



Department for
Business, Energy
& Industrial Strategy

Non-Compete Clauses

Consultation on measures to reform post-termination non-compete clauses in contracts of employment

Closing date: 26 February 2021



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Foreword

The Government is immensely proud of the UK labour market, and the achievements of hard working people and businesses over the last 10 years. In our manifesto we committed to make the UK the best place in the world to work and grow a business, and these two ambitions go hand in hand.

Through championing a flexible and dynamic labour market, we saw significant increases in employment since 2010, including the creation of millions more jobs, reaching the highest employment rate on record and halving the unemployment rate. We have consistently proved that there is no contradiction between high employment and high standards. These achievements would not have been possible without the great successes of UK businesses, with 80% of all job growth since 2010 coming from higher-skilled occupations, and female employment also reaching a record high. However, the impact of Covid-19 reaches deep into our economy and society. It has required us to put our arms as a country, around every single worker, every single employee and to provide an unprecedented package of support to businesses at breakneck speed. The furlough scheme was a first of its kind intervention in UK political history, delivered at scale, devised in rapid time, that protected millions of British families at the most acute stage of the pandemic. We have also provided unprecedented support to business through £35bn of Bounce Back Loans to over one million small businesses and over 60,000 Coronavirus Business Interruption Loans. These are but a few measures of the vast package of support the Government has provided as part of our plan to support jobs and livelihoods.

These measures have been critical in keeping people in work and businesses operating but the economic outlook continues to be challenging with UK GDP still 9.2% below the levels seen in February 2020, and a rising number of people out of work. As a Government we are committed to building back better and to making life better for the people of this great country by unleashing Britain's potential. Standing by these principles and continuing to champion them will be crucial for our economic recovery from the impact of Covid-19.

To support our economic bounce back, the Government is exploring avenues to unleash innovation, create the conditions for new jobs and increase competition. We want to maximise opportunities for individuals to start new businesses, find new work and apply their skills to drive the economic recovery. For these reasons we are seeking views on reforms to non-compete clauses.

In 2016 the Government published a Call for Evidence to better understand how non-compete clauses are used and why, and to look at their prevalence in the UK and the benefits and disadvantages associated with them. Although the Government did not take forward any actions at that time, Covid-19 has had a profound impact on the labour market and the Government is looking at measures to unleash innovation, create the conditions for new jobs and increase competition. That is why we are now seeking views on options to reform non-compete clauses.

The Government is particularly interested in views on an option to make post-termination, non-compete clauses in contracts of employment enforceable only when the employer provides compensation during the term of the clause. This would discourage widespread use of non-compete clauses by employers so that individuals have the freedom and flexibility to use their skills to drive our economic recovery. It would also ensure that individuals receive a fair settlement if they are restricted from joining or starting a business within their field of expertise. We are also interested in views on the possibility of complementing this with measures to enhance transparency and communication where non-compete clauses are used, as well as seeking views on the potential to place statutory limits on the length of non-compete clauses.

We are also seeking views on an alternative option to make post-termination, non-compete clauses in contracts of employment unenforceable. This would in effect be a ban on the use of post-termination, non-compete clauses in contracts of employment. Prohibiting the use of non-compete clauses would have the benefit of providing greater certainty for all parties and could have a positive effect on innovation and competition by making it easier for individuals to start new businesses and enabling the diffusion of skills and ideas between companies and regions.

These reforms would affect businesses and organisations who use post-termination non-compete clauses in their contracts of employment and individuals who are subject to a post-termination non-compete clause and are looking to start a new business or to work for a competitor.

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General information

Why we are consulting

To support our economic recovery from the impacts of Covid-19, the Government is exploring avenues to boost innovation through the diffusion of ideas, create the conditions for new jobs and increase competition. Non-compete clauses can act as a barrier by preventing individuals from working for a competing business, or from applying their entrepreneurial spirit to establish a competing business. We want to maximise opportunities for individuals to start new businesses, find new work and apply their skills to drive the economic recovery. For these reasons, the Government is seeking views on options to reform non-compete clauses.

