

UNITED KINGDOM

Ten Golden Rules for Retaining Key Employees in UK

By James Cox, Daniel Pollard and Steven Cochrane (Gibson, Dunn & Crutcher LLP)

As economic conditions improve, the war for talent is intensifying. We have set out below ten “golden rules” for UK employers seeking to retain key talent. Different rules and considerations may apply in other jurisdictions.

Maintain a Supportive Work Environment

Many key employees, particularly those with children, struggle to reconcile their responsibilities at work and home. As a consequence, employers often struggle to retain key female employees. Employers looking to reverse this trend should consider whether it is possible, without harming their business, to introduce benefit plans and working arrangements which help employees to better balance their responsibilities at home and work. Such benefits and arrangements may include enhanced maternity, paternity and parental leave benefits and part-time and flexible working arrangements.

Benchmark Your Remuneration

Maintaining a competitive remuneration package is, for obvious reasons, important to retaining talent. Now that organizations are starting again to re-evaluate and improve staff remuneration packages, employers should consider benchmarking their remuneration arrangements against industry competitors in order to maintain a competitive remuneration package.

Balance Short Term and Long Term Benefits and Incentives

A well crafted remuneration package will balance both short and long term incentives. Short term incentives (such

James A. Cox is a Partner in the London office of Gibson, Dunn & Crutcher, where he serves as Co-Partner-in-Charge of the office. Mr. Cox has extensive experience in contentious and non-contentious labor and employment matters, with an emphasis on corporate governance matters, boardroom appointments and removals, contractor and directorship matters, employment issues facing private equity companies, cross-border employment issues, and whistle-blowing, among other things. (jacox@gibsondunn.com) Daniel E. Pollard is an English qualified Associate in the London office of Gibson, Dunn and Crutcher specializing in all aspects of UK Labor and Employment law. Mr. Pollard's practice includes contentious, non-contentious and general advisory work. (dpollard@gibsondunn.com) Steven Cochrane is a Scottish qualified Associate in the London Office of Gibson Dunn & Crutcher and deals with a wide range of UK employment law issues including drafting and negotiating executive service agreements, consultancy agreements and compromise/severance agreements, drafting and reviewing staff handbooks and providing general advice in relation to issues such as redundancy, unfair dismissal and discrimination. (scochrane@gibsondunn.com)

as salary, car allowance and annual bonus) remain important elements of any remuneration package but appropriate long term incentives (such as long term incentive plans, equity incentives and stock options) act as a powerful tool to align the interests of key employees with those of shareholders as well as ensuring that key employees have a long term stake in the continued success in their employer. Certain types of equity incentives also have the advantage of being tax favored. While tax advantages can potentially apply to all employees, the advantages will be of particular interest to higher earners as a result of the increases proposed to employment income tax in the UK.

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Incorporate Retention Incentives in Your Annual Bonus Scheme

Annual bonus schemes, commonly viewed as a short term incentive, can be drafted to incorporate valuable retention elements. Many schemes already require employees to remain in employment until the date set for payment of the bonus in order to receive their annual bonus. However, this practice can lead to a destabilizing wave of resignations each year after bonuses are paid. In order to combat this, a number of additional retention tools can be considered when devising a new annual bonus scheme. These tools range from paying annual bonuses in instalments to deferring part of the bonus to be paid at a later date conditional upon continued employment. Depending upon the nature of the bonus arrangements and practice at a particular employer, it may be possible to introduce such retention tools without seeking express consent from employees.

Consider Change of Control Protection in Appropriate Circumstances

Change of control clauses provide an employee with enhanced protection in the event that his employer, or the business in which he works, changes hands. Change of control clauses, which were once a common feature of directors' service contracts, have been subject to much criticism in the UK

Ten Golden Rules *(from page 15)*

by both shareholders and the media and are now rarely used. Nevertheless, change of control clauses can be a powerful tool for reassuring and retaining key employees who might otherwise leave an employer which is considered to be a vulnerable target for takeover and can still be justified as reasonable, in appropriate circumstances, even for directors.

Take Steps to Protect Your Confidential Information and Intellectual Property

UK law provides limited protection for an employer's trade secrets, confidential information and intellectual property but can be supplemented by appropriate language in an employment contract or associated agreement. We therefore advise employers to ensure that the employment contracts of key employees contain express protection of trade secrets, confidential information and intellectual property.

Retain the Right to Place Key Employees on Garden Leave

The term garden leave is used to describe a period of enforced suspension during which the employee continues to be paid but is not permitted to carry out work (either for their current employer or anyone else) and is restricted from contacting colleagues, customers or suppliers. The UK courts will not force an employee to remain on garden leave unless either the employment contract contains a garden leave clause or the employee refuses to work their notice period (see below) and intends to join a competitor. Express garden leave clauses have become a regular feature in the employment contracts of key employees. To the extent that the clause is well drafted and reasonable, the employer will be able to enforce a period of garden leave even where the employee is willing to work their notice period, giving the employer time to shore up its relationships with customers, suppliers and employees.

Combine An Express Garden Leave Clause With An Appropriate Notice Period

At-will employment is not permitted in the UK. As a consequence, employment relationships in the UK are commonly terminable upon period of notice agreed between the employer and employee (subject to legal minimum requirements). A long notice period (even if the notice period to be served by both parties is the same) is generally thought to favour the employee, rather than the employer, as the UK courts will not force an employee to work out their notice period if unwilling to do so. However, as can be seen at rule 6 above, the UK courts may enforce a period of garden leave during an employee's notice period. An appropriate notice period (commonly between 3 and 6 months for key employees) coupled with an express garden leave clause therefore provides an employer with a valuable "buffer" following the resignation of a key employee during which it can take steps to secure its business. Furthermore, the usefulness of your key employees to a competitor may be significantly reduced if you retain the right to enforce an appropriate period of garden leave, particularly where coupled with appropriate post-employment restrictive covenants (see below).

Include Appropriate Post-employment Restrictive Covenants

Post-employment restrictive covenants are lawful in the UK to the extent that they protect a legitimate business interest and do so in a manner which is reasonable having regard to the employer's business and the particular circumstances of the employee. Covenants which do not protect a legitimate business interest, which last too long or are drafted too widely will be unenforceable. A well drafted restrictive covenant is an extremely effective means of neutralizing the ability of a departing employee to misuse their former employer's trade secrets, harm its goodwill or customer connections, or destabilize its workforce. Enforceable restrictive covenants also discourage competitors from attempting to gain access to an employer's trade secrets, customer and supplier relationships or key employees by hiring its key employees.

Enforce Your Contractual Rights

A well drafted employment contract will not operate effectively as a retention tool if not enforced where appropriate. Often key employees deliberately breach obligations under their employment contract (particularly those obligations which prevent them from engaging in competitive activities after termination of employment) because they believe that their former employer lacks the will or the means to enforce them. While enforcing post-employment obligations by means of court action can prove expensive, it sends a strong signal, both to its workforce and competitors, that an employer will take steps to protect its legitimate business interests. □