



Department for  
Business & Trade

# Non-Compete Clauses

Response to the Government consultation on measures to reform post-termination non-compete clauses in contracts of employment.

12 May 2023

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## Introduction

We are proud of the UK's record on employment standards, having raised domestic standards over recent years to make them some of the highest in the world. The increase in employment that the Government has overseen since 2010 is proof that there is no contradiction between high employment and high standards. Under this Government we have seen employment near record highs and unemployment near record lows. The number of payroll employees for March 2023 was 30.0 million, 1.0 million above pre-pandemic levels, and the unemployment rate, at 3.8%, has rarely been lower in the last 50 years. The UK's flexible labour market is at the heart of this success. It enables businesses to start-up, grow and create jobs and opportunity for the people of this country.

As a Government, we are committed to building on this record. We want to make Britain the most dynamic place in the world to work, and to launch, grow and do business. We must build on and strengthen our flexible and thriving labour market. This will help drive growth and promote more competition in UK markets as we build a high-skills, high-wage economy, with a business-friendly culture, where creative enterprise is encouraged and rewarded.

To deliver this, we want to make it easier for individuals to start new businesses, find new work and apply their skills to drive economic growth. 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.

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.

There is currently no provision in the UK employment statutory framework for non-compete clauses. Under current common law, there are very few constraints on the use of non-compete clauses in employment contracts and our estimates suggest that they are widely used across the labour market, with around 5 million employees subject to a non-compete clause in Great Britain and a typical duration of around 6 months. This can adversely impact both the worker affected, as their future mobility is restricted, and the wider economy due to the impacts on competition and innovation.

On 4 December 2020, the Government launched a consultation on measures to reform post-termination non-compete clauses in contracts of employment to maximise opportunities for individuals to start new businesses, find new work and apply their skills to drive economic growth. The consultation also considered whether reforms to non-compete clauses could boost innovation through the diffusion of ideas, create the conditions for new jobs and increase competition.

The purpose of the consultation was to seek views on:

- proposals to make non-compete clauses enforceable only when the employer provides compensation during the term of the clause.
- additional measures including options to enhance transparency where non-compete clauses are used, and placing a statutory limit on the length of non-compete clauses.
- an alternative proposal to make post-termination non-compete clauses in contracts of employment unenforceable.

We received 104 formal responses to the consultation from a range of stakeholders and individuals. Having considered these responses and conducted further research and analysis the Government will proceed by introducing a statutory limit on the length of non-compete clauses of 3 months. The Government will apply the statutory limit of 3 months to non-compete clauses only, and in contracts of employment and limb(b) worker contracts only.

By limiting the length of non-compete clauses to 3 months, the Government is taking bold action to boost flexibility and dynamism in the labour market, and to unleash greater competition and innovation. It will make it easier for workers, including those who are highly skilled, to be able to move to a competitor or to start a competing business. It will also make it easier for businesses to fill vacancies and attract better candidates.

During the consultation we considered alternative options including introducing mandatory compensation for the period of the non-compete clause and an outright ban on the use of non-compete clauses. However, given the direct costs to business of a mandatory compensation model, we decided not to proceed with this option. While an outright ban on non-compete clauses could have a positive effect on competition and innovation, it would remove the freedom for employers and workers to negotiate and agree non-compete clauses, and there is some evidence to suggest that in certain circumstances, non-compete clauses can act as a mechanism to align incentives between workers and employers and enable investments. Having considered all the available evidence, research and literature, it is not clear that the potential benefits of an outright ban in Great Britain, would outweigh the risks and the potential for unintended consequences.

Our reforms to non-compete clauses will ensure talented individuals have greater freedom to apply their skills in another role if they wish or to start their own business with the skills they've gained throughout their career. There are benefits to limiting the use of non-compete clauses both at the individual level, by making it easier for people to start new businesses and find new work if they are subject to a non-compete clause, and wider economic benefits with the potential to drive economic growth through greater competition and innovation.

We will bring forward legislation to introduce the statutory limit when parliamentary time allows. The statutory limit will apply to Great Britain (England, Wales and Scotland), as employment law is devolved to Northern Ireland. The Government will continue to engage and work closely with officials in the Northern Ireland Civil Service.

# Conducting the consultation exercise

## Activity during the consultation period

The Government launched a consultation on measures to reform post-termination non-compete clauses in contracts of employment on 4 December 2020. It was open for 12 weeks and closed on 26 February 2021.

In total, there were 104 formal responses to the consultation. The largest number of formal responses to the consultation (34%) came from individuals, with the second largest group (27%) being legal organisations and professionals. 24% of responses were from employers while 10% of responses were from trade associations. The remaining responses came from trade unions (4%) and academics (1%).

Officials also participated in online meetings, events and discussions, listening and engaging with the views of attendees from across different sectors and places throughout the UK. Several organisations conducted their own surveys based on the proposals in the consultation and shared their results with the Government.

The Government has also been engaging with public sector organisations to consider the implications of proposals for the public sector. 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, workers in 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 employment contract. The reforms to non-compete clauses will not affect restrictions on former public sector employees under the Business Appointment Rules. The Business Appointment Rules are designed to avoid any reasonable concerns that a public servant has been influenced in carrying out their official duties by the expectation of future employment and seek to protect the integrity of the Government.

## Summary of consultation responses

### Option 1. Mandatory compensation

The consultation sought views on 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. Of those who responded to the consultation, a majority (60%) agreed with the approach to apply the requirement for compensation to contracts of employment. Several noted that this approach would discourage the widespread use of non-compete clauses and strikes an appropriate balance between the employer's right to protect its legitimate business interests and the need to avoid non-compete clauses being used inappropriately and/or unnecessarily.

Others noted that it would have the benefit of creating a financial disincentive for longer non-compete clauses and would compensate individuals who may be unable to apply their skills and expertise in their field for a period.

29% of respondents did not support the approach to apply the requirement for compensation to contracts of employment. Many of these respondents felt that the existing system works well and were concerned about the financial burden of providing compensation for the period of the non-compete clause. Others felt that a requirement for compensation may disadvantage smaller employers who may not be in a financial position to provide compensation for the non-compete clause.

### **Complementary measures**

The consultation also sought views on additional measures including options to enhance transparency where non-compete clauses are used and placing statutory limits on the length of non-compete clauses.

Of those who responded to the consultation, 67% supported the measure to improve transparency by requiring employers to disclose the exact terms of the non-compete agreement in writing before they enter into the employment relationship. 15% of respondents did not support this approach and a further 18% chose not to answer this question.

For those who did not agree with the approach, frequently cited reasons included that non-compete clauses should already be clearly set out in writing, usually in an employment contract and that the requirement would add a layer of red tape for employers. Others noted that it did not provide any protection to the employee as the imbalance in the bargaining relationship means that they are likely to sign in any case.

When asked whether respondents would support the inclusion of a maximum limit on the period of non-compete clauses, 60% supported the inclusion of a maximum limit while 27% would not support this approach. Those in favour of a maximum limit on the period of non-compete clauses noted that this would provide clarity and certainty for all parties and allow individuals to start new businesses or take up alternative employment in their field sooner. Those against the inclusion of a maximum limit on the period of non-compete clauses noted that the existing common law approach provides necessary flexibility where exceptional cases may require a longer period, and that employers might respond by increasing the length of non-compete clauses up to the statutory maximum which could result in longer non-compete clauses being used than otherwise would have been the case.

## **Option 2. Ban non-compete clauses**

As an alternative to the options above, the consultation sought views on a proposal 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.

Of those who responded to the consultation, 53% were opposed to a ban on non-compete clauses in contracts of employment, while 36% supported a ban. Those who opposed a ban cited a number of risks and possible unintended consequences such as a loss in investor confidence, particularly in start-ups, a potential shift of certain jobs/functions out of the UK to jurisdictions where non-compete clauses can be enforced, increased litigation in other areas such as intellectual property and trade secrets, and tighter controls on information sharing within organisations. Some respondents felt that these effects could have a detrimental impact on innovation and that the potential benefits of a ban were unlikely to outweigh the risks.

Those who were supportive of a ban on non-compete clauses cited potential benefits including greater freedom for people to take up new employment and start new businesses, increased competition and innovation, more flexibility and mobility in the labour market with the potential for a positive effect on wage growth, fewer barriers to recruitment, clarity for both employers and employees, and the potential for fewer legal disputes and litigation. Several respondents put forward the idea of targeted ban to protect those who earn below a certain salary threshold as an alternative option to an outright ban.



# 1. Option 1. Mandatory Compensation

*The consultation sought views on 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.*

## Questions 1-7

Questions 1-7 sought views on the scope of the proposal to apply a mandatory compensation requirement for non-compete clauses, including whether any reforms should extend to other restrictive covenants and whether they should extend to 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. This section also asked respondents to indicate the level of compensation they think would be appropriate.

47% of respondents to the consultation were of the view that the Government should consider requiring compensation for non-compete clauses only, while 34% thought that the requirement for compensation should apply to non-compete clauses and other restrictive covenants. Respondents who favoured limiting the requirement for compensation to non-compete clauses only, noted that clauses restricting, for example, solicitation or dealing with the former employer's clients do not have such a significant impact on the employee's ability to earn a living in their chosen profession and that compliance with other restrictive covenants is less likely to result in financial disadvantage for employees. Others made the point that the greater the scope of the changes, the greater the cost and disruption will be for businesses at an already challenging time.

For those who felt the Government should apply the requirement to non-compete clauses and other restrictive covenants, the most cited restrictive covenants were non-dealing clauses, which are used to prevent the departing employee from having 'dealings' with their ex-employer's clients for a period after they leave, and non-solicitation clauses, which are used to prevent an ex-employee soliciting employees and customers from their employer or ex-employer's business for a period after they leave. Common reasons respondents provided for wanting a requirement for compensation to extend to these clauses were the impact they can have on competition, labour mobility, wages, quality of service, and on the ability for individuals to making a living. Non-poaching clauses were also noted by several respondents as were invention clauses and clawback provisions in employee stock ownership plans (ESOP).

However, 38% of respondents thought that limiting the scope of reform to non-compete clauses only could lead to unintended consequences, including increased use of other restrictive covenants, for example, non-solicitation clauses and non-dealing clauses, greater use of gardening leave and longer notice periods, greater use of indirect restraints such as shareholders' agreements, options schemes and long-term incentive plans and a potential shift to different contractual arrangements such as limited liability partnerships (LLPs), joint ventures or franchise arrangements.

There was support for the approach to apply the requirement for compensation to contracts of employment, with 60% of respondents agreeing with it. Several noted that this approach would discourage the widespread use of non-compete clauses and strikes an appropriate balance between the employer's right to protect its legitimate business interests, and the need to avoid non-compete clauses being used inappropriately and/or unnecessarily. Others noted that it would have the benefit of creating a financial disincentive for longer non-compete clauses and would compensate individuals who may be unable to apply their skills and expertise in their field for a period.

29% of respondents did not support the approach to apply the requirement for compensation to contracts of employment. Many of these respondents felt that the existing system works well and were concerned about the financial burden of providing compensation for the period of the non-compete clause. Others felt that a requirement for compensation may disadvantage smaller employers who may not be in a financial position to provide compensation for the non-compete clause.

When considering whether the Government should consider applying the requirement for compensation to wider workplace contracts, the views of respondents were split with 42% in favour and 42% against. Those in favour noted the risk around differential treatment and a potential shift from employment to other forms of contract.

For those who thought the Government should not apply the requirement for compensation to wider workplace contracts, respondents cited reasons including; the difficulty in defining 'wider workplace contracts', the risk of increased litigation as to when the requirement for compensation does/does not apply, and the fundamental differences between employment contracts and other contractual agreements such as partnership agreements, LLP agreements, and shareholder agreements, particularly with regards to the balance of bargaining power.

The consultation also sought views on whether 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. Of those who thought the proposed reform would not impact on the use of, and/or the enforceability of, non-compete clauses in wider contract law, there was a widely held view that if the relevant legislation were carefully drafted, it would be unlikely for there to be any effects on wider contract law, particularly as the courts already recognise that the approach to enforcement of non-competes varies with context.

However, those who thought the proposed reform would impact on the use of, and/or the enforceability of, non-compete clauses in wider contract law, a commonly cited reason was that the courts may take a different approach to non-compete clauses in other contractual arrangements in future.

The consultation presented four options for the level of compensation, 60% of average weekly earnings, 80% of average weekly earnings, 100% of average weekly earnings and 'Other'. The most common response to this question was 'Other' with 36 respondents selecting this option. Of those who selected 'Other', a majority were in favour of a lower level than those presented in the consultation with the most favoured choice being 50% of average weekly earnings. Several respondents who selected 'Other' felt that the level of compensation should be agreed between the parties. Only one respondent suggested a higher level than those proposed at 110% of average weekly earnings.

33 respondents thought that 100% of average weekly earnings was the appropriate level of compensation, which was the second most common response after 'Other'. 11 respondents felt that 80% of average weekly earnings was the appropriate level of compensation and 9 respondents thought 60% was the appropriate level. 15 respondents chose not to answer this question. Several responses to this question also highlighted the trade-offs between using a % of average weekly earnings to determine the level of compensation or a % of base salary.

## **Government Response**

The Government will not legislate to make 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.

Requiring mandatory compensation for the period of the non-compete clause could have the benefit of encouraging 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 and would provide a degree of financial security to individuals subject to a non-compete clause. However, it would apply a substantial direct cost to businesses who use non-compete clauses at a critical juncture in our economic recovery.

After further research into the use of non-compete clauses in the labour market and analysis of available data, the Government does not consider it appropriate to place this additional burden on business at a time when we want to support businesses to enhance their productive capacity. Legislating to require businesses to pay for individuals to spend time out of the labour market due to a non-compete clause would not support these aims. We also heard from small businesses and representatives of small businesses who raised concerns about the potential disadvantage for smaller employers who may not be in a financial position to provide compensation for period of the non-compete clause.

Under a mandatory compensation model, ex-employees may also feel less inclined to challenge a non-compete clause and abide by the terms of the clause even if it is broadly drafted and unlikely to be enforceable. This was reflected in the results of the consultation with 76% of respondents of the view that employees would be more likely to comply with the terms of a non-compete clause if mandatory compensation was introduced. Were this to be reflected across a large population of workers this could have a chilling effect on labour market mobility and entrepreneurship, and rather than increase competition and innovation it could have the opposite effect.

When considering establishing a mandatory compensation model we also examined the links to gardening leave. We heard from respondents during the consultation who suggested that the introduction of mandatory compensation could incentivise employers to shift to use gardening leave as an alternative to non-compete clauses. Were employers to respond by using longer periods of gardening leave, this would not be conducive to the aims of the reform as individuals would be even more restricted in the activities that they could carry out than if they were subject to a non-compete clause. This could be mitigated by making the level of compensation sufficiently lower than the cost of placing a worker on gardening leave. However, this could lead employers to respond by reducing the length of gardening leave and increasing the length of the non-compete clause as a cheaper alternative with the potential to leave workers worse off than they would have been under the existing system.

While we are unable to accurately predict the future development of case law on non-compete clauses, there is a risk that with the introduction of mandatory compensation the courts may be more willing to enforce non-compete clauses. If the introduction of mandatory compensation was to have the effect of increasing the enforceability of non-compete clauses, then it would not support our policy objectives of boosting competition and innovation by making it easier for individuals to start new businesses, find new work and apply their skills to drive the economic recovery.

When considering the overall case for introducing a mandatory compensation model the Government has decided not to proceed with this option based on a combination of the significant direct cost to business, the risk of distorting competition by disadvantaging smaller employers who may not be in a position to pay for the use of non-compete clauses, the potential for workers to be less inclined to challenge non-compete clauses and the possible increased willingness of the courts to uphold them. When considering these factors, alongside the interaction with gardening leave, it is not clear that the benefits of a mandatory compensation model would outweigh the risks while opening the possibility of unintended consequences.

## Questions 8-10

Questions 8-10 sought views on whether employers should have the flexibility to unilaterally waive a non-compete clause and how a waiver system might operate for a mandatory compensation model.

