

Protecting Your Relationships & Information from the Threat Within

Your bespoke, fixed price workforce solution



People.

People are one of your most valuable assets. However, unfortunately it is also likely that some are waiting in the wings to leave your business – and take part of it with them.

The expectation of a “Great Resignation” as we move out of the pandemic is well publicised, with up to a quarter of the UK workforce reportedly looking to leave their current roles. We have seen a surge in the number of businesses asking for help in protecting their trade relationships, confidential information, IP and other commercially valuable data from exploitation by former members of the workforce.

The Government’s consultation on the reform of non-competes, the difficulties enforcing restrictive covenants and the increased reliance on professional networking platforms all present challenges in terms of how to protect valuable business relationships and information. Businesses also need to consider whether all sections of the workforce – including workers and self-employed contractors – are appropriately restrained.

In addition, a growing agile workforce, together with the use of digitalised tech, smart devices and BYOD mean businesses are on the backfoot in monitoring suspicious activity.

The potential damage to corporate value caused by a loss of key talent, trade relationships and sensitive business information is a serious issue – whether to Boards, shareholders, or potential investors and purchasers.

It is critical that businesses adapt. Workforce business protection provisions need to reflect the new world of working, proactively anticipate legislative changes and provide future-proofed protection. Our experts are on hand to formulate a bespoke, fixed price strategy to address these challenges.

Click on the icons overleaf to find out more.

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Future-Proofing Business Protection from the Threat Within

To find out more click on the icons. At Osborne Clarke we have a dedicated team of experts who can advise on managing business protection risks. To discuss any of the risks identified or formulate a bespoke, fixed price strategy, **contact** one of our experts for more information today.

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Non-Compete Obligations

The Government is consulting on reforming non-competes. One proposal is to ban non-competes entirely (a trend seen in some US states). A second proposal is to have a statutory limit on duration, while a third is to require that financial compensation is paid during the non-compete period (an approach adopted in some European countries). It is therefore important to be proactive and ensure that robust alternatives are already in place if non-competes are restricted – and we can advise on the variety of options available to you.

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Trade Relationships

Protecting client, prospective client, supplier and employee relationships is key. Getting the scope of these restrictions right is vital, as if they go further than necessary, they will not be enforced. It is of little help if you learn of this when an employee is leaving for a competitor and intends to target clients or orchestrate a team move. We can help you ensure that appropriate protections are in place at the outset, across all levels of the business, whether an employee, worker or self-employed contractor.

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Confidential Information

By default, former employees are only prevented from using their former employer's "trade secrets" once employment ends. However, the bar for "trade secrets" is set incredibly high and it does not protect ordinary confidential information. Instead, carefully drafted, contractual confidentiality restrictions need to remain in force after employment has ended. This is also true of workers and self-employed contractors where robust, express provisions are needed. From a practical perspective, the business also needs to show that it has taken "reasonable steps" to protect this information, which will include hybrid working protections.

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Professional Networking

If professional networking platforms are used to strengthen trade relationships, a Professional Networking and Social Media Policy will be crucial to try to assert ownership over company accounts and business contacts. We can also guide you through the many practical steps that businesses can take to help safeguard contacts – from the terms of the Policy, to taking snapshots of networking accounts at key dates, through to account branding requirements.

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Incentives & Forfeiture

Financial retention packages and share options are an invaluable tool for retaining key talent. In addition, strengthening forfeiture provisions in these schemes can be an effective way to indirectly restrain former employees (such as providing for the loss of deferred stock or cash incentives in the event a former employee joins a competitor or breaches certain provisions). Our team has a wealth of experience in putting in place a variety of different retention and forfeiture tools – whether equity incentives, bonuses, commission, profit share or “softer” benefit packages.

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Intellectual Property

If your workforce comprises certain workers and self-employed contractors, these individuals will own any IP unless express provisions are specifically put in place. Where employees develop IP and databases (such as client contact management systems, patents and inventions) it is important that express provisions are incorporated in the contract. This ensures it is clear that ownership of this IP remains with the company where there is some uncertainty as to whether the employee was acting in the course of employment when particular rights were created. This is especially important if prior to becoming an employee, the individual was engaged as a worker or self-employed contractor.

