

# Consultation Response

Working paper on options for  
reform of non-compete clauses  
in employment contracts

February 2026

# Consultation Response

Working paper on options for reform of non-  
compete clauses in employment contracts

18 February 2026



## Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the UK Government's Working Paper on options for reform of non-compete clauses in employment contracts.<sup>1</sup> We previously responded to the UK Government's Non-compete clauses: consultation on measures to reform post-termination non-compete clauses in contracts of employment<sup>2</sup> in 2021.<sup>3</sup> Our position on the law in this area has not altered significantly and we would draw attention to the General Observation section of our previous response, which highlights differences in the legal position in Scotland as compared to England & Wales. We note there is no consideration requirement in Scotland, this being a key difference.

The sub-committee has the following further comments to put forward for consideration.

---

<sup>1</sup> [Working paper on options for reform of non-compete clauses in employment contracts - GOV.UK](#)

<sup>2</sup> [Non-compete clauses: consultation on measures to reform post-termination non-compete clauses in contracts of employment](#)

<sup>3</sup> <https://www.lawscot.org.uk/media/s3nn0wsg/21-02-26-emp-non-compete-clauses.pdf>



## Discussion Questions

### 1. Introducing restrictions on non-compete clause

#### Current Practice

From experience, it is not apparent whether restricting or completely banning non-compete clauses will, or will not, support economic growth, deliver higher living standards, or otherwise liberate the UK labour market in the ways envisaged by the Working Paper. This is an evidential point for the Government to establish, and we encourage careful analysis.

From experience, non-compete clauses have become common for some employers and sectors, but not all. There appears to be good understanding amongst employment law practitioners as to what a non-compete clause aims to achieve, and that it should go no further than what is necessary to protect an employer's legitimate business interests in order to be enforceable. However, there is no set criteria when drafting non-compete clauses, with some practitioners noting that some non-compete clauses stipulate that the employee either had, or was given the opportunity to obtain, independent legal advice prior to agreeing to it, whereas other non-compete clauses are silent on this point. Some practitioners were also dubious as to whether such advice was taken, even in cases where it was stated to have taken place.

#### Negotiation and Review concerns

An option to address the negotiating imbalance that typically arises in an employment situation, noting that mandatory legal fees coverage (as opposed to contribution) would mitigate financial hardship further and likely reduce over reliance on non-competes, may be the requirement of compulsory independent advice, with or without a legal fees contribution. Such over-reliance appears to have been established by the Government in paragraph 31 of the Working Paper, which suggests over usage in some sectors where there may not be a good case for the extent of the protection offered by non-compete clauses. The overall 26% figure for the extent of non-compete clauses referred to, suggests that there may be some over-use of such clauses.

We acknowledge that such clauses are frequently agreed at the start of a contractual relationship, without regular review. This is likely due to uncertainty around successfully re-negotiating non-compete clauses after the employment contract had been formed. This is likely to be to an employer's advantage owing to employees not wanting to rock the boat at the start of a working relationship. However, this failure to review ultimately creates uncertainty for both parties about the enforceability of the non-compete clause as at the end of the relationship when they are called upon. Owing to some employers having wider job descriptions to encourage movement, and changes to duties within a role or employment relationship, it cannot be assumed that the risks identified at the



start of the employment relationship will be the same as at the end of the relationship. Compulsory review may therefore be another option.

### Employer Protections and Alternative Clauses

The risks that are protected by non-competes are often unique to a particular employer and we hesitate to generalise the impact across all sectors given lack of evidence to rely upon. To the extent that this proposal is limited to non-competes, we expect renewed focus on other contractual provisions (such as non-poaching, non-dealing, confidentiality, intellectual property, garden leave etc) which will provide some protection to employers. In cases where employers have such protection then there is acceptance that non-competes may be disproportionately burdensome on an employee and not necessary to protect legitimate commercial interests.