When considering whether employers should have the flexibility to unilaterally waive a non-compete clause, 48% of respondents thought that waiving a non-compete clause should be by agreement between the employer and the employee while 37% thought it should be a decision for the employer only. Those in favour of any waiver being by agreement between the employer and the employee, noted the risk that an employer could otherwise waive the clause at the latest possible opportunity, thereby benefiting from the clause but without having to pay compensation, and that employers may reconsider their use of non-compete clauses if agreement with the employee is required to waive them.

Those who were of the view that any waiver should be a decision for the employer only stressed the importance for employers to have the flexibility to assess whether the clause is still necessary to protect a legitimate interest, and that without that flexibility there is the risk that an employee refuses to agree to waive the non-compete clause in order to receive financial benefit, even where the employer decides the clause is no longer necessary to protect a legitimate interest. Others also noted that there is less detriment to the employee where an employer waives a non-compete clause, as they can then find other work without constraint.

To disincentivise employers from inserting non-compete clauses and then unilaterally removing them at the end of the employment relationship, the consultation considered the option of requiring the employer to pay compensation for some or all of the period of the non-compete clause unless a defined period of time has elapsed between the waiving of the clause and the end of the employment relationship. This approach was supported by 41% of respondents while 40% were opposed. Those who were opposed to the approach cited its complexity and the associated risk of increased litigation as reasons for their opposition. Others noted that the ex-employee could receive a windfall if they went to work for an employer not in competition, and that some employees may perceive the waiver as an early indication of intention on behalf of the employer to terminate the employment.

When considering what the time period should be for when the employer must waive the restriction before the termination of employment, the consultation presented four options, 3 months, 6 months 12 months and 'Other'. The most common response to this question was 'Other' with 38 respondents selecting this option. Of those who selected 'Other' several respondents suggested linking it to when notice is given while others suggested that it should be commensurate with the length of the restriction. Of the three periods presented, 6 months was the most favoured option with 17 respondents, while 12 respondents favoured 3 months, and 10 respondents opted for 12 months. 27 respondents chose not to answer this question.

## **Government Response**

The Government does not intend to change the existing legal position that employers can unilaterally waive a non-compete clause.

Whether a non-compete clause is necessary for a particular employee to protect a legitimate business interest is unlikely to be a static question and will change and evolve according to the nature of the role that individual carries out. As part of best practice, employers should regularly review their use of non-compete clauses and assess whether they are still necessary to protect a legitimate business interest. It is therefore important for employers to have the flexibility to remove a non-compete clause where they conclude that this it is no longer the case for the individual. Additionally, there is less detriment to the worker where an employer waives a non-compete clause, as they can then find other work without constraint, which supports the objectives of proposed reform to non-compete clauses.

## **Questions 11-17**

Questions 11-17 were specifically for employers to respond to as we wanted to hear; how, and to what extent, they use non-compete clauses, whether they already provide compensation for such clauses, how they might choose to respond to the introduction of a requirement for compensation, and how they thought a requirement for compensation might impact compliance with the clauses.

When looking at the use of non-compete clauses in contracts of employment, the results from the consultation demonstrated that a significant majority of the employers who responded use non-compete clauses or have used non-compete clauses in the past. Of the employers who responded to the consultation, 63% used non-compete clauses and 12% had used non-compete clauses in the past. Only 25% of those who responded did not use non-compete clauses. Use of non-compete clauses in limb(b) workers' contracts was lower amongst employers responding to the consultation than in contracts for employees. 71% of employers who responded did not use non-compete clauses in limb(b) workers' contracts. However, 23% of respondents used non-compete clauses in limb(b) workers' contracts, while 6% had used non-compete clauses in limb(b) workers' contracts in the past.

The consultation also sought views on whether employers would continue to use non-compete clauses if they were required to provide compensation and a majority (56%) said that they would continue to them while 44% said that they would not. For those who said they would continue to use them, a significant number said that they would continue to use them for senior personnel and client/customer facing roles. Many respondents also cited that they would expect to see a reduction in the use of non-compete clauses given the associated cost but that they would continue to be used for senior personnel.

When asked whether other restrictive covenants could be relied upon to protect their business interests, 57% of the employers who responded said that they would not, with some noting the limitations of these protections. However, the consultation results showed that many employers would choose to respond to a requirement for mandatory compensation for non-compete clauses by increasing their use of other restrictive covenants with 51% of employers who responded saying that this is how they would respond. The most frequently cited alternative restrictive covenants were non-solicitation clauses, non-dealing clauses and non-poaching clauses.

The responses to the consultation showed that it is not common practice for employers to provide compensation for non-compete clauses. Only 3 respondents said that they pay for part of the duration of the non-compete clause and only 1 respondent said that they paid compensation/salary to employees for all the duration of the non-compete clause. A number of respondents noted that it is very rare for compensation to be provided for non-compete clauses in the UK where there is no requirement to do so. Several employers operating across different jurisdictions said that they do not provide compensation in the UK, but do so in other countries where they operate and where this is a requirement to do so. Others noted that they use gardening leave to offset some or part of the non-compete period during which the employee receives remuneration.

There was a consensus amongst a majority of employers (76%) who responded to the consultation that they expected employees to be more likely to comply with the terms of a non-compete clause if mandatory compensation was introduced. When asked for other suggestions for increasing compliance, employers suggested stricter and more publicised repercussions for breaches of non-compete clauses, fines and penalties for non-compliance and swift action from the Courts in cases of non-compliance.

## **Government Response**

The Government has decided that there is a case for intervention, despite ruling out the proposal to make non-compete clauses enforceable only when the employer provides compensation during the term of the clause. From the responses mentioning limb (b) workers, the Government has decided to include workers' contracts in the scope of the reforms.

Under current common law, there are very few constraints on the use of non-compete clauses in employment contracts and our estimates suggest that they are widely used across the labour market.

Although most of the existing case law dealing with restraint of trade clauses relates to employees, as opposed to the wider notion of “workers”, the consultation and our further research surveys have shown that some restraint of trades exist in workers’ contracts as well as in contracts of employment (ie. employees’ contracts). While restrictive covenants in workers’ contracts are unlikely to be enforceable, an employer may still seek to include restrictive covenants in a worker’s contract to have a deterrent effect. The Government therefore intends to apply reforms to non-compete clauses to workers and employees equally.



## 2. Complementary measures

*The consultation sought views on additional measures including options to enhance transparency where non-compete clauses are used and placing statutory limits on the length of non-compete clauses.*

### Questions 18-21

Questions 18-21 sought views on options to enhance transparency where non-compete clauses are used, for example, by requiring employers to disclose the exact terms of the non-compete agreement to the employee in writing before they enter into the employment relationship, and whether respondents who had been subject to a non-compete clause in the past had been aware of it/if the such a clause had prevented them from taking up new employment or from starting their own business.

Of those who responded to the consultation, 67% supported the proposal to improve transparency by requiring employers to disclose the exact terms of the non-compete agreement in writing before they enter into the employment relationship while 15% of respondents did not. Those who did not support the approach cited that it would add a layer of red tape for employers and could add complications where employees are promoted to more senior positions within the organisation. Others thought that the proposal would have little impact as the imbalance in the bargaining relationship means that the employee is likely to sign in any case. Some respondents noted that for it to be enforceable, a non-compete clause should already be clearly set out in writing, usually in an employment contract.

When asked whether they had been subject to a non-compete clause, 49% of respondents to the consultation said that they had been subject to a non-compete clause as an employee while 4% of respondents said that they had been subject to a non-compete clause as a limb(b) worker. Of those respondents who had been subject to a non-compete clauses as either an employee or as a limb(b) worker, 79% were aware of the clause before they accepted the offer of employment while 21% were not. Many respondents who were aware of the clause cited the lack of bargaining power when an offer of employment includes a non-compete clause and that they had little choice but to sign it with the offer of employment contingent on agreeing to the terms of the non-compete clause.

Additionally, of those respondents who had been subject to a non-compete clauses as either an employee or as a limb(b) worker, 58% stated that it had prevented them from taking up new employment and/or prevented them from starting their own business.

Consultation respondents provided a number of suggestions to enhance transparency around non-compete clauses including:

- A requirement for the employee to obtain legal advice from a third party on the non-compete clauses. Some suggested this should be paid for by the employer.
- A requirement to make clear on job adverts that the role is subject to signing a non-compete clause.
- A condition that non-compete clauses only become valid after an employee has worked at the organisation for 6 months or longer.
- The creation of a public register of companies who use non-compete clauses.
- A requirement for a disclaimer to be provided by the employer in simple language setting out the consequences of signing the non-compete.
- A requirement for non-compete clauses to be signed separately and individually and not signed as part of the employment contract.
- Guidance and a framework from ACAS for employers and employees.
- A requirement for employers to review non-compete clauses on an annual basis.
- A requirement for non-compete clauses to be included in the written statement of employment particulars.
- Provision for a cooling off period after the signing of a non-compete clause.

## **Government Response**

The Government will enhance transparency by producing guidance on non-compete clauses.

The consultation demonstrated that there was appetite from both employers and employees to enhance transparency around non-compete clauses. 21% of respondents to the consultation stated that they had not been aware of the non-compete clause in their contract before entering the employment relationship. More can be done to raise awareness about non-compete clauses and the Government will continue to consider measures to achieve this. However, given that for a non-compete clause to be enforceable, it should already be clearly set out in writing, usually in an employment contract, the Government is not persuaded that legislating to require employers to disclose the terms of the non-compete agreement again in a separate form would contribute to the policy objectives while adding a further burden on businesses and increased costs.

Several respondents to the consultation also raised a need for guidance on non-compete clauses to support both employers and employees which is something that the Government agrees would be an effective way of raising awareness about non-compete clauses and law underpinning them.

## **Questions 22-24**

Questions 22-24 sought views on the introduction of a statutory limit on the period of non-compete clauses and options for what the maximum period could be. A majority of respondents to the consultation (60%) supported the inclusion of a maximum limit on the period of non-compete clauses while 27% would not support this approach. Some of those in favour of a maximum limit on the period of non-compete clauses noted that it would provide clarity and certainty for all parties while some of those against the inclusion of a maximum limit on the period of non-compete clauses noted that existing law provides necessary flexibility where exceptional cases may require a longer period and that employers might extend the periods to the maximum permissible in response.

Of the three periods presented in the consultation for the maximum limit, 12 months was the most favoured option with 22 respondents, while 21 respondents favoured 6 months, and 18 respondents opted for 3 months. 24 respondents selected 'Other' of which several wanted the maximum limit to be less than 3 months while a smaller number of respondents wanted to see a longer maximum limit of between 12-24 months. Some respondents also suggested linking it to the period the employee has been working with the employer up to a limit, while others noted that they did not agree with principle of a maximum limit on the period of non-compete clauses.

The most frequently cited concern was that, were the Government to introduce a statutory limit on the period of non-compete clauses, employers might use the statutory limit as a default leading to longer periods than otherwise may have been the case. Several respondents also noted that employers may be unable to adequately protect their commercially sensitive trade secrets and other legitimate business interests as a maximum limit would not allow for exceptional cases in the way that existing common law does.

## **Government Response**

The Government will introduce a statutory limit on the length of non-compete clauses of 3 months.

By limiting the length of non-compete clauses to 3 months, the Government is taking bold action to boost flexibility and dynamism in the labour market, and to bring down the cost of living by unleashing greater competition and innovation. It will make it easier for workers, including those who are highly skilled, to be able to move to a competitor or to start a competing business.

A majority of respondents to the consultation (60%) supported the inclusion of a maximum limit on the period of non-compete clauses with many citing the potential benefits of greater clarity and certainty for all parties. Our research has demonstrated that the average or most common duration of a worker's non-compete clause period is 6 months (which was the case for around half of businesses that used non-compete clauses) followed by 12 months (which was the case for a third of businesses that used non-compete clauses). Overall, the responses indicated that non-compete clauses could range from a minimum of 1 month to a maximum of 24 months. A statutory limit of 3 months would, therefore, reduce the average length of non-compete clauses for the majority of workers while maintaining flexibility for business to use them, where they have a legitimate reason to do so. It would have a significant impact in bringing down the length of non-compete clauses, making it easier for individuals to start new businesses, find new work and drive the economic recovery. It will also make it easier for businesses to fill vacancies and attract better candidates.

Evidence shows job switching is associated with higher wage growth and can help improve productivity. The reallocation of workers is particularly important when the economy is adjusting to a shock, allowing them to move to more productive businesses. The flow of workers across the labour market can enable the expansion of high-productivity, innovative businesses, driving up competition and economic growth. While the UK is renowned for having one of the most flexible labour markets among advanced economies, there has been a long-term decline in the rate at which workers move jobs over the past few decades. If we are to see the growth in productivity, competition and innovation required to drive down the cost of living then this trend needs to be reversed. By placing a limit on the length of non-compete clauses we are taking bold steps to boost labour market flexibility, to reduce barriers to recruitment and to ensure the high productivity, innovative businesses of the future can access the talent they need to succeed.

During the consultation and subsequent research surveys, we heard from individuals who suffered significant financial detriment from having to spend an extended period of time out of the labour market, often as long as 6-12 months, unable to work in their area of expertise and unable to afford the financial burden of challenging a non-compete clause in the courts. This is detrimental to the person affected, who may struggle to find a job and meet their outgoings and could see their skills atrophy over time, but it is also detrimental to the wider economy. While the evidence showed that the use of non-compete clauses is most common for higher paid occupational groups it also demonstrated that non-compete clauses are used extensively in middle income positions and are also used in low paid work. Our reforms will make sure that workers do not find themselves unable to work in their area of expertise for longer than 3 months as a result of a non-compete clause. They will make it easier for workers to be able to move to a competitor or to start a competing business with the potential benefits of higher wage growth and better wellbeing.

The Government will apply the statutory limit of 3 months to non-compete clauses only, and in contracts of employment and limb(b) worker contracts only. When compared to other restrictive covenants, non-compete clauses represent one of the strongest restraints of trade and can have a significant impact in preventing individuals from finding new work and/or starting new businesses in competition. While other restrictive covenants, for example, non-solicitation or non-dealing clauses do place limits on the behaviours of former employees they do not have such a significant impact on their ability to earn a living in their chosen profession and compliance with other restrictive covenants is not likely to result in the same degree of financial disadvantage for employees. When a non-compete does not exceed the 3 months statutory maximum, it is the Government's intention that common law principles should continue to apply. The starting point being that restrictive covenants that restrain trade are unenforceable unless they are shown to be reasonable.

Non-compete clauses are also used in wider workplace contracts such as partnership agreements, Limited Liability Partnership (LLP) agreements, and shareholder agreements. However, the difficulties in defining 'wider workplace contracts', could lead to increased litigation as to when the reforms do/do not apply. There are also fundamental differences between employment contracts and other contractual agreements such as partnership agreements, LLP agreements, and shareholder agreements, particularly with regards to the balance of bargaining power. We do not therefore propose extending the reforms to wider workplace contracts. The consultation did ask questions about wider workplace contracts but was focused on the use of non-compete clauses in contracts of employment and did not consider application to the self-employed.

By introducing a statutory limit of 3 months, the Government is leading the world in cracking down on the use of non-compete clauses. In Germany, non-compete clauses are enforceable up to 24 months, in Italy, they can be as long as 3-5 years, and while in the US several states have been taking action to restrict the use of non-compete clauses, there has been no restrictions introduced at the federal level. This Government is taking the bold actions needed to deliver our commitment to build a high skilled, high productivity, high wage economy. Our reforms to non-compete clauses will bring benefits at the individual level, by making it easier for people to start new businesses and find new work if they are subject to a non-compete clause, and wider economic benefits through greater competition and innovation.

### 3. Option 2: Ban Non-Compete Clauses

*The consultation sought views on 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.*

#### Questions 25-37

Questions 25-27 sought views on the benefits and risks of a possible ban on non-compete clauses, and whether respondents would be supportive of a ban on non-compete clauses.

