



Department  
for Business  
Innovation & Skills

## NON-COMPETE CLAUSES

Call for evidence

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# Non-compete clauses

## 1. Introduction

This Government wants to make Britain the best place in Europe to innovate and start up a new business. As part of this, we want to look at our employment rules and whether they could be stifling British entrepreneurship by preventing workers from starting up their own business after leaving a job.

The Government wants to explore whether non-compete clauses can unfairly hinder workers from moving freely between employers, and from developing innovative ideas, translating those ideas into a start-up, and growing their business.

We are mindful of the fact that there are situations in which non-compete clauses are valid and serve a useful purpose, perhaps by restricting workers from immediately working for a direct competitor.

There are clearly arguments for and against the use of non-compete clauses. The focus of this call for evidence is to identify whether there are reasons for believing that non-compete clauses written into employment contracts are stifling innovation, particularly for start-up businesses.

It is important that we start by understanding how these clauses are used and the effect they are having on start-ups, employers, and workers. So we want you to let us have your views, experience, and evidence of such clauses. It is important we fully understand what is meant by non-compete clauses, when and why they are used, their prevalence, what the benefits and disadvantages are, whether there is transparency or misperceptions, and your experiences of issues that have arisen.

Once we have built up a picture of the UK experience, including Northern Ireland where employment law is devolved, the Government will consider whether it is necessary to act in this area, and how.

## 2. The context for considering non-compete clauses

The UK labour market has been thriving, overcoming the economic obstacles it has faced in recent years, and returning to record levels of employment and low levels of unemployment. One of the main drivers of this success is the high degree of flexibility enjoyed by both employers and workers in the UK.

This flexibility enables employers to hire people quickly when business is good, as well as adjust their workforce when demand drops, limiting the long-term impact of financial downturns. This ability to manage fluctuations means employers can retain key skills and personnel, facilitating a quicker return to growth when market conditions improve.

But the UK's labour market flexibility also benefits workers, allowing people to participate in the labour market in a way that suits them. Not everyone can or wants to work in a permanent and rigid '9 to 5' job. There are those, such as mothers returning to work and those with caring responsibilities, who are able to benefit from the UK's flexible approach and are making the most of part-time working, agency work, and self-employment.

But Government is not complacent and we are looking to see if more can be done. That is why we are examining non-compete clauses which prevent a worker from competing against their former employer, and can include restrictions on workers approaching former clients or working for a competitor for a set period of time after leaving a business. We are asking whether non-compete clauses may be hindering those who might be considering setting up, or have set up, an innovative enterprise – when it is most critical for the entrepreneur to be able to hire suitable staff to help grow the new business. We are also conscious that, in an economy in which workers' knowledge, skills and experience are increasingly important, we should not unnecessarily limit the movement of talented people.

In July 2014, The Social Market Foundation's report "Venturing Forth: Increasing high value entrepreneurship" recommended that the government considers banning non-compete clauses from employment contracts. The survey they conducted was small in sample size but their report found that these clauses can act as a barrier to workers leaving a business to start their own business in the same field, even when they have come up with product or service improvements or found a more effective way of providing those services or products.

In the US, research suggests that the limited use and enforcement of these clauses has had a positive impact. There is a view that non-compete clauses (although benefitting an employer), inhibit economic growth, competition and innovation more generally (e.g. by reducing the pool of labour from which competitors can hire, and restricting workers setting up their own businesses). And there is evidence to suggest that the enforcement of non-compete clauses can reduce investment in R&D. This is balanced by the argument from those who believe non-compete clauses are an essential practice that encourage employers to develop new technologies and invest in worker training because they don't have to fear losing their workers or long-standing customer relationships to a competitor.

The Government wants to build our evidence base on how non-compete clauses are currently being used, and what the impacts are. We want to ensure that when used, they 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 decide to leave or start up their own business.

### 3. The current UK position of non-compete clauses

Non-compete clauses have also sometimes been referred to as restrictive covenants, restraint of trade, or conflict of interest.

Employers insert non-compete clauses into employment contracts to restrict a worker's ability to compete against their former employer after they leave, thereby protecting the former employer's confidential information or customer relations for a specific period of time. They are used in addition to clauses which relate specifically to confidential information and intellectual property.