Non-compete clauses (a form of “restrictive covenant”) are inserted into employment contracts to restrict an individual’s ability to work for a competing business, or to establish a competing business for a defined period after termination. They are often used to protect the former employer’s confidential information or customer relations for a specific period of time. The law applicable to non-compete clauses is part of English common law. It has been, and continues to be, developed by the courts on a case-by-case basis. There is currently no provision in the UK employment statutory framework for non-compete clauses, including in Northern Ireland where employment law is devolved.

We are seeking views on specific options to reform non-compete clauses. The responses to the consultation will help inform decisions on detailed policy questions.

At this stage, the Government is considering multiple options. Any decisions to progress these would require consideration of the benefits and risks before implementation.

The implications of these proposals for the public sector will be subject to further consideration. In the public sector, some public servants e.g. Civil Servants, the Military, or the diplomatic service are subject to the Business Appointment Rules or an equivalent set of rules. More widely, employees of some public sector organisations e.g. those working in regulators or Non-Departmental Public Bodies are subject to the principles underpinning the Business Appointment Rules through their contracts of employment.

It is in the public interest that people with experience of public administration should be able to move into other sectors, and that such movement should not be frustrated by unjustified public concern over a particular appointment. However, the aim of the principles underpinning the Rules is to avoid any reasonable concerns that a public servant, in carrying out their duties, may be influenced by the hope or expectation of future employment with a particular employer; or may improperly exploit privileged access to contacts or information, or use such information in a way that confers improper advantage on a subsequent employer.

The government continues to attach much weight to these underlying principles. Moreover, the Cabinet Office and the Advisory Committee on Business Appointments are currently reviewing how the business appointments regime can be improved.

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Subject to the outcome of this consultation, further consideration would be given to the reach across and impact for the public sector, which may include further consultation if necessary.

Consultation details

Issued: 4 December 2020

Respond by: 26 February 2021

Enquiries to:

Frederick Everitt
Labour Market Directorate
Department for Business, Energy and Industrial Strategy
1st Floor, Spur 1
1 Victoria Street
SW1H 0ET

Tel: 020 7215 1009

Email: frederick.everitt@beis.gov.uk

Consultation reference: Consultation on measures to reform post-termination non-compete clauses in contracts of employment

Audiences:

Entrepreneurs, start-ups, micro businesses, SMEs, large businesses, multinational businesses, charities, trade bodies, trade unions, legal representatives, employment lawyers HR professionals, individual employees, think-tanks, general public.

Territorial extent:

England, Wales, and Scotland only. Employment law is devolved to Northern Ireland.

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How to respond

Outline whether responses should be provided in a particular preferred format, where electronic responses should be emailed to, which address to send hardcopy responses to, whether to use different addresses for responses for the devolved administrations, etc.

Respond online at: <https://beisgovuk.citizenspace.com/lm/non-compete-clause>

or

Email to: frederick.everitt@beis.gov.uk

Write to:

Frederick Everitt
Labour Market Directorate
Department for Business, Energy and Industrial Strategy
1st Floor, Spur 1
1 Victoria Street
London
SW1H 0ET

A response form is available on the GOV.UK consultation page:
www.gov.uk/government/consultations/XXX

When responding, please state whether you are responding as an individual or representing the views of an organisation.

Your response will be most useful if it is framed in direct response to the questions posed, though further comments and evidence are also welcome.

Confidentiality and data protection

Information you provide in response to this consultation, including personal information, may be disclosed in accordance with UK legislation (the Freedom of Information Act 2000, the Data Protection Act 2018 and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential please tell us, but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

We will process your personal data in accordance with all applicable data protection laws. See our [privacy policy](#).

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We will summarise all responses and publish this summary on [GOV.UK](https://www.gov.uk). The summary will include a list of names or organisations that responded, but not people's personal names, addresses or other contact details.

Quality assurance

This consultation has been carried out in accordance with the government's [consultation principles](#).

If you have any complaints about the way this consultation has been conducted, please email: beis.bru@beis.gov.uk.

The proposals

Summary of Current Law

The law applicable to non-compete clauses is part of English common law. It has been, and continues to be, developed by the courts on a case-by-case basis. Although there is no statutory definition of a post-termination non-compete clause they are generally understood to refer to clauses that restrict an ex-employee's ability to work for a competing business, or to establish a competing business for a defined period after termination. We recognise that a number of wider 'restrictive covenants' are used by businesses and organisations to protect their interests in a number of areas. Examples include non-solicitation clauses, non-dealing clauses and non-poaching clauses.