When asked about the benefits of a ban on non-compete clauses, respondents noted the potential benefits for individuals such as; greater freedom to take up new employment and start businesses, better career progression, and the potential for higher wages. Others cited the benefits for both workers and employers, such as greater clarity for both parties, fewer legal disputes and litigation, and fewer barriers to recruitment. Some respondents also noted the potential overarching benefits for the labour market and the economy including greater competition and innovation, more labour mobility, and the opportunity to further foster the UK's start-up culture.

Turning to the potential risks and unintended consequences of a ban on non-compete clauses respondents thought that a ban could lead employers to protect their interests in other ways, for example, using other restrictive covenants, longer notice periods and gardening leave, confidentiality clauses and indirect restraints such as deferred benefits. Respondents also highlighted concerns around employers tightening controls on information sharing within the organisation and whether a ban could lead multinational organisations to move certain jobs/functions out of the UK to jurisdictions where non-compete clauses can be enforced. It was also noted that a ban could lead to a loss of investor confidence, particularly in start-ups and lower appetite for training employees. The point was also raised that a ban would not necessarily lead to reduced litigation but may shift litigation to other areas such as intellectual property and trade secrets as businesses seek to protect their interests. There were also concerns that a ban could lead to business failures where companies are no longer competitive and that if a ban was limited to employment contracts only, it could lead to possible restructuring.

When asked whether they would support a ban on non-compete clauses in contracts of employment, 53% of respondents said that they would not support a ban, while 36% said that they did support a ban.

Questions 28-30 sought views on the scope of a ban on non-compete clauses, and whether there were circumstances where non-compete clauses should be enforceable were the Government to introduce a ban. Respondents to the consultation were broadly split on whether a ban on non-compete clauses should extend to wider workplace contracts with 43% in favour and 42% against.

Those in favour of extending a ban to wider workplace contracts stressed the importance of similar treatment across different contractual arrangements while respondents who were against noted that there was a fundamental difference in bargaining power between parties negotiating an employment contract and parties negotiating a commercial relationship, for example, members of a Limited Liability Partnership.

When asked whether a ban should apply to non-compete clauses only or whether it should also apply to other restrictive covenants, 43% of respondents wanted to see it limited to non-compete clauses only while 33% thought that it should also apply to other restrictive covenants. Of those who thought that a ban should also apply to other restrictive covenants, the most frequently cited covenants were non-solicitation clauses and non-dealing clauses. Non-poaching clauses were also referenced by some respondents, as were share schemes and shareholder agreements. There was also an equal split between respondents to the consultation who thought that there should be circumstances where a non-compete clause should be enforceable if the Government introduced a ban (40%), and those who thought that there should be no circumstances where they are enforceable (40%). For those who thought that there should be circumstances where a non-compete clause could be enforceable, some of the circumstances cited included, for directors and executive board members, for small businesses, upon sale of a business, where dismissal is for gross misconduct, where the employer pays for legal advice regarding the clause and where the employee refuses to adhere to their notice period.

Questions 31-33 sought views on the relationship between non-compete clauses and competition and innovation and whether there are options for reform to non-compete clauses short of a ban that the Government could consider to promote competition and innovation. Respondents to the consultation provided a number of suggestions for reform to non-compete clauses including stricter rules and limits on the area of competition in terms of market, products and geography; allowing employees to easily and quickly challenge restrictions without the risk of high legal costs; enforcing non-compete clauses through the Employment Tribunals rather than the High Courts; and introducing a requirement for the employee to take independent legal advice before signing up to a non-compete clause. Several respondents also raised the proposal to place restrictions on the use of non-compete clauses for workers who earn below a certain salary threshold.

Of the 23% of respondents who said that they were aware of instances where a non-compete clause has restricted the spread of innovation/innovative ideas, some described instances which had prevented themselves/people they knew from developing new and innovative ideas and starting their own businesses. Others described the role of non-compete clauses in restricting individuals from moving from established businesses to new innovative start-ups and the effect of non-compete clauses in encouraging anti-competitive behaviour to the detriment of innovation.

Respondents also shared literature, research, and evidence that they were aware of that explores the impact of non-compete clauses on competition, innovation, or economic growth. This can be found at question 33 of the question-by-question analysis in Annex A.

Questions 34-37 were specifically for employers and sought views on the impacts of a ban on non-compete clauses on businesses and organisations, whether they felt that they would still be able to protect their business interests and what their response might be.

Of the employers who responded to the consultation, 54% thought that they would be able to protect their business interests through other means if the Government introduced a ban on non-compete clauses, while 46% thought that they would not. Several respondents noted the limits of other protections such as intellectual property law and confidentiality clauses and the difficulty in enforcing against breaches, the costs involved in doing so, and the lack of protection they provide regarding relationships with clients, suppliers, and other key business contacts.

43% of employers who responded to the consultation thought that a ban on non-compete clauses in contracts of employment could benefit their business citing benefits such as quicker and easier recruitment, greater access to talented employees, happier and more productive employees, a levelling of the playing field for employers who do not wish to use non-compete clauses and a focus on positive incentives for retention rather than punitive measures. However, 57% of employers who responded to the consultation did not think their business or organisation would benefit from a ban.

61% of employers responding to the consultation thought that a ban on non-compete clauses in contracts of employment would impact their business/organisation citing impacts such as a tightening of sharing confidential information, loss of staff and clients, disruption to the stability of the workforce, a more challenging investment climate, lower recruitment levels in future and potential business failure.

The ways in which employers might respond to a ban on non-compete clauses that were most frequently cited included strengthening their use of other restrictive covenants, confidentiality clauses and intellectual property protections; increasing their use of gardening leave, removing deferred compensation and benefits from employees who leave and join a competitor firm; moving certain roles/functions abroad; tightening information sharing within the business/organisation; improving working conditions and pay; and providing positive incentives to increase retention.



## Government Response

The Government will not proceed with option 2: a ban on the use of post-termination, non-compete clauses in contracts of employment.

The consultation exercise has drawn out, and built on, the themes we see in the research and literature on the potential benefits of a ban on non-compete clauses such as greater freedom to take up new employment and start businesses, better career progression, the potential for higher wages and greater clarity for both parties. However, it has also highlighted the potential risks and unintended consequences of a ban, including employers tightening controls on information sharing within the organisation, a loss of investor confidence, particularly in start-ups and lower appetite for training employees.

On balance, there does not appear to be sufficient evidence that the potential benefits of a ban in Great Britain would outweigh the risks and the potential for unintended consequences. A ban on non-compete clauses could have a positive effect on competition and innovation by 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 competition and innovation. However, the consultation responses also demonstrated that many employers would choose to respond to a ban by strengthening their use of other restrictive covenants, confidentiality clauses and intellectual property protections; increasing their use of gardening leave, removing deferred compensation and benefits from employees who leave and join a competitor firm; and tightening information sharing within the business/organisation. While we recognise the potential for these behavioural responses to occur in response to all policy options that seek to restrict the use of non-compete clauses, we expect the scale of the response to be more significant following a ban. Employers may also seek to use other mechanisms to protect their business interests in response to a ban including reducing investment in training and upskilling workers. Were these behavioural responses replicated across a large population of employers there is the risk that a ban may not enhance competition and innovation and could lead to economic costs that outweigh the benefits. Employees would not benefit either if were employers to respond to a ban in this way in terms of their ability to move to a competitor or to establish a competing business. However, they may benefit if employers were to move to positive incentives to retain staff (e.g. increased pay, bonuses, greater flexibility etc) or where employers use gardening leave as an alternative to non-compete clauses (where they would receive pay).

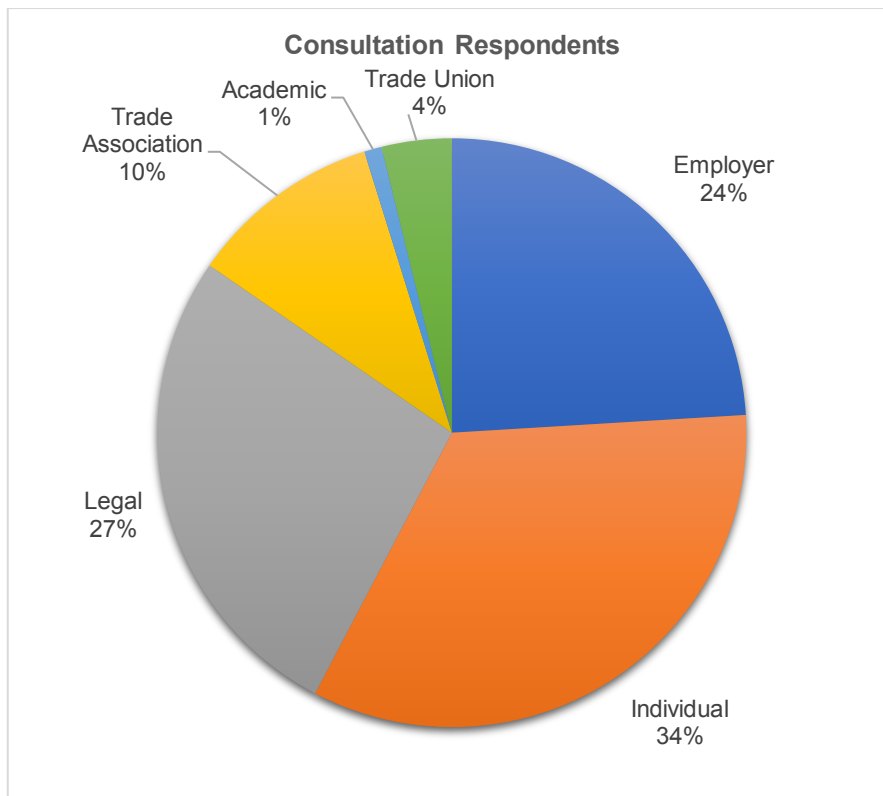
A further argument the consultation presented as a benefit of a ban on non-compete clauses was the potential for greater certainty for all parties. Both employers and employees would know where they stand with regards to use of non-compete clauses. However, during the consultation we heard from a wide range of respondents about the risk of disputes and litigation shifting to other restrictive covenants and other areas of law such as intellectual property as businesses and organisations seek to protect their interests. As with the arguments above, there was not clear evidence that the potential benefits of a ban in Great Britain, would outweigh the risks.

Neither is there a consensus in the literature and research that banning non-competes would help achieve the Government's objectives with regards to competition and innovation. While some argue that non-competes tend to reduce innovation, other studies in the US have shown that, in states where non-competes are enforced, businesses in those states are better able to take on risky research and development tasks, and commercialise their innovations, which can lead to better longer-term success. Similarly, there are studies which indicate that businesses may be incentivised to invest more in their employees, particularly in relation to training where there is greater enforcement of non-compete clauses.

An outright ban on non-compete clauses would remove the freedom for employers and workers to negotiate and agree non-compete clauses. Having considered all the available evidence and research and literature, our view is that at this stage there is not a strong enough case to justify such a strong Government intervention. It is not clear that the potential benefits of a ban in Great Britain would outweigh the risks and the potential for unintended consequences.

## Annex A. Question-by-Question Analysis of Consultation Responses

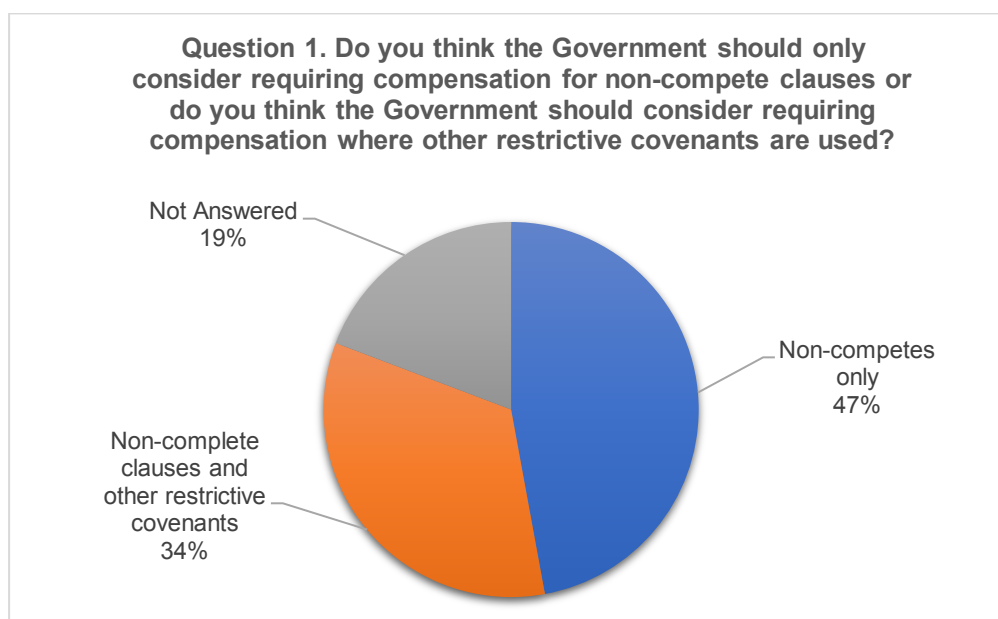
In total there were 104 formal responses to the consultation. The largest number of formal responses to the consultation (34%) came from individuals, with the second largest group (27%) being legal organisations and professionals.



## Option 1: Mandatory Compensation

**Question 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?**

47% of respondents were of the view that the Government should only consider requiring compensation for non-compete clauses while 34% thought that the requirement for compensation should apply to non-compete clauses and other restrictive covenants. 19% of respondents did not give a response to this question with a common reason for not responding being that they disagreed with the principle of compensation for non-compete clauses.



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

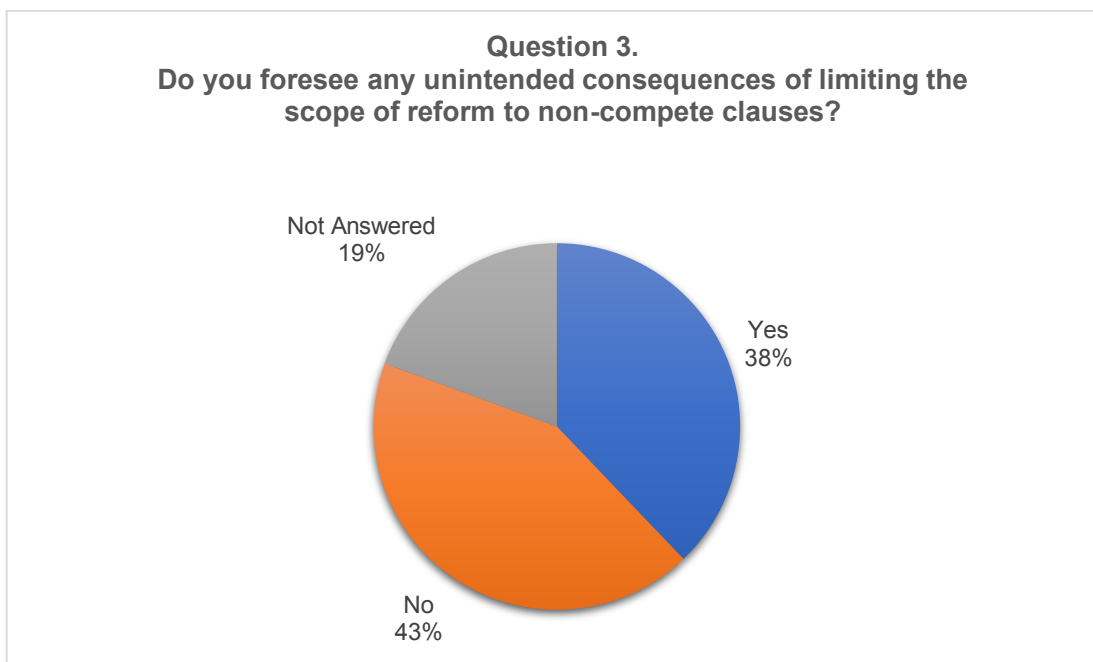
The most cited restrictive covenants in response to this question were non-dealing clauses (cited in 5 responses) and non-solicitation clauses (cited in 4 responses). Common reasons respondents provided for wanting a requirement for compensation to extend to these clauses were the impact they can have on competition, labour mobility, wages, quality of service, and on the ability for individuals to making a living. Non-poaching clauses were also noted by several respondents as were invention clauses and clawback provisions in employee stock ownership plans (ESOP).