It is important to set out that in the context of this call for evidence we are not talking about confidentiality clauses or intellectual property. Those are separate policy areas that should not be confused with non-compete clauses. Intellectual property rights will protect the legitimate interests of a former employer and operate independently from any contract between an employer and its workers. For example, the law of confidence will prevent current or former workers from personally using their employer's trade secrets or confidential customer lists. Similarly, trade mark and passing-off law will prevent former workers from suggesting that they have a connection with the business in which they formerly worked unless the former employer agrees to this. Copyright law will prevent a former worker from copying written works created in the course of his former employment where he does have the consent of the former employer.

In general, non-compete clauses often include:

- a. Restrictions to an ex-worker's ability to work for a competing business, including one they establish themselves.
- b. Restrictions which prevent an ex-worker from having dealings with the employer's customers or clients.
- c. Restrictions preventing an ex-worker from hiring workers of the former employer.
- d. Restricting a worker from setting up a business in a geographical location that would disadvantage their ex-employer.

Non-compete clauses can sometimes be accompanied by gardening leave clauses for maximum effect. These require workers during all or part of their notice period not to attend their place of work and not to have contact with clients or customers whilst continuing to receive their usual salary and benefits. This type of restriction means the person remains a worker of the business during this time.

There is no provision in the UK employment statutory framework for non-compete clauses, including in Northern Ireland where employment law is devolved. As such there is no statutory definition. However, non-compete clauses are subject to the common law principle of "restraint of trade". The principle provides that a worker should be free to follow his trade and use his skills without undue interference, thereby rendering a contractual

term (such as a non-compete clause) purporting to restrict that worker's freedom to work for others or carry out his trade or business void unless it is: (a) designed to protect legitimate business interests; and (b) no wider than reasonably necessary.

Consequently, even where non-compete clauses are found in employment contracts, they may not necessarily be enforceable, unless a court considers that the non-compete clause is to protect a "legitimate business interest" and is no wider than reasonably necessary.

Simply proving that the employer will suffer from "more competition" is not counted as a legitimate business interest. In broad terms, the courts have recognised that a legitimate business interest may include protecting trade connections (with customers, clients or suppliers) and, more generally, goodwill; trade secrets and other confidential information; and maintaining stability of the workforce.

Such factors a court may look to when considering whether a clause is reasonable may include:

- The job and the influence of the worker
- The geographical area of any restriction
- The length of time of the post termination restriction
- The type of interest and nature of the business being protected

It should be noted that a court will consider each dispute on a case by case basis and consider the circumstances of each worker. In the UK employers and workers are free to agree the terms of an employment contract meaning that each contract will be potentially different due to each worker having a different set of circumstances. There is no set formula of whether a non-compete clause is valid and as such there is no 'tick list' for an employer to follow to ensure such clauses are successful.

If an employer is able to successfully enforce a non-compete clause, the employer may seek an injunction or, failing that, seek damages from the worker for breach of the covenants, or a variety of other remedies.

## 4. Call for evidence - questions and areas for consideration

The questions in this section form the information we want to gather as part of this call for evidence. Please see the **How to Respond** section for ways in which you can respond to the discussion and questions below.

### 1. Examples of 'non-compete clauses'

There is no commonly accepted definition of a non-compete clause, and it is not a term used in UK statute. However, the term is being increasingly used in academic literature. For the purposes of this call for evidence, by "non-compete clauses" we are referring to any clause in an employment contract that seeks to restrict a worker's ability to compete against their former employer after they leave. They are often also referred to as restrictive covenants. Examples, of which we are aware, include:

- a. Restrictions to an ex-worker's ability to work for a competing business.
- b. Restrictions which prevent an ex-worker from having dealings with the employer's customers or clients.
- c. Restrictions preventing an ex-worker from hiring workers of the former employer.
- d. Restricting a worker from setting up a business in a geographical location that would disadvantage their ex-employer.

**Q1a. Are any of the examples above incorrectly being framed as a non-compete clause? If so, why?**

**Q1b. Are you aware of other examples of clauses in an employment contract which restrict a worker's ability to compete against a former employer? If so, please can you provide examples of these.**

## 2. The prevalence of non-compete clauses in the UK

The UK employment framework allows employers and workers to agree and negotiate worker contracts. As a result government does not hold any information on worker contracts or non-compete clauses. This means Government is not able to immediately see what the scale is of the use of such clauses, or where and in which circumstances they are used. There is an assumption that they tend to be used in higher skilled roles in the UK, and is why they may stifle the creation of start-ups.

