

## How to..... deal with the risks of a departing employee with a grudge.

Employees who are leaving under a cloud can cause problems to an employer, however there are a number of steps an employer can take in order to prevent or mitigate any potential damage that a rogue employee may cause:

**Remind the employee of their contractual obligations.** Before an employee departs, remind the employee of their contractual obligations to the company and their ongoing implied duties of fidelity, and mutual trust and confidence.

If the employee's contract includes an express provision on confidentiality that extends beyond the duration of the contract then you should also highlight this. This provision will also apply post termination.

Likewise, the contract may also include restrictive covenants that can be enforceable to prevent the scorned employee damaging the business by poaching staff or clients or joining a competitor for periods of between 3-6 months after employment ends.

The employer should remind the employee of these continuing contractual obligations in writing to avoid any doubt in the employee's mind that these provisions still apply to them.

**Restricting access and changing employees' duties.** The first thing to consider is what access the employees have. It is not unheard of for a departing employee to surreptitiously download or send themselves documents, data or even whole contact databases for use in their next job.

Employees with access rights can be tempted to use them. If an employer is concerned about a departing employee working on certain projects or carrying out specific duties that for example include maintaining contact with customers, then they can usually reallocate certain duties to the employee during their period of notice.

It is better, though, if you have a clause in the contract of employment enabling you to do this.

By tasking the employee with less commercially and time-sensitive duties, an employer can minimise the risk of an employee causing damage. It can also help to avoid the negative impact from underperforming or lack of motivation in the final weeks of employment.

In addition, allocating more administrative tasks with limited access will help minimise the risk of the employee obtaining useful confidential information that they can use with their next employer.

**Place the employee on garden leave.** Some contracts include a clause permitting the employer to place a member of staff on garden leave for the duration of their notice period.

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Garden leave means that the employee remains employed and bound by their contractual obligations until their termination date, but they are not normally permitted to attend the employer's premises, contact customers or perform duties unless the employer expressly asks them to do so. You can place as many restrictions as you want on their engagement and activities on garden leave.

This can be very effective for preventing employees who have had regular customer contact from keeping in contact with customers before they leave or working on commercial activities that you may not wish the employee to be privy to.

If a manager is concerned that a disgruntled colleague may somehow jeopardise customer relationships or be disruptive in the workplace during their notice period, garden leave is a useful tool to avoid that happening too.

**Payment In Lieu Of Notice (PILON).** Sometimes it is better to minimise any risk of conflict or negative incidents by having no notice served by the employee after their resignation or notice of dismissal. This can also avoid the possibility of an employee using their access rights inappropriately, as long as your exit process removes their authorisations immediately.

Technically you should include a right to pay in lieu in the contract, otherwise it is a breach of contract to pay the employee in lieu of their notice and terminate the employment with immediate effect.

However, this is rarely disputed by a departing individual who is often happier to leave with their salary paid during the notice period paid rather than have to work it.

It is worth noting that if an employee is dismissed for gross misconduct, they are not entitled to any notice pay so a payment in lieu will not be necessary.

If a business has any concerns about the potential actions of an employee during their notice period, invoking a PILON clause would be the employer's preferred option to terminate the relationship immediately and protect the business.

However, this may not be appropriate if the business does not want the employee to leave and immediately join a competitor.

### Careful management

When employee exits are not managed carefully, employers can encounter many operational and reputational difficulties when departing staff decide to behave spitefully. Holding exit interviews can be one way to manage risks and minimise damage pre or post termination.

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However, if a departing employee causes significant financial loss, the employer may be able to pursue them for damages for breach of contract and there may be scope to bring claims against their new employer too.

If they take personal data with them then they could be prosecuted by the Information Commissioner's Office.

Prevention is better than cure though, and it is easier and more cost effective for employers to prevent damage or loss by ensuring their contracts of employment contain the clauses they can rely on to manage the exit effectively, such as garden leave clauses.

The appropriate steps to take will vary depending on each specific scenario, so having a range of options you can use is important.

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**For further advice and help on dealing with departing employees, please contact us on 07899 665506 or email [tracy@crafnantconsulting.co.uk](mailto:tracy@crafnantconsulting.co.uk)**