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

Of those who responded to the consultation, 43% did not foresee any unintended consequences from limiting the scope of reform to non-compete clauses, 38% did foresee unintended consequences while 19% chose not to answer the question.

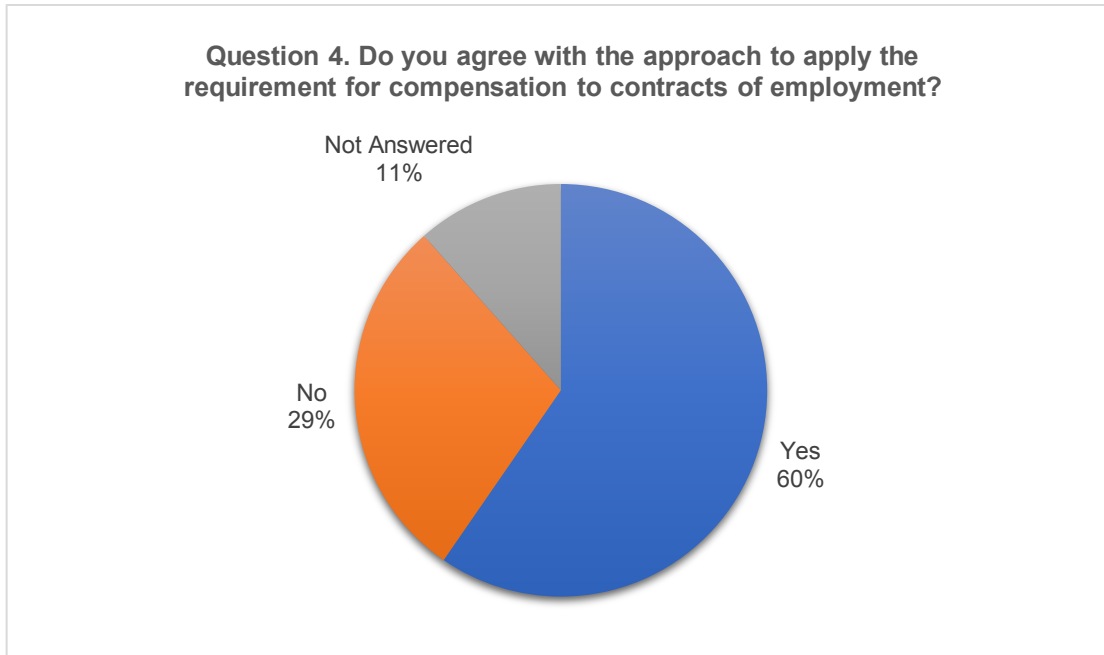
For those who did foresee unintended consequences of limiting the scope of reform to non-compete clauses, those commonly referred to included:

- Employers increasing their use of other restrictive covenants, for example non-solicitation clauses and non-dealing clauses.
- Greater use of gardening leave and longer notice periods.
- Greater use of indirect restraints such as shareholders' agreements, options schemes, and long-term incentive plans.
- A potential shift to different contractual arrangements such as limited liability partnerships (LLPs), joint ventures or franchise arrangements.
- A stronger focus on enforcing intellectual property law.



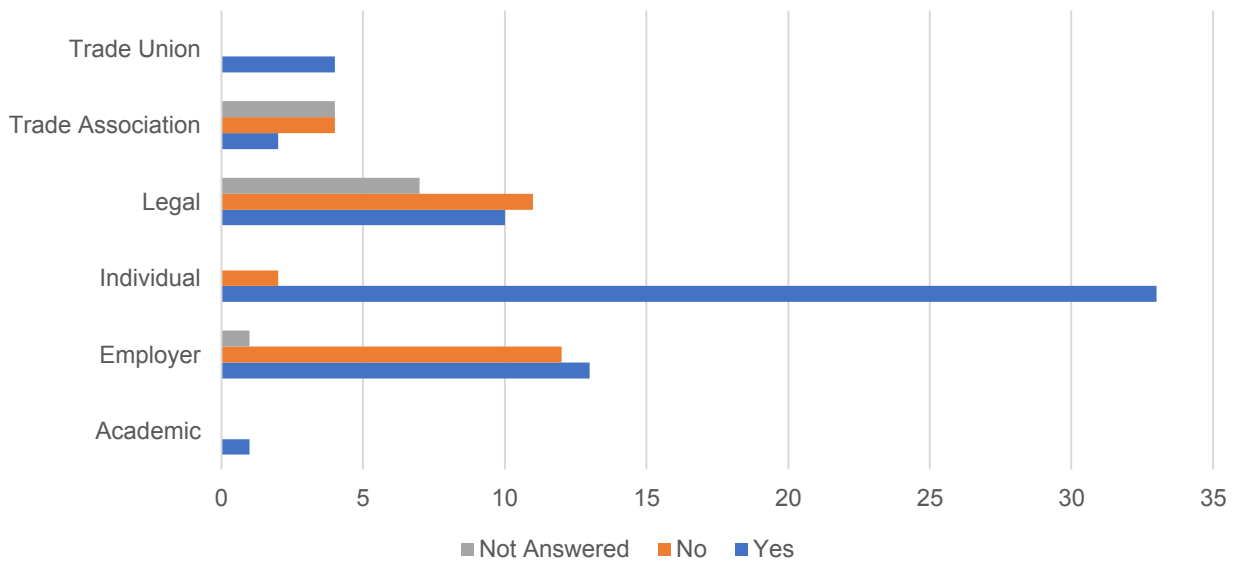
**Question 4. Do you agree with the approach to apply the requirement for compensation to contracts of employment?**

Of those who responded to the consultation, 60% agreed with the approach to apply a requirement for compensation to contracts of employment while 29% did not. 11% of respondents chose not to answer this question.



If we look at how different groups responded to this question, the highest number of respondents who agreed with the approach to apply a requirement for compensation to contracts of employment were those responding as individuals. A majority of employers who responded to the consultation also agreed with the approach to apply a requirement for compensation to contracts of employment, albeit a narrow one. Views from legal organisations and professionals were more varied with a narrow margin between those who agreed with the approach and those who did not.

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

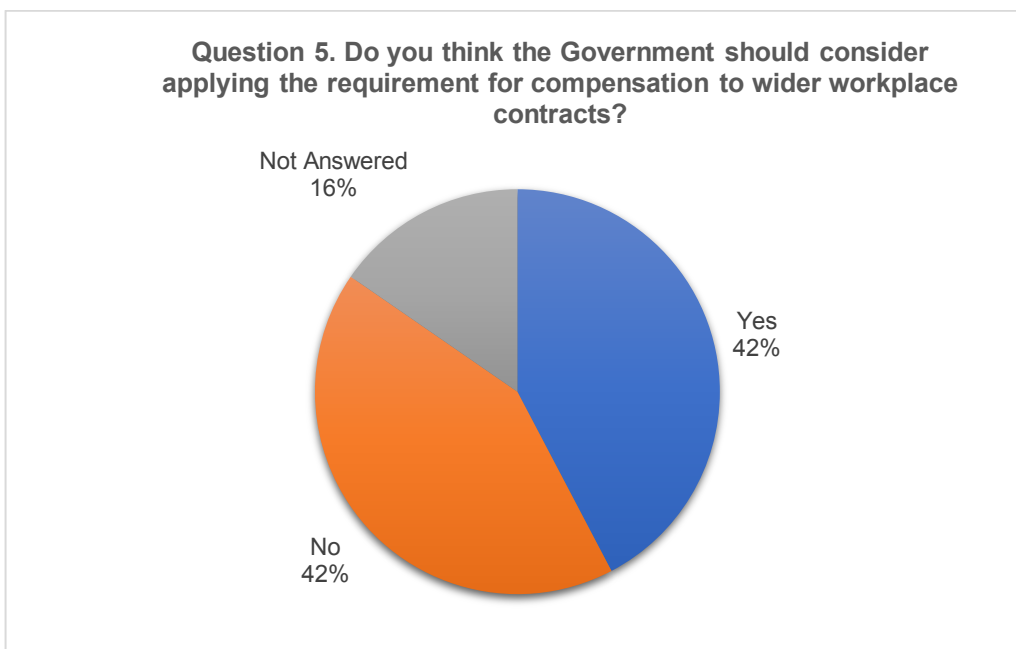


**Question 5. Do you think the Government should consider applying the requirement for compensation to wider workplace contracts?**

Of those who responded to the consultation, 42% thought the Government should consider applying the requirement for compensation to wider workplace contracts while 42% did not think this is something the Government should be considering. 16% chose not to respond to this question.

For those who thought the Government should consider applying the requirement for compensation to wider workplace contracts, respondents noted the risk around differential treatment and a potential shift from employment to other forms of contract.

For those who thought the Government should not apply the requirement for compensation to wider workplace contracts, respondents cited reasons including; the difficulty in defining 'wider workplace contracts', the risk of increased litigation as to when the requirement for compensation does/does not apply, and the fundamental differences between employment contracts and other contractual agreements such as partnership agreements, LLP agreements, and shareholder agreements, particularly with regards to the balance of bargaining power.





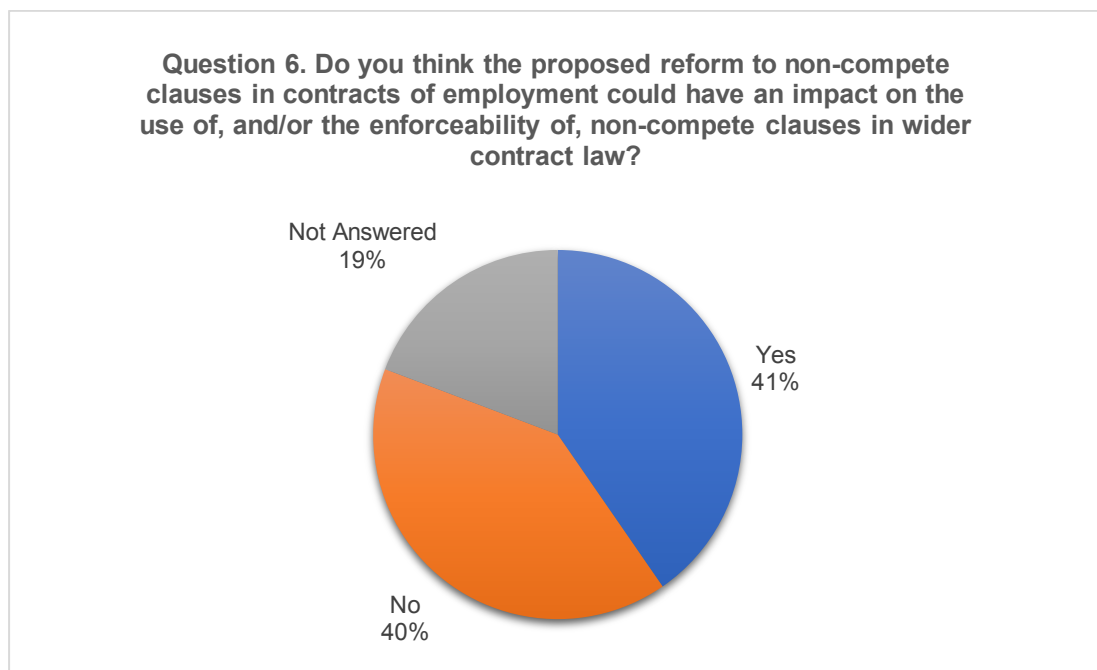
**Question 6. Do you think the proposed reform to non-compete clauses in contracts of employment could have an impact on the use of, and/or the enforceability of, non-compete clauses in wider contract law? If yes, please explain how and why.**

Of those who responded to the consultation, 41% thought that 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, while 40% thought that would not be the case. 19% chose not to answer this question.

54% of legal organisations and professionals who responded to the consultation did not think the reforms would have an impact on the use of, and/or the enforceability of, non-compete clauses in wider contract law while 29% thought they would.

Of those who thought the proposed reform would not impact on the use of, and/or the enforceability of, non-compete clauses in wider contract law, there was a widely held view that if the relevant legislation were carefully drafted, it would be unlikely for there to be any effects on wider contract law. The courts already recognise that the approach to enforcement of non-competes varies with context.

Of those who thought the proposed reform would impact on the use of, and/or the enforceability of, non-compete clauses in wider contract law, a commonly cited reason was that the courts may take a different approach to non-compete clauses in other contractual arrangements in future.

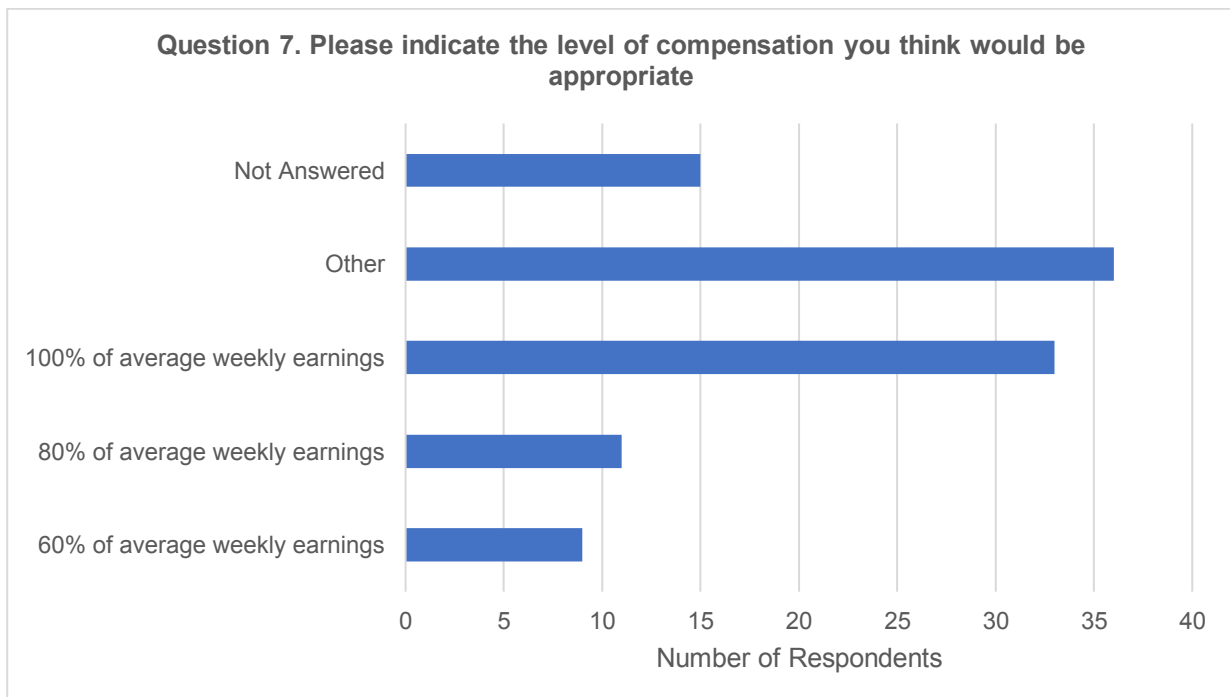


**Question 7. Please indicate the level of compensation you think would be appropriate:**

The most common response to this question was 'Other' with 36 respondents selecting this option. Of those who selected 'Other', a majority were in favour of a lower level than those presented in the consultation with the most favoured choice being 50% of average weekly earnings. Several respondents who selected 'Other' felt that the level of compensation should be agreed between the parties. Only one respondent suggested a higher level than those proposed at 110% of average weekly earnings.

33 respondents thought that 100% of average weekly earnings was the appropriate level of compensation, which was the second most common response after 'Other'. 11 respondents felt that 80% of average weekly earnings was the appropriate level of compensation and 9 respondents thought 60% was the appropriate level. 15 respondents chose not to answer this question.

Several responses to this question also highlighted the trade-offs between using a % of average weekly earnings to determine the level of compensation or a % of base salary.



