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Desperately seeking substance – BIS Call for Evidence on restrictive covenants

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"*We want to ensure that when used, covenants are justified, well-constructed, targeted and reasonable. There needs to be a balance which ensures the employer can protect its business interests when staff move on and the worker is not unfairly disadvantaged when they (SIC) decide to leave or start up their own business*".

So says the Department for Business Innovation and Skills in its Call for Evidence last month in relation to the impact of what it grimly terms "non-compete" clauses on the flexibility of the UK labour market https://www.gov.uk/government/consultations/non-compete-clauses-call-for-evidence.

The Call is a pretty depressing document for a number of reasons. These include the absence of any very obvious evidence of any actual awareness on BIS' part of the existing regime for the enforcement of restrictive covenants, which is pretty much exactly what the Government seeks in the opening lines above. In addition, there is the usual collection of slipshod grammatical and punctuation errors and some entirely inappropriate elisions of legal concepts such as covenants "*stifling start-ups*" and their "*being used unreasonably*". Most of all, however, you are left with the overwhelming feeling that the Government has saddled BIS with the task of filling twelve pages with meaningful questions on the topic come what may, leading to such facile and unanswerable gems such as "*Would legislation to restrict the use of non-compete clauses in certain circumstances affect your business?*" Uh?

The Call for Evidence document recognises that non-solicitation and non-competition clauses have a proper place in the employer's armoury but suggests at the same time that much of what covenants are currently used for could be adequately dealt with under the general law relating to confidentiality and intellectual property. Even if that were true, which it patently is not, there is no reason there to redraw the law on covenants if they do indeed do no more than cover the same ground. The reality of course is that restrictive covenants <u>are</u> more protective in the right circumstances, hence the hundreds, maybe more, of extensively argued and reasoned senior court decisions that covenants reasonable in their reach and duration are not contrary to the common law principle of restraint of trade while those which are not "*justified, well-constructed, targeted and reasonable*" will be void.

So there is no question of the Government setting out to ban restrictive covenants altogether, just to

limit their application to cases where they strike the balance set out above. It might seem churlish to mention that we do of course already have a tried and tested mechanism for that purpose, being the civil court system. While covenant litigation may be lengthy and expensive, it pales into nothing compared to that about the proper parameters of confidentiality and intellectual property rights clauses, the suggested alternatives.

Despite the focus in the Call for Evidence on the alleged adverse impact of restrictive covenants on start-ups, it also seems wildly unlikely that the Government would seek to legislate about such restrictions as they affect new businesses only – the idea of Government guidance on an area so varied, legally complex and fact-specific just makes something in you fall on its side. It would only be the work of a few dozen pages before it was realised that an inability to protect key customers or staff which might damage an established business could be fatal to a start-up. Entrepreneurs have at least as much to lose from a weakening of covenants as anyone else.

What is hinted at in the Call which might lead to change is a challenge to the "transparency" of existing covenants, and in particular the extent to which employees realise that there are indeed restrictions in their contracts or are told clearly what they mean. While this has nothing at all to do with stifling start-ups, it is possible we could one day see a statutory requirement that an employee can only validly enter a restriction on post-termination activities if he has first received a clear statement of the impact it would have at that time. In that way, the Government might hope (it is hard to tell), the courts' jurisdiction to strike out over-wide covenants could be left untouched and the entrepreneurs of the future might feel less willing to bind themselves into them in the first place.

If you have any comments to make in response to the Call for Evidence (above and beyond "what an inexcusable waste of public money", which I suspect that BIS will have had in a variety of forms already), you have until 19 July to submit them.

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