**Q.2a: Do you have examples where non-compete clauses have been used?**

**Q2b: In your experience, are non-compete clauses particularly used in certain sectors or are they generally used across the labour market?**

**Q2c: If you answered that non-compete clauses are particularly used in certain sectors – which ones? And what is the justification for their use in those specific sectors?**

**Q2d: In your experience, are non-compete clauses used only or particularly in relation to higher skilled roles in the UK such as science or tech based jobs?**

## 3. Have you as an employer used a non-compete clause?

We need to understand why an employer would use a non-compete clause, and if so what the justification would be as one can only be enforceable if it protects a legitimate business interest and be for a reasonable time. For example, a drugs research business could argue that preventing one of their scientists from working for a direct competitor for two years after termination of employment is proportionate, but the same could not be said if they sought to prevent the scientist taking up a job in a bank. Even so, the employer would have to make the case that the same effect could not be achieved through other means – for instance, through a confidentiality clause.

**Q.3a: Have you as an employer used a non-compete clause?**

**Q.3b: What was the type of job and what were the terms and restrictions you included in the non-compete clause?**

**Q3c: What was your justification for including a non-compete clause?**

**Q3d: Do you use non-compete clauses only for certain jobs or do you use them as a blanket term across your business and worker contracts?**

**Q3e: Have you had to challenge an ex-worker you believe has breached such a clause? If so, please provide as much information as you are able to explain the issue, what action you took, and the outcome.**

#### 4. Have you ever been subject to a non-compete clause as a worker?

We need to understand if workers are aware of non-compete clauses in their contracts and how transparent they are.

**Q4a: Have you ever been subject to a non-compete clause as a worker?**

**Q4b: If you have been aware of a non-compete clause in a contract you have held with an employer, what was the job and what were the terms and restrictions of the non-compete clause?**

**Q4c: Were you aware of the non-compete clause in your contract when you signed your contract, and what the implications were for you? Did your employer explain the implications? Was it transparent?**

**Q4d: Have you ever dis-regarded a non-compete clause? If so, please explain the issue, if your employer responded or challenged you, and the outcome.**

**Q4e: Have you tried to challenge a non-compete clause, either formally or informally? If so, please provide as much information as you are able to explain the issue, what action you took, and the outcome.**

#### 5. Have you experience of where a non-compete clause has affected or prevented the ability of workers to move from one job to another new business or employer, or hindered their ability to start up their own business?

We would like to gather evidence to understand the nature and scale of the impact of non-compete clauses.

**Q5a: Have you had a non-compete clause which has influenced your decision to leave or stay with an employer, or start a new business yourself?**

**Q5b: What was the job (where the non-compete applied), and what were the terms of the clause?**

**Q5c: Have you been influenced in a decision to hire or not hire someone by the terms of an existing non-compete clause?**

**Q5d: If you have answered 'yes' to Q5c, please explain the terms of the non-compete clause, and the impact of the decision on the business, and the sector and specific job.**

## 6. Could there be any repercussions or unintended consequences if Government restricted some forms of non-compete clauses?

If Government were to find evidence to suggest non-compete clauses are stifling start-ups, or being used unreasonably, one option might be to restrict their use in certain circumstances.

**Q6a: Would legislation to restrict the use of non-compete clauses in certain circumstances affect your business? If so, how?**

**Q6b: Would such legislation lead to unintended consequences in your opinion?**

**Q6c: Could you restrict their use in certain circumstances through non-legislative measures?**

**Q6d: As an employer, would intellectual property law and confidentiality clauses suffice to protect your interests if legislation to restrict the use of non-compete clauses came into force? If not, why?**

**Q6e: What types of businesses would (or ought) to benefit from additional restrictions on the use of non-compete clauses?**

## 7. In your experience (as an employer, individual, or in your capacity as an adviser) are non-compete clauses transparent?

It is not immediately clear how transparent non-compete clauses are to workers and whether they understand the implications. In the same way, it is not clear whether employers understand the purpose of non-compete clauses and use them appropriately and alongside intellectual property law and confidentiality clauses, which are different to non-compete clauses.

Even without non-compete clauses, intellectual property rights will protect the legitimate interests of a former employer. These rights operate independently from any contract between an employer and its workers. For example, the law of confidence will prevent current or former workers from personally using their employer's trade secrets or confidential customer lists. Similarly trade mark and passing-off law will prevent former workers from suggesting that they have a connection with the business in which they formerly worked unless the former employer agrees to this. Copyright law will prevent a former worker from copying written works created in the course of his former employment where he does not have the consent of the former employer.