**Question 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?**

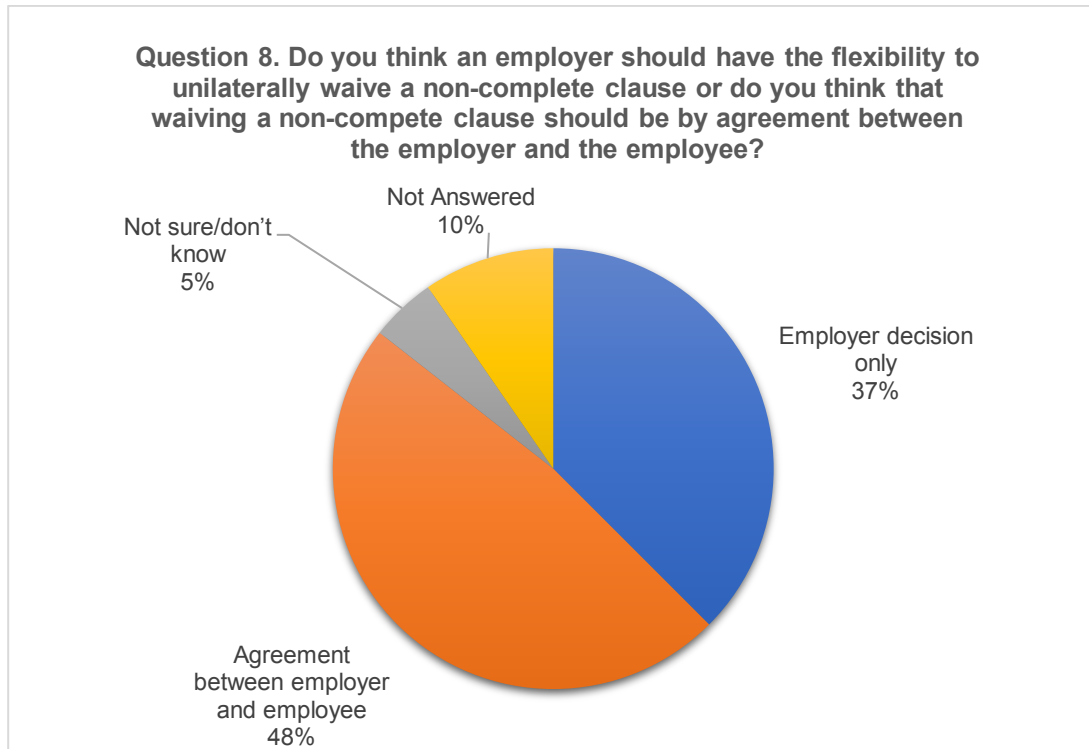
Of those who responded to the consultation, 48% thought that waiving a non-compete clause should be by agreement between the employer and the employee while 37% thought it should be a decision for the employer only. 5% were unsure and 10% chose not to answer this question.

Of those who thought any waiver should be by agreement between the employer and the employee, some of the reasons they provided for taking this position included;

- the risk that an employer could otherwise waive the clause at the latest possible opportunity thereby benefiting from the clause but without having to pay compensation,
- employers may reconsider their use of non-compete clauses if agreement with the employee is required to waive them,
- the principle that changes to employment terms and conditions should be made by agreement.

Of those who thought any waiver should be a decision for the employer only, some of the reasons they provided for taking this position included;

- the employer should have the flexibility to assess whether the clause is still necessary to protect a legitimate interest and waive it accordingly,
- there is less detriment to the employee who can then find other work without constraint,
- the risk that an employee refuses to agree to waive the non-compete clause in order to receive financial benefit, even where the employer decides the clause is no longer necessary to protect a legitimate interest,
- it could pose risks in redundancy and insolvency scenarios where an employer cannot afford to pay compensation and has no intention to enforce the non-compete clause.



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.

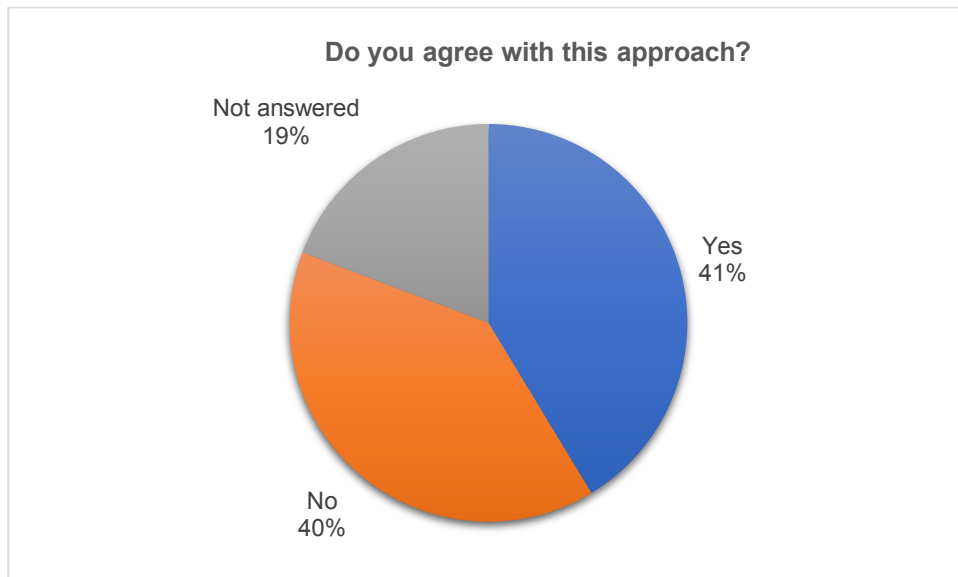
If, on the other hand, the employer waits to give written notice until a month before the end of the employment relationship, the employer then will be required to compensate the employee for 5 months after the employment relationship has ended. The employee would be able to compete immediately after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

### Question 9. Do you agree with this approach?

Of those who responded to the consultation, 41% agreed with the approach outlined above while 40% disagreed with it. 19% of respondents chose not to answer this question.

Of those who disagreed with the approach, some of the reasons they stated for their position included;

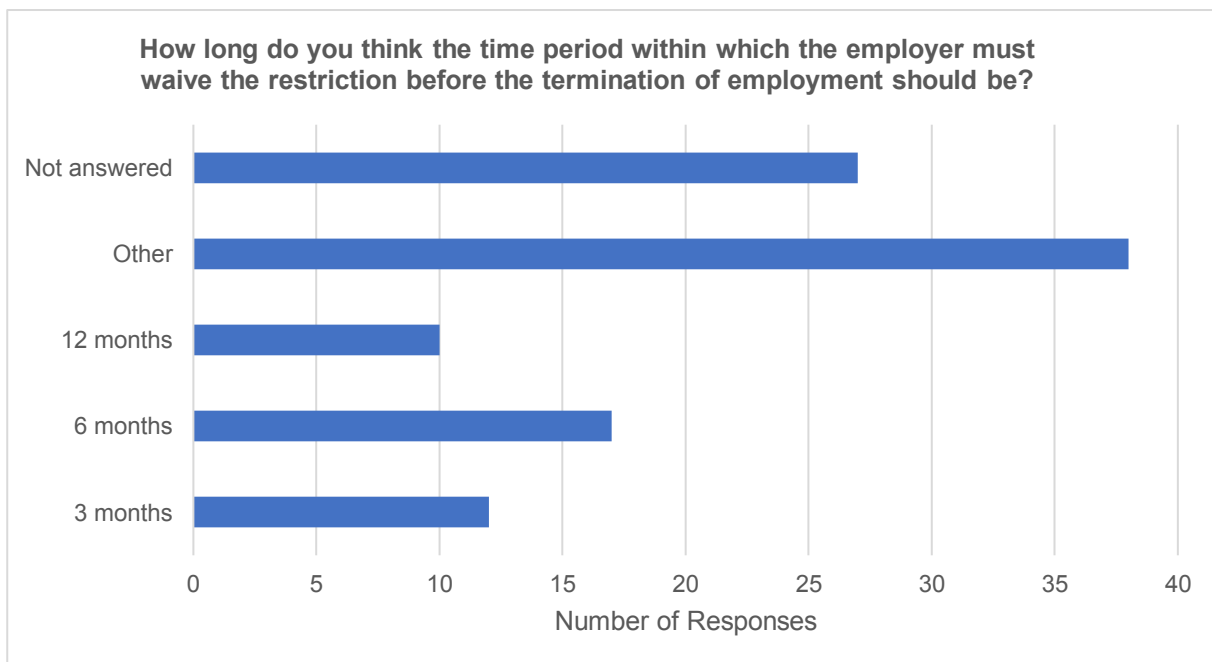
- its complexity,
- risk of increased litigation,
- the ex-employee could receive a windfall if they went to work not in competition,
- some employees may perceive the waiver as an early indication of intention on behalf of the employer to terminate the employment.



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

The most common response to this question was 'Other' with 38 respondents selecting this option. Of those who selected 'Other', several respondents suggested linking it to when notice is given while others suggested that it should be commensurate with the length of the restriction.

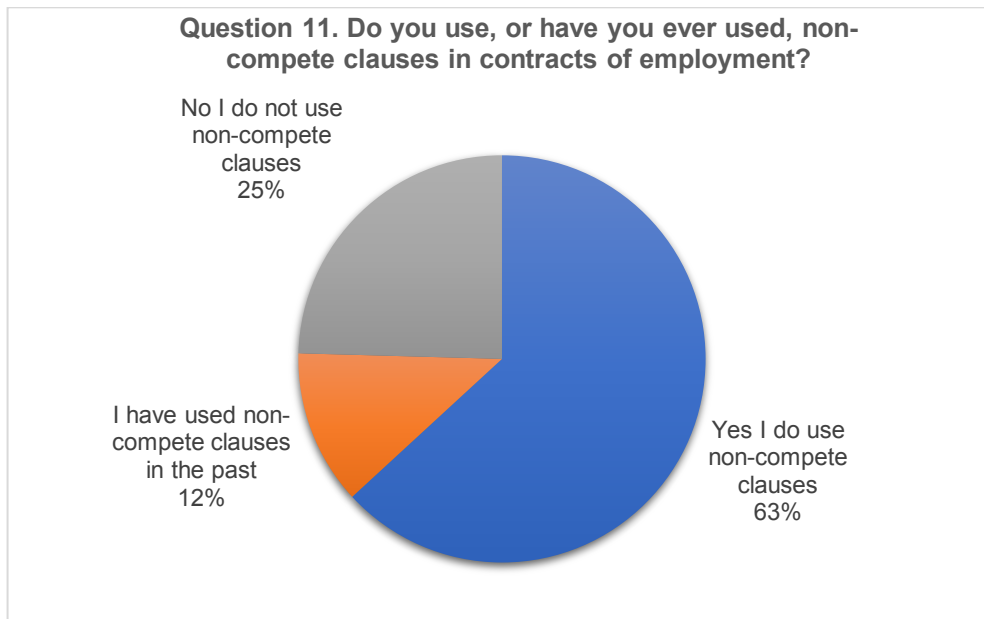
Of the three periods presented, 6 months was the most favoured option with 17 respondents while 12 respondents favoured 3 months and 10 respondents opted for 12 months. 27 respondents chose not to answer this question.



Questions 11-17 were specifically for employers, so the data does not include those who did not respond to these questions to avoid the high number of these responses skewing the data.

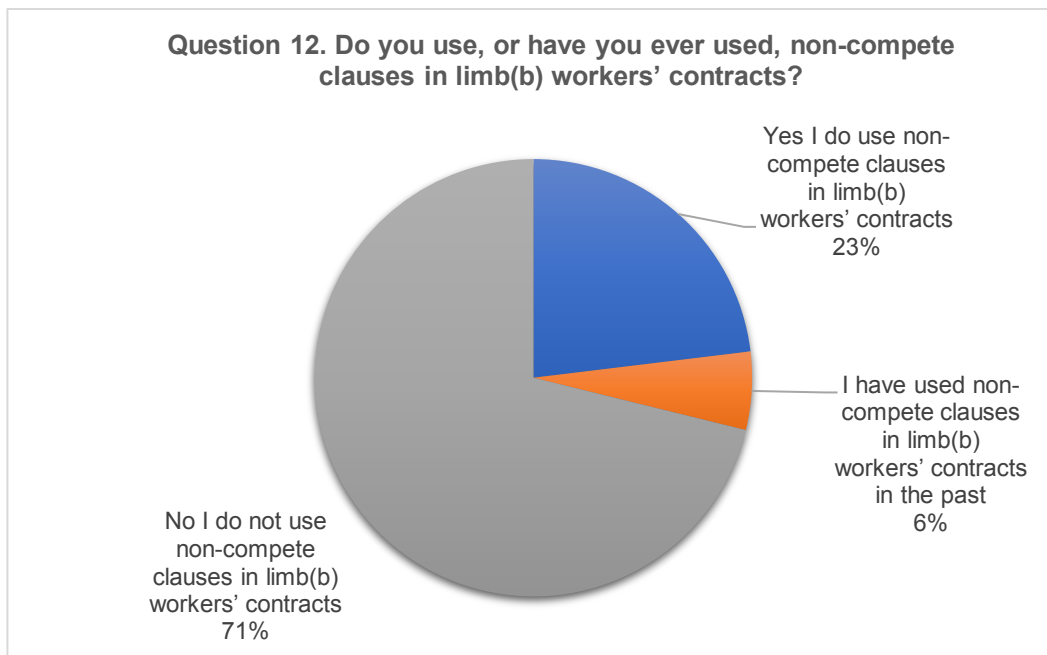
**Question 11. Do you use, or have you ever used, non-compete clauses in contracts of employment?**

Of those who answered this question 63% used non-compete clauses and 12% had used non-compete clauses in the past. 25% of those who answered this question do not use non-compete clauses.



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

Of those who answered this question, 71% do not use non-compete clauses in limb(b) workers' contracts. 23% of respondents used non-compete clauses in limb(b) workers' contracts while 6% had used non-compete clauses in limb(b) workers' contracts in the past.

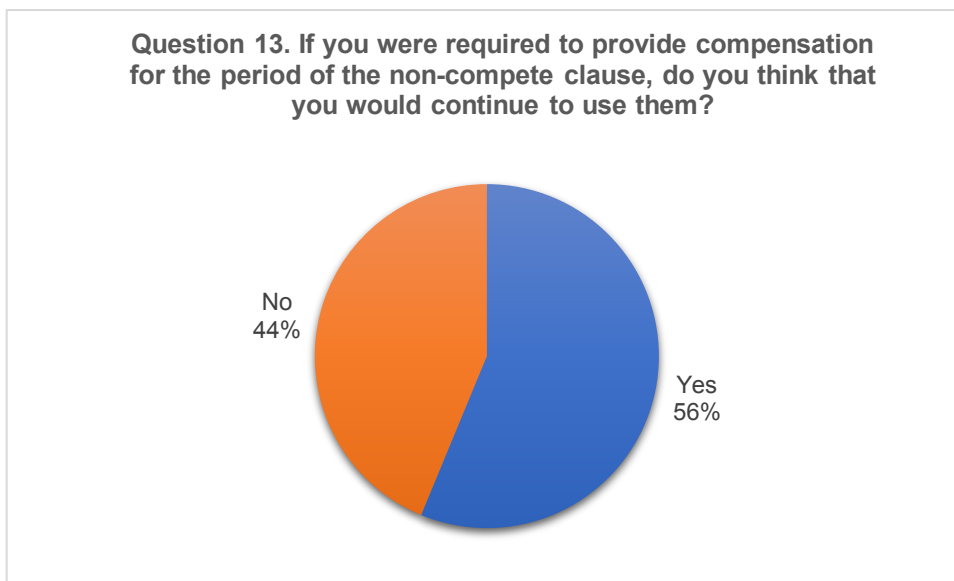




**Question 13. If you were required to provide compensation for the period of the non-compete clause, do you think that you would continue to use them? If yes, what kind of employees/limb(b) workers (high/low paid) would you maintain non-compete clauses in place for?**

Of those who answered this question, 56% said that they would continue to use non-compete clauses if they were required to provide compensation while 44% said that they would no longer use them.

Of those who said they would continue to use them, a significant number said that they would continue to use them for senior personnel and client/customer facing roles.