The legal principles relevant to non-compete clauses form part of the doctrine of restraint of trade. The courts have recognised the tension in this area between a person's freedom to trade, and the need to uphold contracts and to protect legitimate interests, as part of a contract. The task of the court is to balance these competing aspects of public policy.

The law is predicated on the presumption of unenforceability. All non-compete clauses, and other restraints of trade, are presumed to be unenforceable unless they are demonstrated to be reasonable. A non-compete clause will only be reasonable and enforceable if (i) it protects a legitimate business interest of the ex-employer, and (ii) it is no wider than reasonably necessary to protect that legitimate business interest. The onus of proving reasonableness in both these respects is on the employer. It follows that a non-compete clause is only enforceable if an employer has demonstrated, to the court's satisfaction, that it is reasonably necessary to protect its legitimate business interest. If the court is not so persuaded, the non-compete clause is unenforceable. 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 employee for breach of the covenant, or a variety of other remedies.

Option 1: Mandatory Compensation

The Government is considering the option of making post-termination, non-compete clauses in contracts of employment enforceable only when the employer provides compensation for the period the clause prohibits the individual from working for a competitor or starting their own business. Some employers already choose to provide compensation for the period of a non-compete clause or choose to use 'garden leave' in conjunction with a non-compete clause. Applying mandatory compensation for the period of the non-compete clause would encourage employers to consider whether the use of a non-compete clause is necessary and reasonable for that particular role before inserting it into a contract. It would create a financial disincentive to the use of non-compete clauses 'as standard' in contracts of employment and reduce misuse of non-compete clauses. An employer would also be disincentivised to apply a non-compete clause for an unreasonable length of time as this would incur additional cost.

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Mandatory compensation could also benefit both the employee and the employer by reducing litigation as ex-employees may feel less inclined to breach a potentially enforceable non-compete restriction when they are compensated for the period for which they are unable to compete, which may reduce the likelihood of legal action (with the costs that could involve) .

There is also a psychological effect of the inclusion of a non-compete clause even if it is broadly drafted and unlikely to be enforceable, for example if the employee perceives the non-compete clause as binding; they will likely abide by it fearing legal repercussions. Claims are brought in the High Court. Consequently, the losing party will generally bear the winner's legal costs, which can deter employees from taking any action which may risk legal proceedings.

Under this option employers would still be able to use post-termination non-compete clauses as a means of protecting their business interests, provided the ex-employee was compensated. The Government recognises that introducing mandatory compensation for non-compete clauses could give rise to greater use of 'gardening leave' and other indirect restraints, such as forfeiture provisions being used, which result in employees losing deferred stock or cash incentives in the event that they join a competitor. However, under these circumstances the ex-employee still stands to benefit in some form.

Several countries require mandatory compensation where non-compete clauses are used in contracts of employment, including Germany, France and Italy.

Complementary Measures

Making post-termination, non-compete clauses in contracts of employment enforceable only when the employer provides compensation could be complemented by additional measures. These include options to enhance transparency where non-compete clauses are used, and to place statutory limits on the length of non-compete clauses.

To enhance transparency around non-compete clauses, the Government could introduce a requirement for employers to disclose the exact terms of the non-compete agreement to the employee in writing before they enter into the employment relationship. Failing to do so would make the clause unenforceable.

This would ensure that the prospective employee is aware of the exact terms of the non-compete when entering into an employment relationship. It would enable them to understand how such a clause would restrict their ability to start a new business or find new work after they leave allowing them to make an informed decision.

The Government is also exploring the option to place statutory restrictions on the period of non-compete clauses in contracts of employment so that a non-compete clause would only be enforceable if it did not exceed a maximum period. Currently in the UK, the length of a non-compete clause should be reasonable and no longer than necessary.

Courts tend to enforce non-compete restrictions of up to 12 months, depending upon the seniority of the employee concerned and their access to confidential information and clients.

