

Briefing note

Lateral hiring: be prepared

The Financial Times in October 2012 forecast a “wave of poaching of the most senior City lawyers”. Whilst the predicted wave has not yet struck, it is still likely that as organic growth becomes more difficult to achieve, lateral hires of top lawyers with established revenue streams will increase.

As a result, law firms should be thinking carefully about the issues and risks presented both by the departure of individuals or teams and by the arrival of incoming lateral hires, and should be planning upfront for these rather than waiting for problems to arise.

In this briefing note, we consider some of the main issues arising from lateral hiring from both an employment and a risk management perspective, and set out a checklist of practical steps which firms should consider taking.

Protection against departing employees and partners

It is key to consider what protections you have in your contracts with your partners and employees which would assist you in protecting your business in the event of any departures. It will be too late to update and extend these protections once any risk of people leaving becomes apparent – so your review and updating of this documentation needs to be a continuous process. In addition, firms should be on the lookout for suspicious activity indicating that a team move or the departure of a key individual is imminent, so that they can proactively look to take practical steps to protect their position if and when the move occurs.

Recommended steps in relation to setting up protection in employment contracts or Partnership Deed/LLP Members Agreements

- Ensure key personnel are bound by appropriate and enforceable restrictive covenants, whether in the Partnership/Members Agreement or in contracts of employment. Without appropriate restrictions, and in the absence of any unlawful behaviour prior to leaving, partners and employees are free to commence competing with their prior firm as soon as their notice period is complete (provided they abide by their obligations of confidentiality). This means from day one after their notice period is ended, partners can start work for a new firm, and pick up the phone to, and solicit business from, their previous firm’s clients. They can also return to persuade employees/partners to follow them. Firms should review the restrictive covenants they use regularly and ensure that individuals sign up to new terms, particularly on promotion or change of job duties or location
- Review the length of notice periods. A long notice period can help prevent key personnel from leaving immediately and joining a competitor. During the notice period, remaining partners and other fee earners can strengthen existing client relationships and make new client contacts
- Ensure you have garden leave clauses. A garden leave clause will entitle the firm to require the individual to stay at home or be restricted to certain activities or duties during the notice period. The benefit of this over pay in

lieu of notice is that the employee or partner remains bound by all of their ongoing obligations as an employee or partner during their notice period – but is removed from daily contact with clients and other employees/partners

- Prevent work with others. Include a requirement for the individual to devote their whole time and attention to the business and not to “*work for anyone else without express permission from the management board*”. This clause will assist in acting as a deterrent to the individual from spending time (whilst still employed or a partner) preparing to work for a competitor firm

Other practical steps

- Make sure confidential information is kept confidential. Take active steps to ensure that confidential information is marked confidential to avoid arguments it does not need to be treated as such, and check that specific types of information which need protecting are referred to in a carefully drafted confidentiality clause in the Partnership/Members Agreement or the employment contract. Practical steps to ensure confidential information remains secure and under the control of the firm are key, including password protection, IT encryption of sensitive client lists, financials and business plans, and appropriate policies restricting the taking of confidential information out of the firm's control (whether by printing and taking hard copies, or sending out soft copies by email/USB sticks etc)
- Ensure that the firm's technology and communications policies and procedures are up to date and sufficiently extensive. IT, Communications and Social Media policies must be reviewed regularly to keep up with technological advances. This will assist greatly in any investigation of suspicious activity through monitoring of email and computer use, since a forensic examination of the firm's IT systems will usually be a crucial source of identifying any wrongdoing by a departing employee/partner, and then evidencing anything which has been done. The increased use of social media and portable devices such as ipads and iphones, as well as increased use of icloud (and other remote servers), means that it is often difficult for individuals to hide anything they may have done, but it will often require a forensic computer expert to uncover the evidence. A widely drafted and up to date IT policy will be essential to give maximum flexibility without falling foul of data protection laws
- Put in place a strategy to manage exits. Design an exit strategy that you can implement in cases of departures. This should reduce risks to the firm of unlawful activity, and will assist in taking any legal steps which are necessary. The strategy might include a formal meeting with the individual to remind them of their contractual obligations. It will be important to prepare a written attendance note of the meeting and follow up with a letter reminding the individual of their restrictive

covenants and confidentiality obligations. Consider placing the employee on garden leave, and/or restricting their duties so they are prevented from contacting clients. Ensure that IT equipment is returned and make it clear that emails and documents must not be deleted