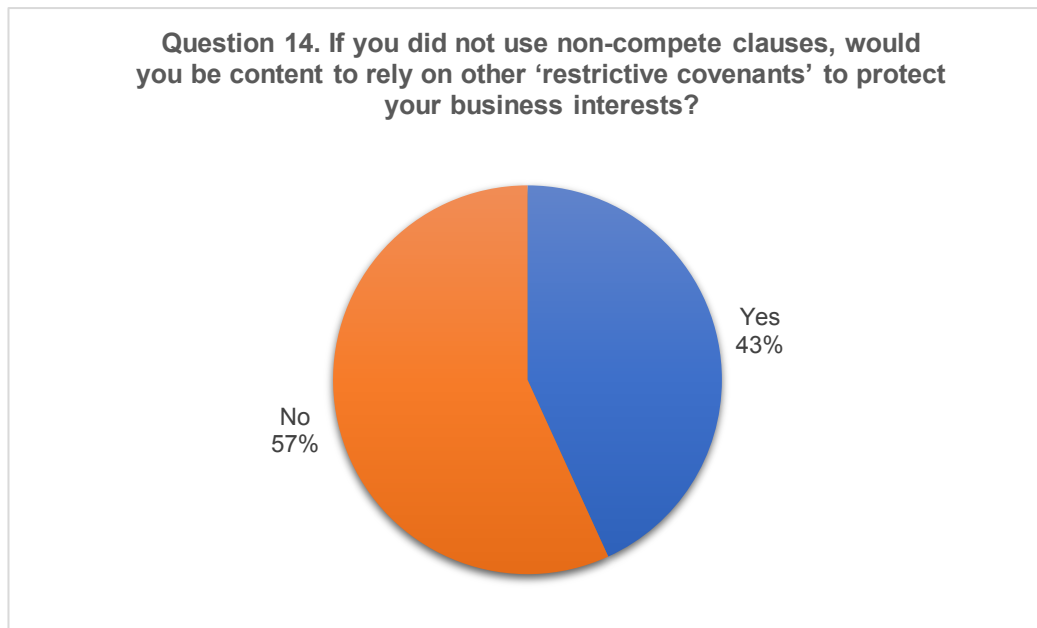


**Question 14. If you did not use non-compete clauses, would you be content to rely on other 'restrictive covenants' to protect your business interests? If yes, do you think there would be any unintended consequences to this?**

Of those who answered this question, 43% said that they would be content to rely on other 'restrictive covenants' to protect their business interests while 57% said that they would not.

Some possible unintended consequences respondents highlighted were;

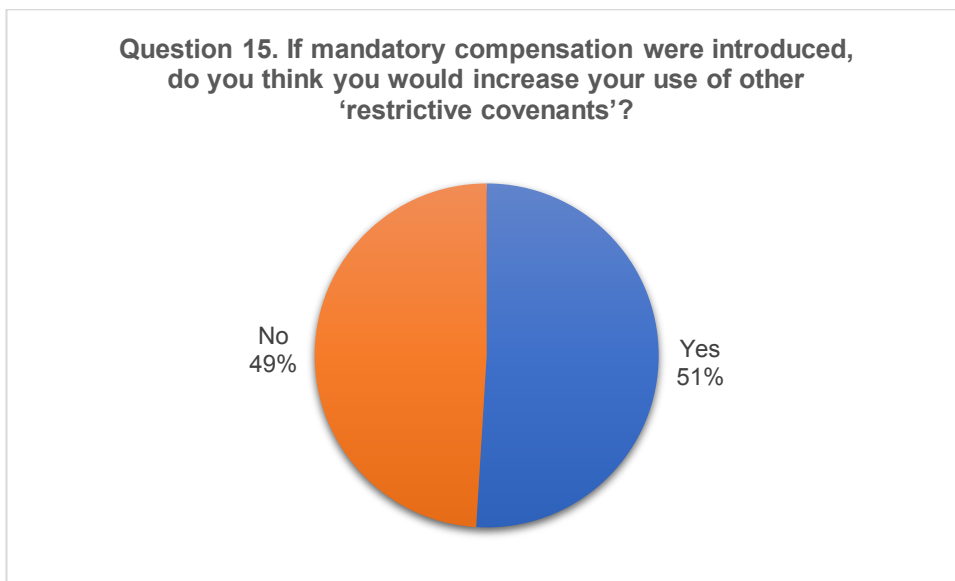
- Strengthening of other restrictive covenants,
- Longer notice periods and increased use of garden leave,
- Increased focus on confidentiality clauses, data protection and intellectual property,
- An increased use of indirect restraints such as deferred equity arrangements.



**Question 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.**

Of those who answered this question, 51% said that they would increase their use of other restrictive covenants while 49% said that they would not.

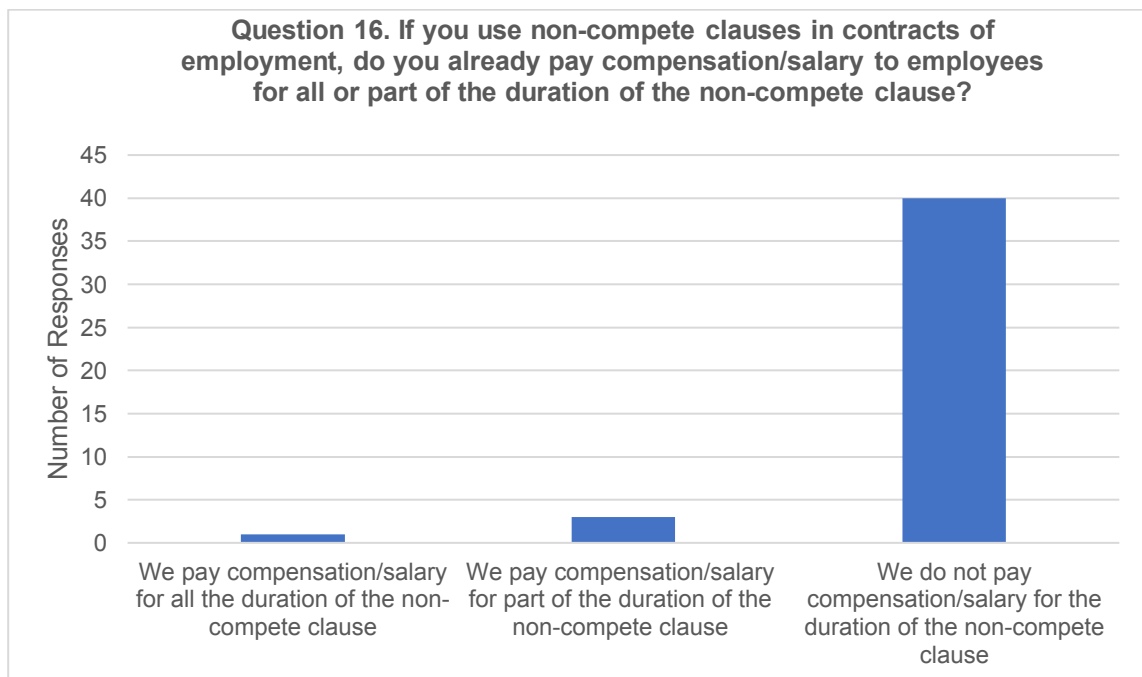
For those who said that they would increase their use of other restrictive covenants, the most frequently cited were non-solicitation clauses, non-dealing clauses and non-poaching clauses.



**Question 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?**

Of those who answered this question, 40 respondents said that they do not pay any compensation/salary to employees for all or part of the duration of the non-compete clause, 3 respondents said that they pay for part of the duration of the non-compete clause and only 1 respondent said that they paid compensation/salary to employees for all the duration of the non-compete clause.

Several respondents to this question noted that they use gardening leave to offset some or part of the non-compete period during which the employee receives remuneration.

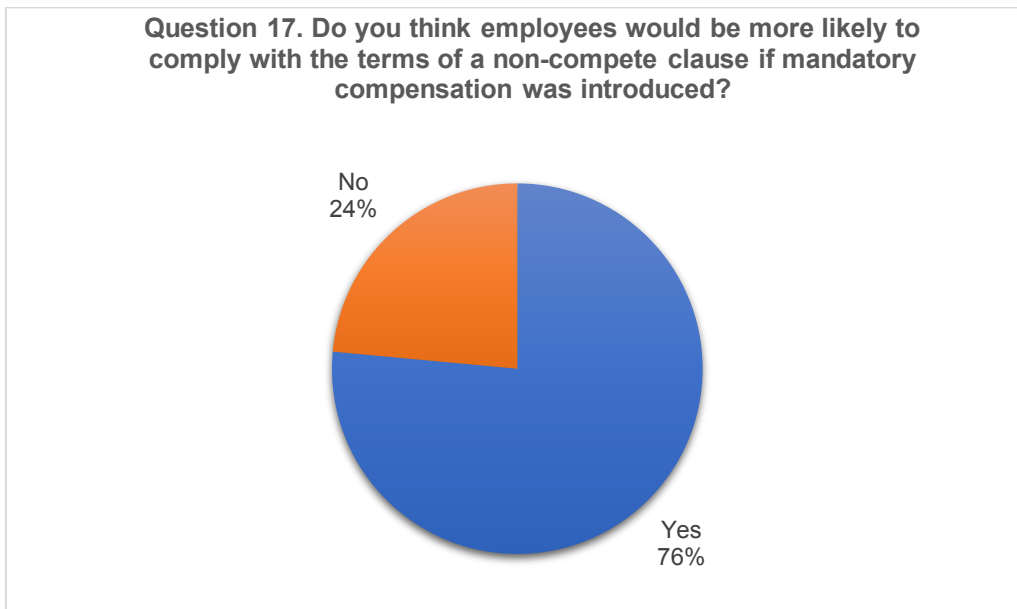


**Question 17. Do you think employees would be more likely to comply with the terms of a non-compete clause if mandatory compensation was introduced? If not, do you have any suggestions for increasing compliance.**

Of those who answered this question, 76% of respondents thought that employees would be more likely to comply with the terms of a non-compete clause if mandatory compensation was introduced while 24% did not think this would be the case.

Suggestion's respondents provided for increasing compliance included;

- Stricter and more publicised repercussions for breaches of non-compete clauses,
- Fines and penalties for non-compliance,
- Swift action from the Courts in cases of non-compliance.



## Complementary Measures

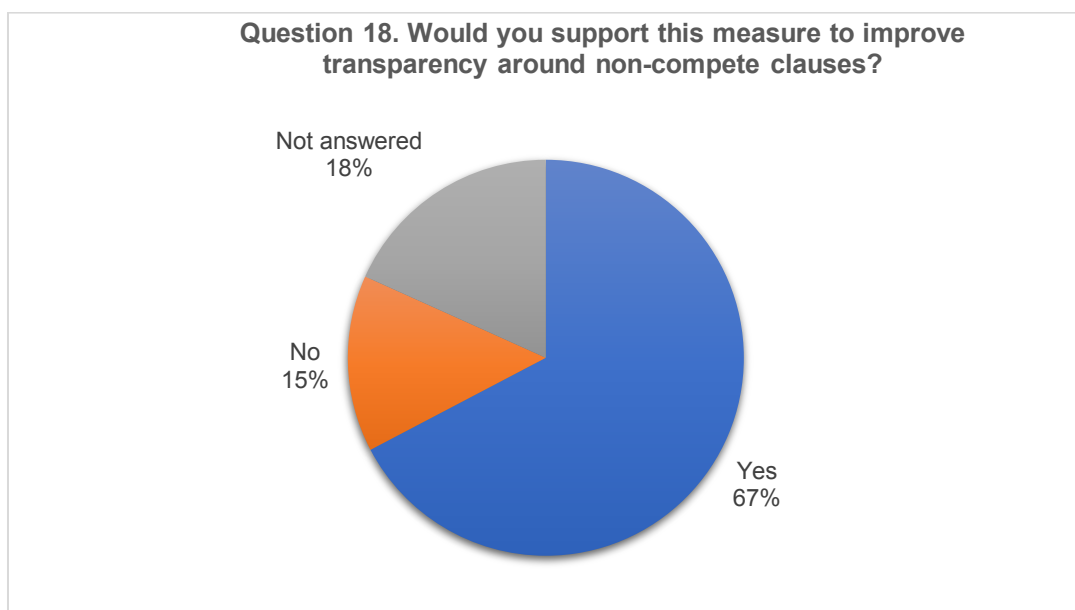
To improve transparency around non-compete clauses, the Government is considering a requirement for employers to disclose the exact terms of the non-compete agreement to the employee in writing before they enter into the employment relationship. Failure to do so would mean that the non-compete clause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

### **Question 18. Would you support this measure to improve transparency around non-compete clauses? If not, please explain why not.**

Of those who responded to the consultation, 67% supported the measure to improve transparency by requiring employers to disclose the exact terms of the non-compete agreement in writing before they enter into the employment relationship. 15% of respondents did not support this approach and a further 18% chose not to answer this question.

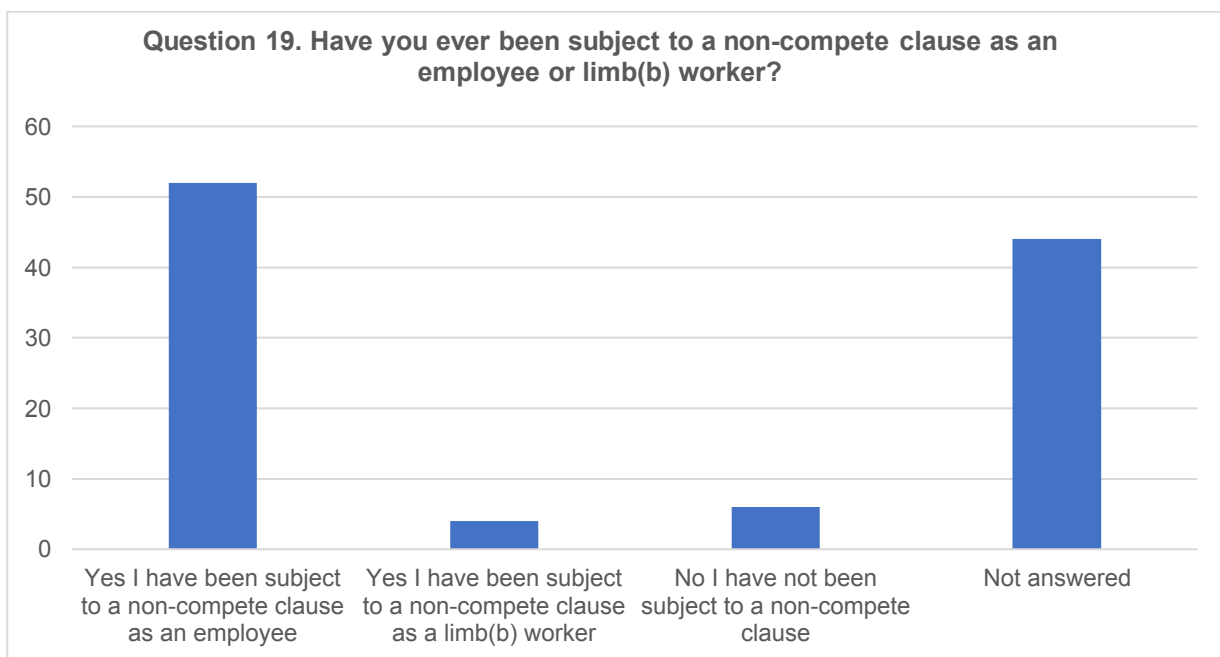
For those who did not agree with the approach frequently cited reasons for this position included:

- Non-compete clauses should already be clearly set out in writing, usually in an employment contract.
- The requirement would add a layer of red tape for employers
- It could add complications where employees are promoted to more senior positions within the organisation
- It does not provide any protection to the employee as the imbalance in the bargaining relationship means that they are likely to sign in any case.