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Introducing a specified maximum period would have the advantage of certainty and would prevent businesses using non-compete clauses that are unreasonable in length. There is a risk that employers may read this maximum period as standard to be used in all cases, thus imposing a longer restriction than might otherwise be regarded by the courts under the current regime as reasonable and risking enforceability.

However, the requirement to provide compensation for the period could also act as a disincentive for employers to apply non-compete clauses for long periods as it would carry additional cost.

Option 2: Ban Non-Compete Clauses

As an alternative to the options above, the Government is considering whether making all post-termination, non-compete clauses in contracts of employment unenforceable is a necessary step to boost innovation and competition. This would in effect be a ban on the use of post-termination, non-compete clauses in contracts of employment.

Prohibiting the use of non-compete clauses would have the benefit of providing greater certainty for all parties. The scope of any ban would need to be clearly defined and there would need to be consideration of whether there would be any exemptions. The Government is also interested in options short of banning non-compete clauses which limit their enforceability in the interests of spreading innovation. The consultation therefore seeks views on these points.

A ban on post-termination, non-compete clauses in contracts of employment could have a positive effect on innovation and competition making it easier for individuals to start new businesses and enabling the diffusion of skills and ideas between companies and regions, which can in turn impact economic growth. It could also increase labour mobility which can benefit both the employee and overall efficiency of labour markets as employees move between businesses and there is a spill over effect of skills and knowledge.

This is the approach that has been taken in California, which is home to some of the world's most innovative organisations and tech clusters, where non-compete clauses are void, regardless of whether they are reasonable. In Israel, which over the past fifteen years has established itself as one of the most innovative and entrepreneurial economies in the world, the courts have significantly limited the enforceability of non-compete clauses regardless of their reasonableness. While the success of these respective international examples is based on a host of factors, their innovative approach to non-compete clauses should not be discarded as playing a part.

The Government recognises that there are arguments against prohibiting the use of non-compete clauses, including that such clauses can help protect legitimate business interests and prevent harm to a business through, for example, loss of confidential information. However, it is important to note that this consultation seeks views on targeted and specific reforms to post-termination non-compete clauses in contracts of employment.

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The consultation does not seek views on confidentiality clauses, intellectual property law or other means to protect legitimate business interests.

Those are separate 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 employees. For example, the law of confidence will prevent current or former employees from personally using their employer's trade secrets or confidential customer lists. Similarly, trademark and passing-off law will prevent former employees 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 employee from copying written works created in the course of his former employment where he does have the consent of the former employer.

Consultation questions

Option 1: Mandatory Compensation

The Government is considering the option of making post-termination, non-compete clauses in contracts of employment enforceable only when the employer provides compensation during the term of the clause.

Although there is no statutory definition of a post-termination non-compete clause they are generally understood to refer to clauses that restrict an ex-employee's ability to work in similar employment for a competing business, or to establish a competing business for a specified period after termination of employment.

We recognise that a number of wider post-termination 'restrictive covenants' are used by businesses and organisations to protect their interests in a number of areas. Examples include:

- **Non-solicitation clauses** – used to prevent an employee soliciting employees and customers from their employer or ex-employer's business for a period after they leave the business.
- **Non-dealing clauses** – used to prevent the departing employee from having 'dealings' with their ex-employer's clients for a period after they leave the business.
- **Non-poaching clauses** – similar to non-solicitation clauses, used to prevent an ex-employee hiring employees of their former employer's business.
- **Goodwill protection clauses** – prevent the seller of a business going immediately into competition with the buyer of that business after the sale.

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1. Do you think the Government should only consider requiring compensation for non-compete clauses or do you think the Government should consider requiring compensation where other restrictive covenants are used? Please indicate below.

- Non-competes only
- Non-complete clauses and other restrictive covenants

2. If you answered ‘non-complete clauses and other restrictive covenants’, please explain which other restrictive covenants and why.

3. Do you foresee any unintended consequences of limiting the scope of reform to non-compete clauses? If yes, please explain your answer.

The Government is considering applying the requirement for compensation where non-compete clauses are used in contracts of employment.

We recognise that non-compete clauses can be used in wider workplace contracts or other contracts which have a bearing on the workplace, for example in contracts for services, consultancy agreements, partnership agreements, Limited Liability Partnerships, employee share options and franchise agreements to name a few.

