistic assessment of what they might achieve taking account of the possibility of any evidence obtained being ruled inadmissible
- LinkedIn & Social Media announcements or 'chat'
- Other: Uncharacteristic behaviour patterns: leaving the office, checking deferred stocks and options etc.

Decide whether to threaten or take legal action

Having investigated and obtained evidence, you will need to assess whether the employee's activities pose a real threat to your business and, if so, what you want to achieve by threatening or issuing proceedings including:



- The prospects of success or losing your application for an injunction
- What are the broader consequences of losing? For example, will other employees be encouraged to challenge *their* contracts if you do not succeed?
- Who should legal action be considered against/how will they respond?
 - former employee(s)
 - any third party, for example, the employee's new employer or business partner

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