

Employee focus: things to be aware of when leaving your role to join a competitor

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For many employees, changing jobs can be stressful. Having gone through multiple rounds of interviews and discussions, there is a real temptation to sign on the dotted line when the employment contract is finally issued.

However, it is always worth taking a step back and looking before leaping. Before anything is formally agreed, you should always carefully review the terms of your existing contracts as well as the new employment contract to ensure you understand what you are signing up to, what you are giving up and whether there are any restrictions on your activities immediately after you leave.

Check your restrictions

If you are planning on joining a competitor, you should first check whether your current contractual documents, such as your employment contract and deferred compensation agreements, contain any enforceable post-termination restrictive covenants (such as a non-compete, non-solicitation or non-dealing).

If your current employment contract does contain post-termination restrictive covenants, and you are looking to work during the restrictive period, you should seek independent legal advice straight away. Although, not all post-termination restrictive covenants are enforceable (even if they are contained in a signed written contract), it is always worth getting a legal

opinion to understand whether those contained in your contract will restrict you from carrying out your new role.

Your new employment contract may require you to confirm you are joining restriction-free. If so, you should discuss your post-termination restrictive covenants with the new employer straight away. An open dialogue could lead to alternative possibilities being explored such as removing the restriction-free obligation, or a delayed start date, or changing the parameters of the role to ensure you are not in breach of the post-termination restrictive covenants during the restrictive period.

It is rarely advisable to start a new role with a new employer if that will place you in breach of an existing restriction; there is always the risk that both the employee and the new employer may be dragged into disruptive legal proceedings – including injunctive proceedings and claims of breach of contract. The costs of defending these proceedings can be very high, and if the employee is unsuccessful, the Court may make a number of debilitating orders including (i) an order to prevent an employee from taking up the new role, soliciting and/or dealing with former clients, (ii) an order for payment of the former employer's legal fees, and (iii) an order to pay the former employer's damages or an account of profit.

Negotiate your terms

Employers may have a standard form employment contract, but this does not mean that these contractual terms cannot be tailored to reflect the 'deal' that the new employer is willing to make and the one you are willing to accept.

Key contractual terms which should be reviewed carefully include:

- salary:** whilst it may seem obvious, there is more to salary provisions than just the amount that will be paid to you. The terms should also clarify the manner of payment, any deductions to be made from the salary (such as MPF) and how often and when salary will be paid. You should also look out for when the salary is reviewed by the new employer and the circumstances in which an increase/decrease could occur
- benefits:** these provisions may include entitlements to insurance, enhanced sick leave or an enhanced retirement scheme. You should carefully check whether the benefits are contractual or discretionary (ie can be withdrawn at any time and for any reason) before signing on
- bonus:** bonuses can come in many forms; a signing bonus, an end of year bonus, a guaranteed bonus, or a discretionary bonus. The new employment contract should clearly set out the basis upon which the bonus is payable, when the bonus is payable, whether the bonus is paid in cash or subject to deferral as well as whether payment is subject to any conditions and/or forfeiture
- shares and options:** these payments are often found either in the employment contract or in a standalone share option plan. Either way, you should expect to be told the vesting periods, vesting conditions, strike or exercise price, forfeiture provisions, clawback and the consequence of termination on your rights to exercise the shares or options
- scope of employment:** whilst, typically in Hong Kong, employers prefer to retain some flexibility on the scope of the role itself, you should expect to see detailed in the new contract, your title, place of employment (including any prohibition or requirement to work from home), and whether you would be expected to travel or relocate at any time
- length of employment and termination:** employment contracts in Hong Kong are usually either for a fixed term period or may be terminated by either party giving notice of termination. You should always check whether terms reflect the agreement reached. In addition, modern contracts usually also set out a list of circumstances in which you will be terminated summarily for cause (ie terminated immediately without notice or payment in lieu of notice), so it is important to read through this and ask the new employer to take out any which appear excessive
- post termination restrictive covenants:** as on joining, you should check whether the restrictions are enforceable (even if onerous) and, if the length/scope is not one you are willing to accept, you should raise this and renegotiate it with your new employer.

Get it in writing

You should read all terms carefully and ensure that the contract expressly reflects the 'deal' that was agreed. This is because any verbal agreements or promises made by the new employer which are not recorded in the new employment contract may not be enforceable.

Most employment contracts contain a clause which states that what is contained in the contract forms the entire agreement between the parties and is in substitution for and shall supersede any prior agreement, arrangement or understanding (whether oral or written). This essentially means, unless it is in the employment contract, you may face an uphill struggle to enforce the terms of any previous agreement.

Conclusion

The key takeaway here is that employees should always understand what they are signing up for. They should not only check whether they are permitted to work for the new employer but also that the terms of the new employment reflect the 'deal' that has been agreed between both sides of the employment relationship. A clear record and understanding of each party's obligations and entitlements enables the new relationship to start (and continue) on the right footing.

Where employees are unclear of their rights and obligations, they should seek legal advice. We have extensive experience in advising on employment contracts for regulated individuals (particularly in the world of finance, accounting and law) as well as other senior executives. Please do not hesitate to contact Andrea Randall, a Partner and Head of the Employment Practice in Hong Kong for any employment law related queries you may have.

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