4. Do you agree with the approach to apply the requirement for compensation to contracts of employment?

5. Do you think the Government should consider applying the requirement for compensation to wider workplace contracts?

6. Do you think the proposed reform to non-compete clauses in contracts of employment could have an impact on the use of, and/or the enforceability of, non-compete clauses in wider contract law? If yes, please explain how and why.

The Government is considering what a reasonable level of compensation would be for the period of the non-compete clause. The level of compensation needs to be high enough to deliver the aims of encouraging employers to consider whether the use of a non-compete is necessary for a particular role before inserting it into a contract, and to create a financial disincentive to their use. It should also reflect that an individual bound by a non-compete clause may be restricted from making a living in the area where their skills and expertise are most applicable and the harm this could have on competition and innovation.

To provide legal certainty, and to provide clarity to both employers and employees, the Government is considering a level of compensation that is set as a percentage of the ex-employee’s average weekly earnings prior to termination of employment for the duration of the non-compete clause.

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7. Please indicate the level of compensation you think would be appropriate:

- 60% of average weekly earnings
- 80% of average weekly earnings
- 100% of average weekly earnings
- Other (please specify and explain why)

Currently in the UK an employer can unilaterally waive a non-compete clause at any point during the employment relationship. Were the Government to introduce mandatory compensation there is a risk that employers continue to use non-compete clauses broadly and then use this flexibility to remove the clause at the end of the employment relationship to avoid paying any compensation. While this would then allow the ex-employee to establish their own business in competition or to take up employment with a competitor, the existence of the non-compete clause in their contract may have affected their decision-making during the employment relationship.

8. Do you think an employer should have the flexibility to unilaterally waive a non-complete clause or do you think that waiving a non-compete clause should be by agreement between the employer and the employee? Please indicate your answer below.

- Employer decision only
- Agreement between employer and employee
- Not sure/Don't know

Please explain your answer.

To disincentivise employers from inserting non-compete clauses and then unilaterally removing them at the end of the employment relationship, the Government could require that an obligation for the employer to pay compensation for some or all of the period of the non-compete clause is retained unless a defined period of time has elapsed between the waiving of the clause and the end of the employment relationship.

How this could work with an example of a 6-month period:

The employer could at any time during the employment relationship waive the post-termination non-compete clause in writing to the employee. In such case, the employer's obligation to pay compensation would cease to exist after 6 months have elapsed from the day the clause was waived. Were the employer to give notice to waive the non-compete 6 months prior to the end of the employment relationship, the employer would not be required to provide the worker with any additional compensation once the employment has ended.

If, on the other hand, the employer waits to give written notice until a month before the end of the employment relationship, the employer then will be required to compensate the employee for 5 months after the employment relationship has ended. The employee would be able to compete immediately after the employment relationship has ended.

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9. Do you agree with this approach? If not, why not?

10. How long do you think the time period within which the employer must waive the restriction before the termination of employment should be?

- 3 months
- 6 months
- 12 months
- Other (please specify)

Questions specifically for employers:

11. Do you use, or have you ever used, non-compete clauses in contracts of employment?

The terms 'employee' and 'contract of employment' have been used in this consultation on the basis that non-compete restraints are most commonly applied to employees in a contract of employment. However, the Government recognises that non-compete restraints may be being used in the contracts of workers who are not employees (as defined in section 230(3)(b) Employment Rights Act 1996) known as 'limb(b) workers'.

12. Do you use, or have you ever used, non-compete clauses in limb(b) workers' contracts?

13. If you were required to provide compensation for the period of the non-compete clause, do you think that you would continue to use them? If yes, what kind of employees/limb(b) workers (high/low paid) would you maintain non-compete clauses in place for? Please explain your answer.

14. If you did not use non-compete clauses, would you be content to rely on other 'restrictive covenants' to protect your business interests? If yes, do you think there would be any unintended consequences to this? Please explain your answer.

15. If mandatory compensation were introduced, do you think you would increase your use of other 'restrictive covenants'? If yes, please explain why and which ones.

16. If you use non-compete clauses in contracts of employment, do you already pay compensation/salary to employees for all or part of the duration of the non-compete clause?