- Consider risks, and where you may need co-operation from a departing individual in the future. Firms should consider the possibility that professional liability claims or regulatory action against the firm may arise in the future in relation to matters on which the departing partner or fee-earner has worked. Since the cooperation of that partner or fee-earner will be important should such a risk eventuate, it is important, if at all possible, to remain on good terms with those departing. Firms should also consider including in any exit package a provision expressly requiring cooperation on the part of the departing individual in the event of a claim or regulatory action against the firm in relation to matters on which they worked. This should be considered regardless of the level of seniority of the departing individual, since the cooperation of even a very junior former employee could prove central to corroborating the evidence in a particular claim. Individuals should also be reminded that their cooperation is a condition of the firm's professional indemnity cover, under which they are an insured
- Retain the team around a departing member. Consider putting in place retention mechanisms for those remaining. These can range from simple discussions, and making people feel wanted, to offering inducements to stay; such as pay rises or bonuses payable on the condition that the employee does not join a competitor within a certain time period

Pre-litigation steps

- If any unlawful behaviour is suspected, the key is to act quickly. Consider either speaking to the employee directly (for example, under a disciplinary process) or begin more behind the scenes investigations such as engaging a forensic expert to investigate the firm's IT systems and monitor email and computer use. There are risks in taking this approach: care should be taken that surveillance and monitoring are lawful under the Data Protection Act and other laws. If discovered, such action might entitle the employee to resign and claim constructive dismissal and in any subsequent application for an injunction, the employer's behaviour might scupper its chances of succeeding in the application
- If a team move is suspected, consider sending a letter before action to the employees concerned or the new employer. This is much cheaper than taking legal action and could have the desired effect of destabilising the team move. The downside is that it will, however, place the individuals on notice that legal proceedings may be forthcoming, allowing them the opportunity of protecting their own positions

Protection when hiring new employees and partners

Law firms proposing to take a lateral hire need to be mindful of the individual's obligations to their current firm. In addition, the firm will need to take careful steps to address the risk management challenges that can arise from the introduction of lateral hires into the business.

Identification of and negotiation with targets

- Check how the target team or individuals have been identified. Have names been obtained from an individual in breach of their obligations to their current firm? The new hirer should ensure that it does not ask for, or receive names of members of the target directly from the main target or other team members. Consider appointing a well-regarded recruitment consultant to assist at arm's length with the recruitment process
- Request from any target individual a copy of their contract of employment, shareholders agreements, share schemes or other documentation relevant to their obligations to their employer/ex-employer/firm, subject to issues of confidentiality. Seek legal advice on the enforceability of any restrictive covenants which might restrict the targets' activities post termination of employment
- Remind targets that they are expected to comply with their legal obligations to their employer/ex-employer and in particular confidentiality obligations. Any offer of employment could be made conditional on compliance with existing obligations towards the target's ex-employer
- Be aware that telephones, computers, blackberries, etc and their records would all be subject to disclosure in any litigation, as would documentary evidence. Depending on how they have been used, these could give the impression of a conspiracy or an inducement to breach employment contracts
- Ensure that, before any contract is entered into, full due diligence has been taken on each individual whom it is proposed to hire. Detailed and precise questions should be asked at interview or in a questionnaire, aimed at

establishing not only general matters, but also the 'risk profile' of that individual generally: for example, whether they have been involved in a negligence claim or any regulatory action, and their attitude towards various risk issues. Cultural fit from a risk point of view is important, and therefore hiring firms may well also wish to consider what information is available about the risk culture of potential joiners' previous firms and the extent to which this is compatible with their own risk management culture. Although a good recruitment consultant will be of assistance in these areas, it is prudent for firms also to carry out their own due diligence

Pre-litigation steps

- Think carefully how to react to any letter before action received from the targets' ex-employer or ex-firm. Any such letter may require the new hirer to give undertakings to protect the ex-firm's business interests such as confidential information and customer connections. Giving such undertakings might avoid future litigation but it could mean the new hirer giving more than it is legally required, for example, if the restrictive covenants are not enforceable

Integration and ongoing risk management

- Full and proper conflict checks should be carried out from the outset, and any necessary information barriers put in place upon a lateral hire's arrival, to prevent problems arising further down the line
- Detailed procedures should also be put in place to integrate lateral hires into the risk management culture of the firm and to educate them about its policies and standards. Risk and/or professional standards guides and policies play an important role, and these should be made readily available, for example on the firm's intranet, and lateral hires told that they are expected to read and implement them. Risk and compliance training will also be important. More broadly, however, firms should also seek to foster a way of life at the firm whereby old and new joiners alike are encouraged to share and discuss issues internally and, at all levels, to take responsibility for upholding good standards

Further information

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