Whilst employers undoubtedly have deeper pockets to enforce restrictive covenants - compared to employees who might be forced into challenging enforcement - the legal position around non-competes remains complex. This, together with associated court/legal costs to enforce such clauses, regularly acts as a deterrent to both employers and employees to take enforcement action. That said, it is acknowledged that this tends to favour an employer position of presumed enforceability rather than an employee position of presumed unenforceability. This is more so the case for lower paid roles or non-unionised workforces where collective bargaining power is lower.

### Impacts on Existing Contracts

It is not clear whether restrictions would have effect on non-competes already agreed or only new contracts, yet to be agreed, from a set date. Should non-compete clauses be banned or otherwise restricted, then consideration should be given to the following (some of which may not be as relevant if a ban or restriction was only applied to new contracts):

- **The increased use of garden leave clauses.** Some employers may consider it essential for an employee to be removed from the relevant marketplace in to protect their customers, data, IP, or otherwise. Whilst garden leave clauses are common in employment contracts, they can not necessarily be presumed to be in all. Should employers not be given an opportunity to rectify this, then some employers may be forced into considering whether or not to unilaterally impose a garden leave period (potentially increasing the risk of a breach of contract claim or otherwise creating an argument that the employee is released from other terms of the contract that were intended to survive termination). This would appear to be an unfair position for an employer who would not have known of this possibility at the outset of the relevant contract. Should garden leave provisions be used more, then there could be unintended consequences for employees. In particular, it is likely to be more expensive to



employers to put an employee on garden leave, with all associated employer costs, compared to a quicker termination with a payment in lieu of notice (PILON) with reliance on a non-compete clause. That may initially be seen to address the balance between the parties, but once realised by employers, it may result in employers altering terms and conditions during any garden leave period (i.e. ensuring notice is based on basic salary only, removing entitlement to variable remuneration or otherwise varying eligibility criteria, reducing holiday entitlement to statutory minimum etc) to decrease that impact. Whilst PILON or partial PILON might remain an option for many employers, it will result in a more nuanced consideration for employers as they debate whether removal from the market outweighs the benefits of a PILON payment to them or the employee.

- Some employers are likely to have **protection via other contractual provisions** (non-poaching, non-dealing, IP, confidentiality etc) but those cannot be presumed. For those that do, it would seem fair to suggest that they already have protections in place and that preventing someone from working at a competitor might go further than what is necessary. However, for those that don't then they won't necessarily have any right to renegotiate the terms with the employee.
- Whether the **reason for termination** is relevant to the approach adopted. For example, someone entering into a Settlement Agreement will commonly negotiate the removal of a non-compete, particularly when the reason for termination is redundancy. This is often on the basis that there has been no fault of the employee and that it is considered unfair (in a general sense as opposed to a legal sense) to restrict their ability to find alternative work. Whilst not every employee will be offered a settlement agreement, this debate did raise a question about whether the reason for leaving could be used as the determining factor as to whether or not a non-compete clause was appropriate or not.

## 2. A statutory limit on the length of non-compete clauses

At the risk of repeating the observation in the Working Paper, adding a statutory limit could indicate an industry standard with presumed enforceability for those that do not exceed it. Provided that it is made clear that established common law principles still apply to those non-compete clauses that are within the statutory limit then we are generally comfortable with this idea. In this regard, we refer to comments in our previous response<sup>4</sup>, but reflect that a shorter 6 month period

---

<sup>4</sup> <https://www.lawscot.org.uk/media/s3nn0wsg/21-02-26-emp-non-compete-clauses.pdf>



would likely be reasonable in the majority of clauses to enable an employer to mitigate risk. Another option would be to introduce a presumption of unenforceability above a statutory limit, which could be challenged by an employer thereby reversing the burden.

### 3. A statutory limit that differed according to company size

No comments.