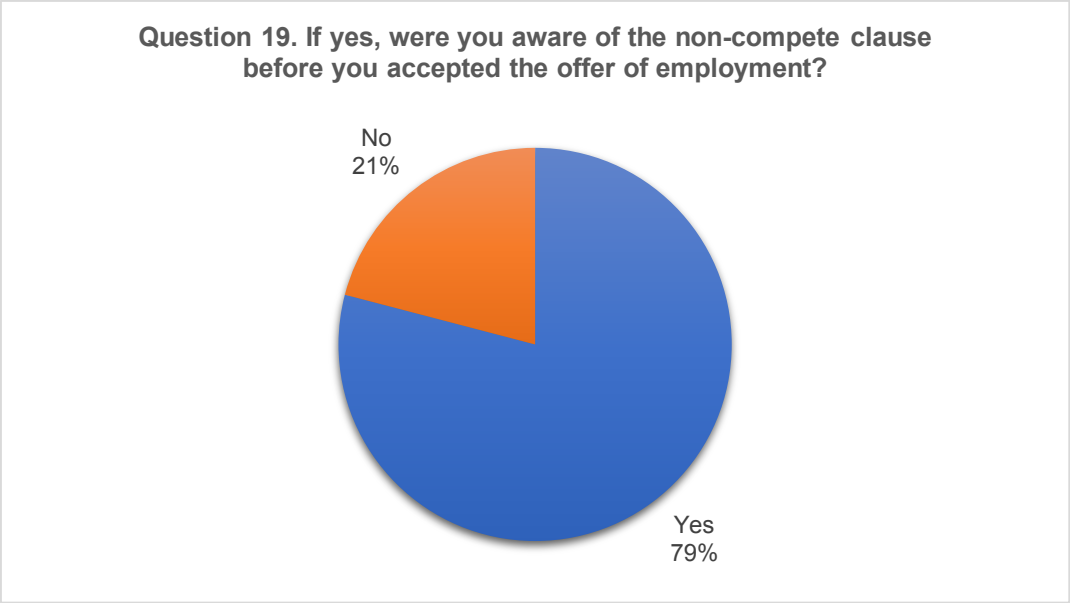


**Question 19. Have you ever been subject to a non-compete clause as an employee or limb(b) worker? If yes, were you aware of the non-compete clause before you accepted the offer of employment?**

Of those who responded to the consultation, 52 respondents said that they had been subject to a non-compete clause as an employee while 4 respondents said that they had been subject to a non-compete clause as a limb(b) worker. 6 respondents said that they had not been subject to a non-compete clauses while 44 respondents did not answer this question. The reason a high number of respondents did not answer this question was because many were responding to the consultation on behalf of an organisation rather than as individuals.

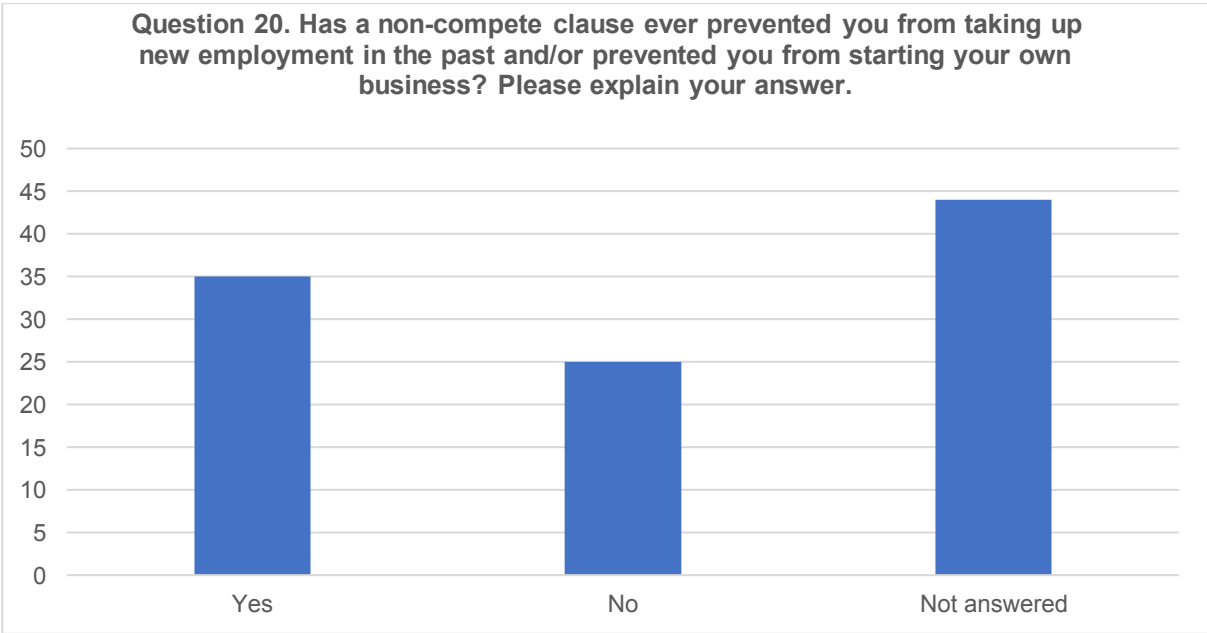


Of those respondents who had been subject to a non-compete clauses as either an employee or as a limb(b) worker, 79% were aware of the clause before they accepted the offer of employment while 21% were not. Many respondents who were aware of the clause cited the lack of bargaining power when an offer of employment includes a non-compete clause.



**Question 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.**

Of those who responded to the consultation, 35 respondents had experienced a non-compete clause preventing them from taking up new employment and/or preventing them from starting their own business while 25 had not. 44 respondents did not answer this question. The reason a high number of respondents did not answer this question was because many were responding to the consultation on behalf of an organisation rather than as individuals.





Many respondents highlighted the financial impact of non-compete clauses in terms of loss of earnings and the damage to their careers from protracted periods out of the labour market. Several also noted that the threat of legal action by the previous employer had prevented them from taking up a new role or starting a new business even where they thought the clause was likely to be found unenforceable by the Courts. They cited the high cost of pursuing legal action leaving them with no choice but to accept the terms of the non-compete clause.

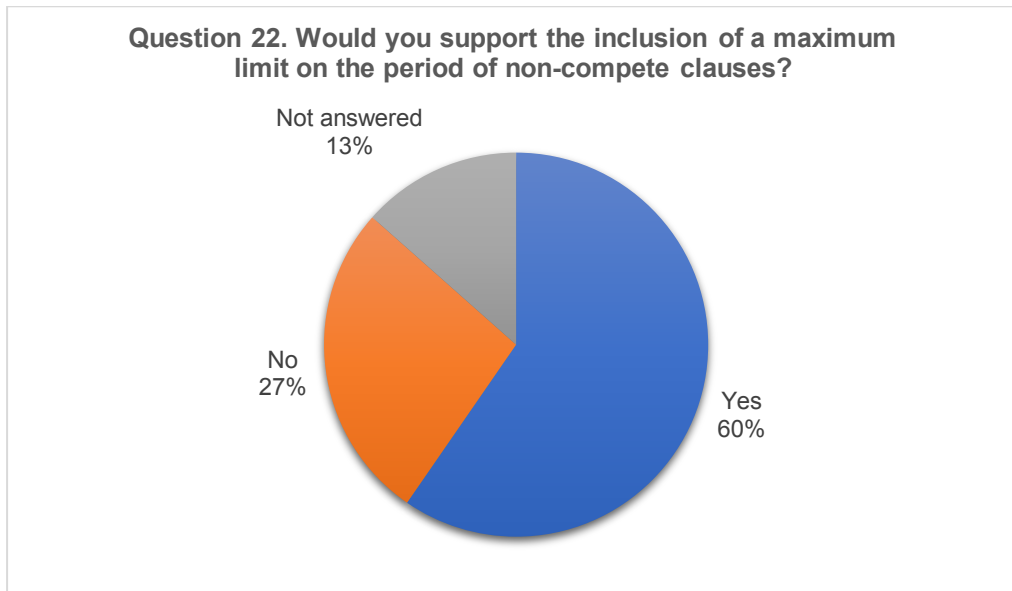
**Question 21. Do you have any other suggestions for improving transparency around non-compete clauses?**

Suggestion's respondents provided in response to this question included:

- A requirement for the employee to obtain legal advice from a third party on the non-compete clauses. Some suggested this should be paid for by the employer.
- A requirement to make clear on job adverts that the role is subject to signing a non-compete clause
- A condition that non-compete clauses only become valid after an employee has worked at the organisation for 6 months or longer
- The creation of a public register of companies who use non-compete clauses
- A requirement for a disclaimer to be provided by the employer in simple language setting out the consequences of signing the non-compete
- A requirement for non-compete clauses to be signed separately and individually and not signed as part of the employment contract.
- Guidance and a framework from ACAS for employers and employees.
- A requirement for employers to review non-compete clauses on an annual basis
- A requirement for non-compete clauses to be included in the written statement of employment particulars
- Provision for a cooling off period

**Question 22. Would you support the inclusion of a maximum limit on the period of non-compete clauses?**

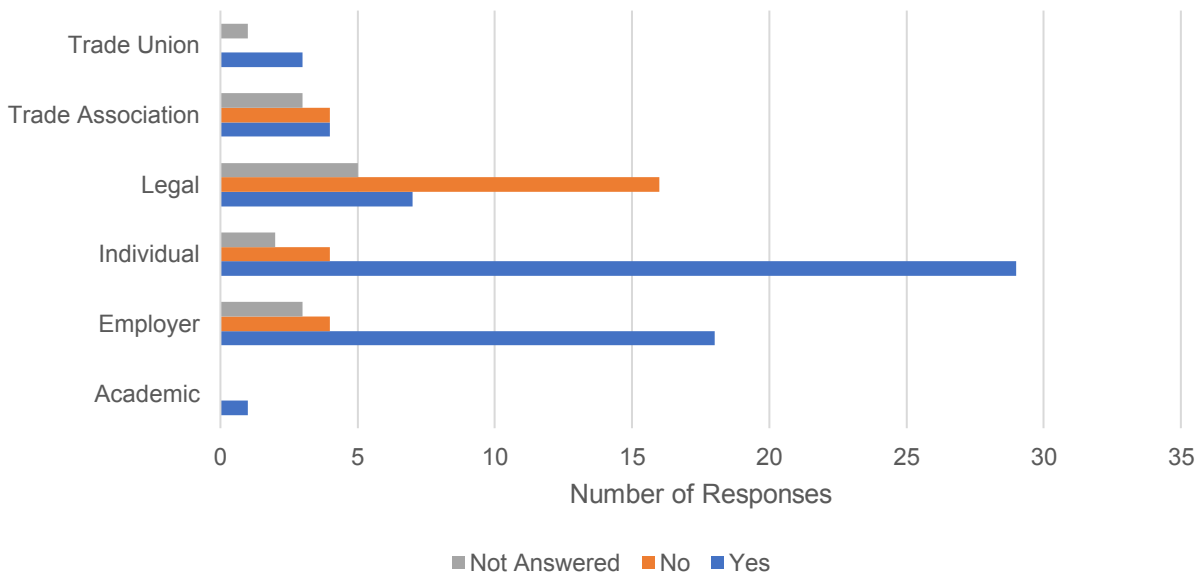
Of those who responded to the consultation, 60% supported the inclusion of a maximum limit on the period of non-compete clauses while 27% would not support this approach. 13% of respondents chose not to answer this question.



If we look at how different groups responded to this question, the highest number of respondents who supported the inclusion of a maximum limit on the period of non-compete clauses were those responding as individuals. A majority of employers who responded to the consultation also supported the inclusion of a maximum limit on the period of non-compete clauses. Views from legal organisations and professionals were more varied with a majority against the inclusion of a maximum limit on the period of non-compete clauses.

Some of those in favour of a maximum limit on the period of non-compete clauses noted that this would provide clarity and certainty for all parties while some of those against the inclusion of a maximum limit on the period of non-compete clauses noted that existing law provides necessary flexibility where exceptional cases may require a longer period and that employers might extend the periods to the maximum permissible in response.

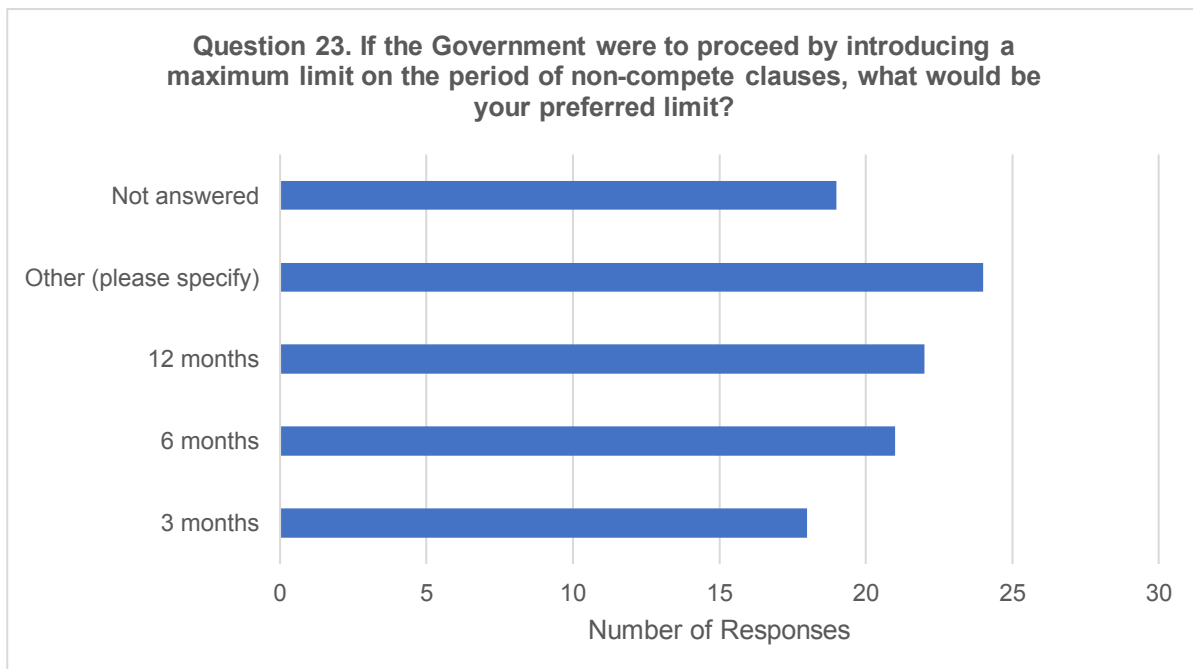
**Question 22. Would you support the inclusion of a maximum limit on the period of non-compete clauses?**



**Question 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?**

The most common response to this question was 'Other' with 24 respondents selecting this option. Of those who selected 'Other' several respondents wanted the maximum limit to be less than 3 months while a smaller number of respondents wanted to see a longer maximum limit of between 12-24 months. Several also suggested linking it to the period the employee has been working with the employer up to a limit. Others noted that they did not agree with principle of a maximum limit on the period of non-compete clauses.

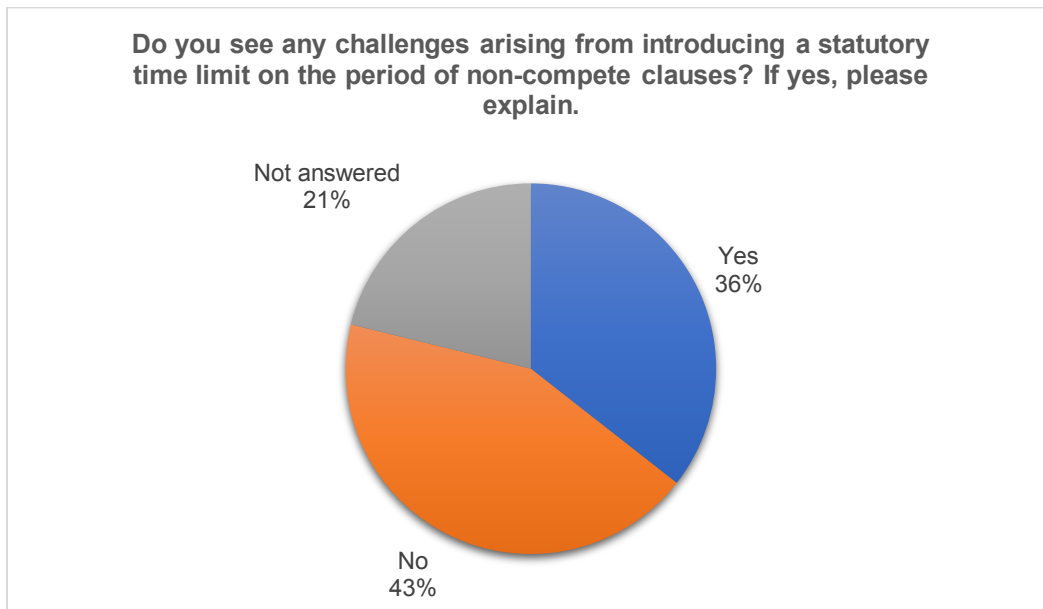
Of the three periods presented, 12 months was the most favoured option with 22 respondents while 21 respondents favoured 6 months and 18 respondents opted for 3 months. Of those who selected 12 months, several noted that this would align with existing case law. 19 respondents to the consultation chose not to answer this question.