However intellectual property law does not prevent a former worker from taking advantage of the general experience he has acquired in the course of a former employment. Therefore, the legislation as it stands should not act as a barrier for someone leaving one business to set up their own on the basis of their personal knowledge and experience.

**Q7a: Are you aware of guidance or do you seek guidance on the use of non-compete clauses and the associated intellectual property law and confidentiality clauses? What sources do you use?**

**Q7b: Could guidance be improved to assist both employers and workers in their understanding of how non-compete clauses should work, what business interests could legitimately be considered as justification for non-compete clauses, and how to prevent such clauses from being inserted in contracts inappropriately?**

**Q7c: Do you think new or improved guidance would improve confidence around the valid use of non-compete clauses and where confidentiality and intellectual property is a more appropriate way to protect business interests?**

**Q7d: If you provide advice to employers in structuring and using non-compete clauses, what principles do you consider important to take into account?**

**Q7e: If you provide advice to workers in negotiating or challenging non-compete clauses, what principles do you consider important to take into account?**

## **5. Conclusion and next steps**

One of the aims of this Government is to ensure that the UK has a competitive, flexible and effective labour market to encourage business success and growth. A key part of this aim is to boost innovation and help people to start and grow a business.

The Government wants to ensure that people are not unfairly restricted either from moving freely within the labour market or from creating new enterprises and start-ups. However it is also important to protect business interests and ensure they can survive as an enterprise.

We look forward to receiving your views, experience, and examples in order to see what the issues are and whether non-compete clauses are used unreasonably in certain circumstances, or are appropriate to support a start-up economy. This will help to build a picture of the situation across the economy.

It is important that in the years to come, the UK labour market continues to enjoy the high levels of flexibility it currently does. If it is found that non-compete clauses are a barrier to this flexibility, Government will consider how best to act and the results from this call for evidence will help inform next steps.

## 6. How to respond

We invite views on the issues and questions discussed in this call for evidence document. We particularly welcome responses to the specific questions in the 'Call for evidence - questions and areas for consideration' section. It is not necessary to respond to all the questions if you are not able to; you are welcome to provide answers only to those issues of most interest or relevance to you.

This call for evidence will run for 8 weeks and the closing date for responses is 19 July 2016.

It is important that when you respond to this call for evidence, you state whether you are responding as an individual or representing the views of an organisation as this will help to build a picture of our evidence base. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation form and, where applicable, how the views of members were assembled.

You can reply to this consultation either:

- online at <https://bisgovuk.citizenspace.com/lm/non-compete-clauses-call-for-evidence> , or
- via the response form available electronically on the consultation page at <https://www.gov.uk/government/consultations/non-compete-clauses-call-for-evidence> (until the consultation closes). This response form can be submitted online/by email or by letter to:

Paula Lovitt  
Labour Market Directorate  
Department of Business, Innovation and Skills  
1 Victoria Street  
London  
SW1H 0ET

Email: [labourmarket.consultations@bis.gsi.gov.uk](mailto:labourmarket.consultations@bis.gsi.gov.uk)

Questions about the policy issues raised in the document can be addressed to:

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Department of Business, Innovation and Skills  
1 Victoria Street  
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Email: [labourmarket.consultations@bis.gsi.gov.uk](mailto:labourmarket.consultations@bis.gsi.gov.uk)

## 7. Confidentiality and data protection

Information provided in response to this call for evidence, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). There is also a statutory Code of Practice issued under section 45 of the FOIA with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

If you want information, including personal data, that you provide to be treated in confidence, please explain to us what information you would like to be treated as confidential and why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

## 8. Comments or complaints on the conduct of this call for evidence

If you wish to comment on the conduct of this call for evidence or make a complaint about the way it has been conducted, please write to:

Angela Rabess  
BIS Consultation Co-ordinator  
1 Victoria Street  
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SW1H 0ET

Tel: 020 7215 1661  
Email: [angela.rabess@bis.gsi.gov.uk](mailto:angela.rabess@bis.gsi.gov.uk)

However if you wish to comment on the specific policy proposals you should contact the policy lead named on page 12 (see section 6, 'How to Respond').



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