### 4. The length and company size thresholds should be set at, for example:

- a) A statutory limit of 3 months for companies with more than 250 employees and a limit of 6 months for companies with 250 or fewer employees
- b) A statutory limit of 3 months for companies with more than 50 employees and a limit of 6 months for companies with 50 or fewer employees
- c) Other – please explain

Whilst we appreciate why this idea had been mentioned, there is concern that size doesn't necessarily correlate with risk. Irrespective of size and presumed deeper pockets, the risk is likely posed by the nature of the business, the skills of the individual, the role that they did for the employer and the influence they had as a result of the investment and relationships gained during their tenure.

Presumptions to the contrary risk muddying the logic as to the purpose of a restrictive covenant. Furthermore, a company's size is susceptible to change and invites more complex arguments about how size will be determined, particularly when a group is comprised of different legal entities, so is felt to be complicated.

In addition, applying a relatively arbitrary threshold based on company size would have (presumably unintended) consequences in favouring smaller companies over innovative companies with more employees, which does not appear to achieve any of the Government's objectives as set out in the Working Paper. As a company grows (or shrinks), the use of a 'snapshot date' will complicate matters of enforcement.

### 5. A ban on non-compete clauses in contracts of employment

See comments at question one.

### 6. A ban on non-compete clauses in contracts of employment below a salary threshold



We have concerns around the longevity of any threshold and what options there might be for employers to make a salary rise that takes someone above the threshold conditional on agreeing to a non-compete.

#### 7. How the government could ensure that a ban below a salary threshold also supports higher-paid innovators, experts and entrepreneurs in the UK

There is an overall presumption that tech roles require movement, but it is likely that those are the roles that most concern employers due to the passage of time being particularly important for early adopters of certain technologies and not losing that competitive advantage. There is a risk that businesses seek to find new ways to protect themselves from key person dependencies.

#### 8. A combination of a ban below a salary threshold and a statutory limit for those who earn above the threshold

No comments.

#### 9. Whether restrictions should be limited to non-compete clauses only or should also apply to other restrictive covenants

Non-dealing and non-solicitation restrictive covenants achieve a different purpose to a non-compete. It feels proportionate to focus on non-compete at this point to avoid unintended consequences that have not been appropriately consulted on. Furthermore, the impact of removing non-competes would not be understood for some time.

#### 10. How the government can ensure that other restrictive covenants, for example non-dealing clauses, are not used in a way that would have a similar effect as a non-compete clause, if restrictions were limited to non-compete clauses only

There is always a possibility that a non-dealing clause effectively renders someone unable to work in the same market if that pool is very small. This could however be seen one of two ways: either the employer has a greater need for protection because their full customer base is at risk of being solicited, or the market is so diluted that the customer base is spread across all competitor businesses as part of ordinary course such that there is unlikely to be any competitive harm to the employer. In this regard common law principles remain sufficient to identify whether there is a legitimate business need worthy of being protected. That said, some suggestions above, such as the possibility of independent legal advice, could be applied to non-dealing.



11. Whether restrictions on non-compete clauses should be limited to employment contracts or whether the government should consider applying them to wider workplace contracts

The UK recognises different working relationships, and the Government would need to be clear as to what scope is being proposed in order to invite informed consultation. Of note, the bargaining or power imbalance that exists between parties will vary depending on their relationship, status and purpose of the agreement. This might be seen to be a question about employment status (employee, worker, contractor) but there will also be a connection between commercial contracts when there are business acquisitions, share options agreements, or otherwise which could be indirectly impacted by this proposal.

12. Any evidence demonstrating that a ban, or restrictions, on non-compete clauses could impact inward investment or investment in training and upskilling

See above comments.

13. Any obstacles to bringing claims on restrictive covenants, including non-compete clauses, in the courts

See above comments.

14. Whether these obstacles are related to concerns about the costs of bringing a claim, and whether there are barriers to prospective claimants accessing mechanisms to reduce or predict costs (for example, FRC, LEI, CFA or DBA)

N/A

15. Any suggestions for what the most appropriate response would be, and how it might be implemented

See above comments.



For further information, please contact:

Terri Cairns  
Policy Team  
Law Society of Scotland  
[terricairns@lawscot.org.uk](mailto:terricairns@lawscot.org.uk)