Please explain your answer

17. Do you think employees would be more likely to comply with the terms of a non-compete clause if mandatory compensation was introduced? If not, do you have any suggestions for increasing compliance.

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Complementary Measures

The following measures are being considered in addition to mandatory compensation.

To improve transparency around non-compete clauses, the Government is considering a requirement for employers to disclose the exact terms of the non-compete agreement to the employee in writing before they enter into the employment relationship. Failure to do so would mean that the non-compete clause was unenforceable.

- 18. Would you support this measure to improve transparency around non-compete clauses? If not, please explain why not.**
- 19. Have you ever been subject to a non-compete clause as an employee or limb(b) worker? If yes, were you aware of the non-compete clause before you accepted the offer of employment?**
- 20. Has a non-compete clause ever prevented you from taking up new employment in the past and/or prevented you from starting your own business? Please explain your answer.**
- 21. Do you have any other suggestions for improving transparency around non-compete clauses?**

The Courts often consider the seniority of the employee concerned and their access to confidential information and clients when determining whether the period of the non-compete clause is reasonable. It is rare that the court will enforce a non-compete that lasts for over 12 months.

To provide certainty for both employers and employees, the Government is considering introducing a maximum limit on the period of non-compete clauses. Clauses that exceed that maximum period would automatically be unenforceable.

- 22. Would you support the inclusion of a maximum limit on the period of non-compete clauses?**
- 23. If the Government were to proceed by introducing a maximum limit on the period of non-compete clauses, what would be your preferred limit?**
 - 3 months
 - 6 months
 - 12 months
 - Other (please specify)

Please explain in further detail the reasoning behind your preferred limit.

- 24. Do you see any challenges arising from introducing a statutory time limit on the period of non-compete clauses? If yes, please explain.**

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Option 2: Ban Non-Compete Clauses

To support the Government's commitment to unleash innovation, create the conditions for new jobs and increase competition, we are considering making post-termination, non-compete clauses in contracts of employment unenforceable. This would have the benefit of providing greater certainty for all parties and would make it easier for employees to start new businesses, find new work and apply their skills to drive the economic recovery.

However, the Government also recognises that there are arguments in favour of non-compete clauses playing an important role in protecting legitimate business interests.

- 25. What do you think could be the benefits of a ban on non-compete clauses in contracts of employment? Please explain your answer.**
- 26. What do you think might be the potential risks or unintended consequences of a ban on non-compete clauses? Please explain your answer.**
- 27. Would you support a ban on non-compete clauses in contracts of employment? Please explain your answer.**
- 28. If the Government introduced a ban on non-compete clauses, do you think the ban should extend to wider workplace contracts?**
- 29. Do you think a ban should be limited to non-compete clauses only or do you think it should also apply to other restrictive covenants? If the latter, please explain which and why.**
- 30. If the Government introduced a ban on non-compete clauses in contracts of employment, do you think there are any circumstances where a non-compete clause should be enforceable? If yes, please explain.**
- 31. Are there options short of banning non-compete clauses which would limit their enforceability in the interests of spreading innovation? Please explain your answer.**
- 32. Are you aware of any instances where a non-compete clause has restricted the spread of innovation/innovative ideas? Please explain your answer.**
- 33. If you are aware of any literature, research, or evidence from your own business experience that looks at the impact of non-compete clauses on competition, innovation, or economic growth please list the publications below.**

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Questions specifically for employers:

- 34. If the Government introduced a ban on non-compete clauses in contracts of employment do you think you would be able to sufficiently protect your business interests through other means, for example through intellectual property law and confidentiality clauses? If not, why not?**
- 35. Do you think a ban on non-compete clauses in contracts of employment could benefit your business/organisation? If so, how?**
- 36. Do you think a ban on non-compete clauses in contracts of employment would impact your business/organisation? If yes, please explain in what ways and the severity of any impacts to your business/organisation.**
- 37. How do you think your business/organisation would respond to a ban on non-compete clauses in contracts of employment? Please explain.**

This consultation is available from: <https://gov.uk/government/consultations/consultation-on-measures-to-reform-post-termination-non-compete-clauses-in-contracts-of-employment>

If you need a version of this document in a more accessible format, please email enquiries@beis.gov.uk. Please tell us what format you need. It will help us if you say what assistive technology you use.