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HR Procedures & Training

Courts assess restrictive covenants for reasonableness at the time they were put in place and not when being enforced. This means restrictive covenants should be refreshed as the employee progresses through the organisation. In addition, reminders of obligations, both during employment and on termination are also important. We can help you implement the HR procedures, documentation and training to place the business in the best position if enforcement action is needed.

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The Contract

If the business acts in breach of the employment contract/contract for services, post termination restraints may not be enforceable. Our specialists can check for pitfalls and also ensure that the company has maximum flexibility in dealing with employees, workers and self-employed contractors on exit. The ability to restrict the role of an individual during their notice period is an invaluable tool in enforcing restrictions via the backdoor. In addition, comprehensive duties and obligations on termination play an important role in managing expectations and setting the scene for enforcement action.

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Workforce Monitoring

There are a raft of tech enabled steps that can be taken to monitor workforce activity – such as alerts that are triggered if certain information is copied or accessed frequently. We can advise on strategies that utilise technology and monitoring to deter and evidence breach of restrictions, all while remaining compliant with GDPR obligations.

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Data Protection

If an individual takes personal data when leaving the business without the consent of the data controller (for example, to use at a competitor), they may have committed a criminal offence. Businesses also have a duty to put in place adequate safeguards to protect such information and to report incidents to the Information Commissioner's Office. A failure to do so may result in heavy revenue based fines and potential claims. We can help you navigate this tricky area.

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Embedding your Business with its Clients

It is important to consider how embedded the business is with key clients. For example, the business could assign multiple account managers to key clients, so reducing reliance on a single person. Technology is also key. For example, putting in place tech enabled, client-tailored support systems that competitors would find hard to replicate, or having exclusive or non-compete arrangements with certain software providers.

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Recruitment & Team Moves

Businesses can face legal action for “inducement of breach of contract” and “conspiracy” if new hires act in breach of their obligations to former employers, harm their business, or orchestrate a team move. We can assist you in developing a strategy for onboarding employees, workers and self-employed contractors in a way that reduces the risks of claims against your business. On the other side, we are well versed at assisting companies in reducing the risk of team moves, taking steps to safeguard the business and prevent further damage.

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Reorganisations & Acquisitions

Where internal business lines are restructured, or external businesses are acquired via TUPE, the scope of current restrictive covenants and other business protection provisions need to be carefully reviewed. This is because they may be drafted in a way that will only cover the original employer and its business and trade connections, and not the new employer. This means new restrictive covenants may need to be put in place. Also, if acquiring or investing in businesses, it is vital that the corporate documents contain appropriate business protection provisions to restrain sellers and shareholders from competitive activities. These corporate covenants can often be broader and wider in scope than employment covenants, so providing further protection.

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International Protections

Where members of your workforce work in a number of countries, it is important that robust business protection provisions are enforceable across all relevant jurisdictions. As an international law firm, we can help put seamless protection in place.

Contacts

Please get in touch with your usual Osborne Clarke contact or one of our experts below:



Claire Bowles
Associate Director
T +44 20 7105 7170
claire.bowles@osborneclarke.com



Natasha Burbidge
Senior Associate
T +44 117 917 3108
natasha.burbidge@osborneclarke.com



Carla O'Neill
Senior Associate
T +44 118 925 2042
carla.oneill@osborneclarke.com



Isobel Turner
Associate
T +44 207 105 7490
isobel.turner@osborneclarke.com

Expertise

At Osborne Clarke we have a dedicated team of employment, commercial and IP dispute lawyers who can advise on managing workforce business protection risks. To discuss any of the risks identified or to find out more about how Osborne Clarke can help you, please get in touch with your usual Osborne Clarke contact or one of our experts.

Please note that cyber security and data security risks have not been covered here, but our specialist teams would be happy to provide you with information on how Osborne Clarke can help you navigate these risks.



Osborne Clarke in numbers

925+

talented lawyers

working with

270+

expert Partners

in

25

international locations*

advising across

8

core sectors

with insight into

3

Transformational trends

driven by

1

client-centred approach

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Belgium: Brussels

France: Paris

Germany: Berlin, Cologne, Hamburg, Munich

Italy: Busto Arsizio, Milan, Rome

The Netherlands: Amsterdam

Spain: Barcelona, Madrid, Zaragoza

Sweden: Stockholm

UK: Bristol, London, Reading

USA

New York, San Francisco, Silicon Valley

Asia

China: Shanghai

India*: Bangalore, Mumbai, New Delhi

Singapore

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