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

Of those who responded to the consultation, 36% saw challenges arising from introducing a statutory time limit on the period of non-compete clauses while 43% did not. 21% of respondents chose not to answer this question.

The most frequently cited concern was that employers might use the statutory limit as a default leading to longer periods than otherwise may have been the case. Several respondents also noted that employers may be unable to adequately protect their commercially sensitive trade secrets and other legitimate business interests as a maximum limit would not allow for exceptional cases as existing common law does.



## **Option 2: Ban Non-Compete Clauses**

**Question 25. What do you think could be the benefits of a ban on non-compete clauses in contracts of employment? Please explain your answer.**

When asked this question respondents provided some of the following benefits:

- Greater competition, innovation & growth
- More flexibility for employees
- Greater labour mobility & wage growth
- Clarity for both parties
- People would have greater freedom to take up new employment and start businesses
- Less legal disputes and litigation
- Remove barriers to recruitment
- Foster a start-up culture
- Common arguments to support these positions included that non-compete clauses act to restrict competition and prevent employees from using their skills to work for competitors or to start their own business.

14 respondents to the consultation chose not to answer this question.

**Question 26. What do you think might be the potential risks or unintended consequences of a ban on non-compete clauses? Please explain your answer.**

When asked this question respondents provided some of the following risks and unintended consequences:

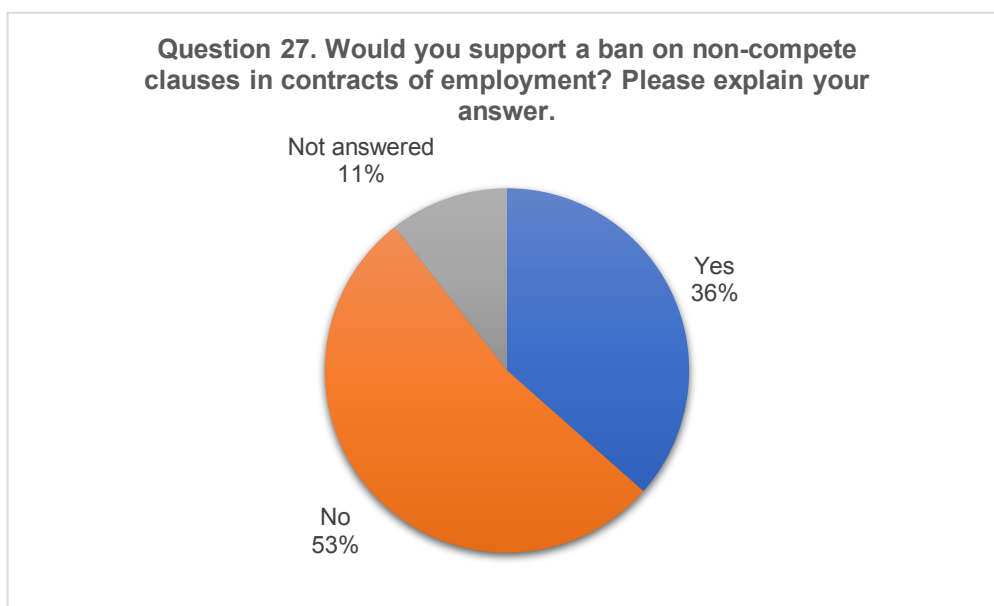
- Lead employers to circumvent the ban and protect their interests in other ways e.g other restrictive covenants, longer notice periods & gardening leave, confidentiality clauses and indirect restraints such as deferred benefits
- Tighter controls on information sharing within the organisation
- Multinational organisations may move certain jobs/functions out of the UK to jurisdictions where non-compete clauses can be enforced
- Possible restructuring if a ban is limited to employment contracts only
- Loss of investor confidence, particularly in start-ups
- Increased litigation in other areas such as intellectual property and trade secrets
- Business failures could increase where companies are no longer competitive

11 respondents to the consultation chose not to answer this question.

**Question 27. Would you support a ban on non-compete clauses in contracts of employment? Please explain your answer.**

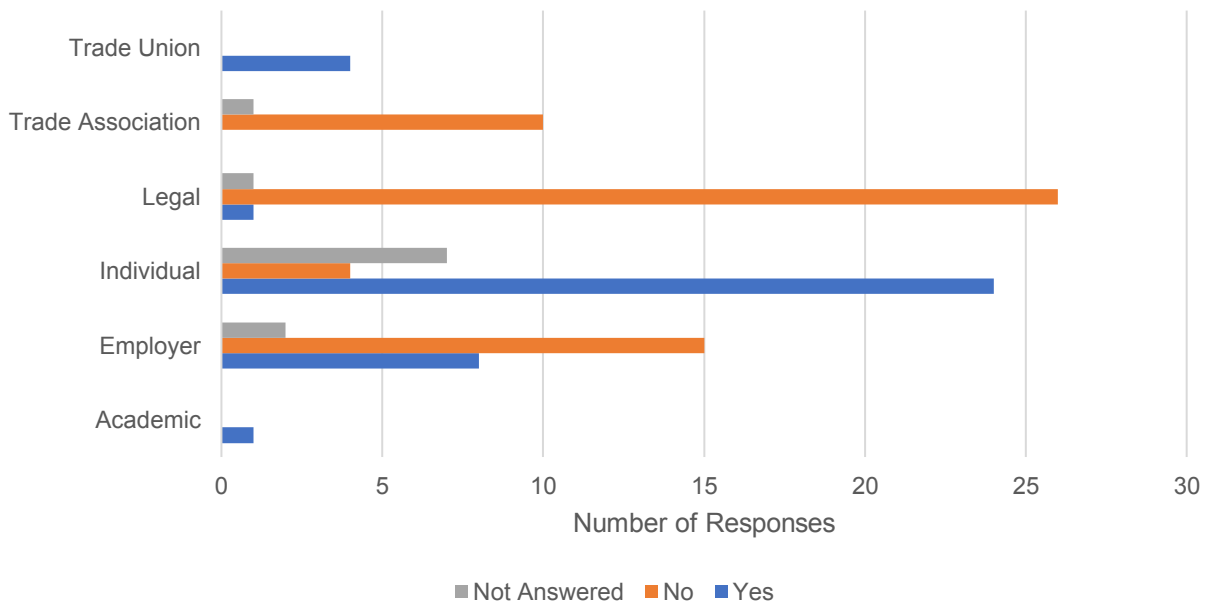
Of those who responded to the consultation, 53% did not support a ban on non-compete clauses in contracts of employment while 36% did support a ban. 11% of respondents chose not to answer this question. Those who did not support a ban cited similar reasons to the risks and unintended consequences in Question 26, with some noting that the potential benefits were unlikely to outweigh these risks.

For those who supported a ban, similar themes were raised around greater competition, innovation and growth, more flexibility for employees and greater labour mobility and wage growth.



If we look at how different groups responded to this question, the highest number of respondents who did not support a ban on non-compete clauses in contracts of employment were from legal organisations and professionals. The highest support for a ban came from those responding as individuals with 24 respondents favouring a ban. Employers were more split with 8 respondents supporting a ban and 15 respondents against a ban.

**Question 27. Would you support a ban on non-compete clauses in contracts of employment? Please explain your answer.**

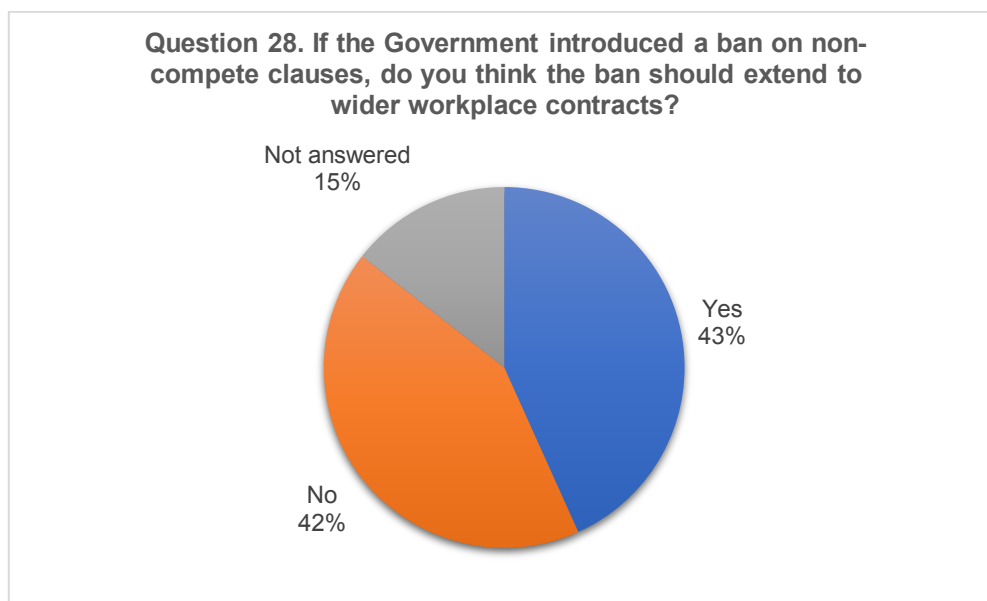




**Question 28. If the Government introduced a ban on non-compete clauses, do you think the ban should extend to wider workplace contracts?**

Of those who responded to the consultation, 43% thought a ban on non-compete clauses should extend to wider workplace contracts while 42% did not. 15% of respondents chose not to answer this question. Some of the respondents who thought the ban should extend to wider workplace contracts stressed that increasing use of atypical contracts could reduce the impact of any ban and that there should be similar treatment across different contractual arrangements.

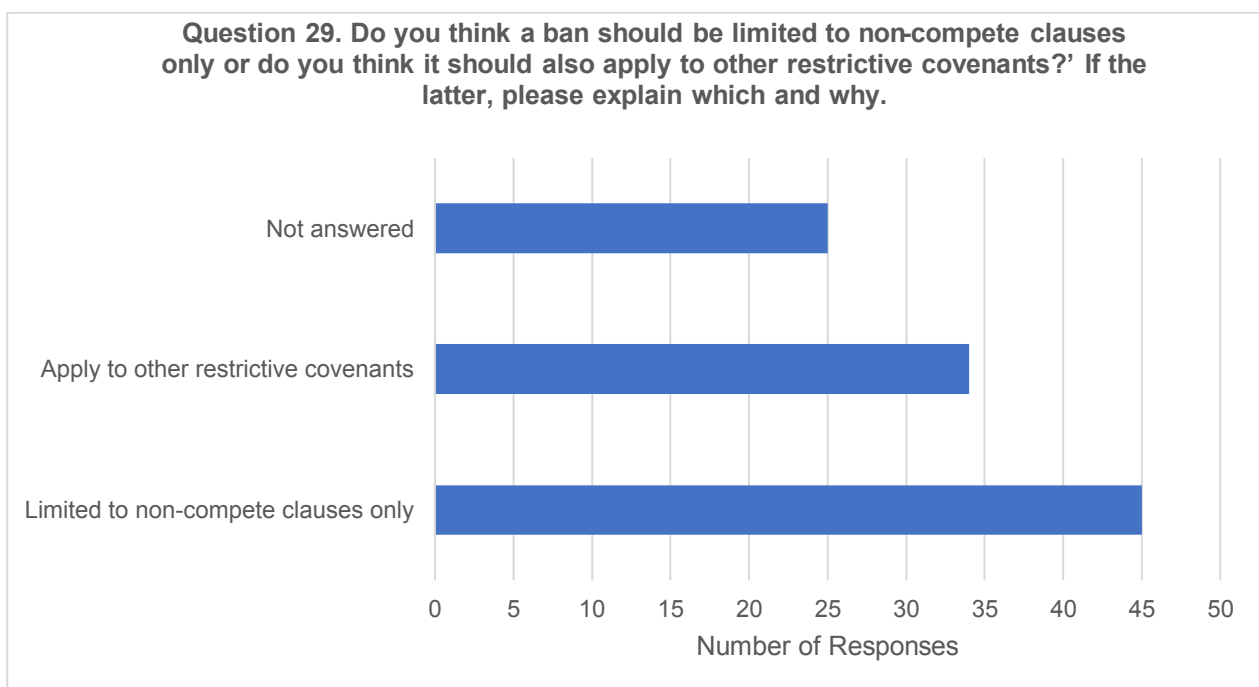
Some of the respondents who were against a ban extending to wider workplace contracts noted that there was a fundamental difference in bargaining power between parties negotiating an employment contract and parties negotiating a commercial relationship, for example members of a Limited Liability Partnership.



**Question 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.**

Of those who chose to answer this question a majority (45 respondents) thought that a ban should be limited to non-compete clauses. 34 respondents thought that a ban should also apply to other restrictive covenants. 25 respondents chose not to answer this question.

Of those who thought that a ban should also apply to other restrictive covenants the most frequently cited were non-solicitation clauses and non-dealing clauses as they restrict customer/client choice. Non-poaching clauses were also referenced by some respondents as were share schemes and shareholder agreements.

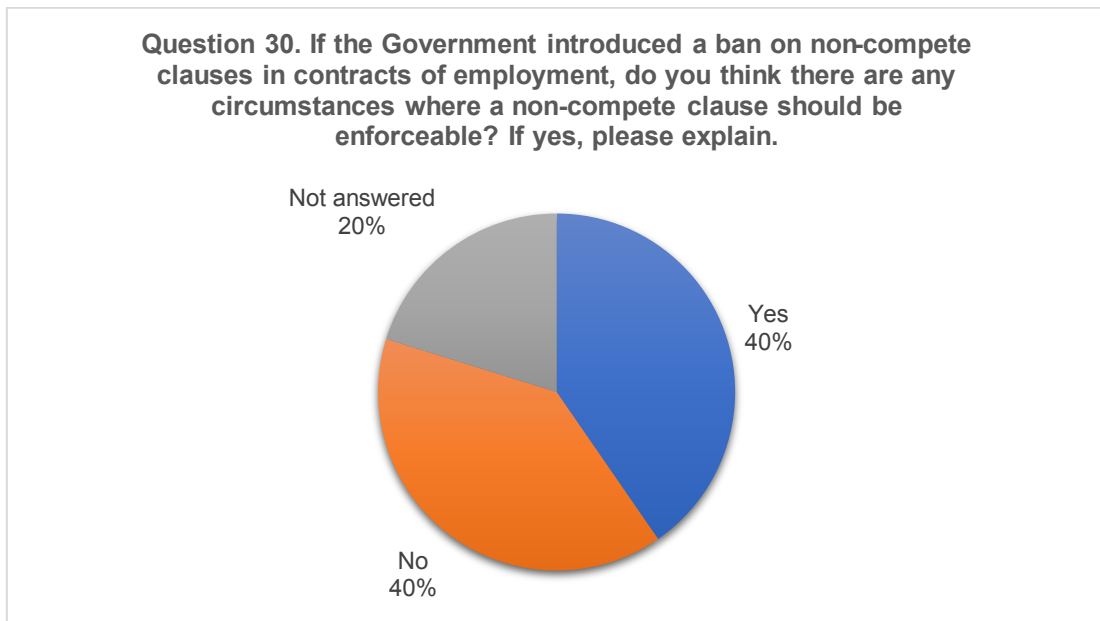


**Question 30. If the Government introduced a ban on non-compete clauses in contracts of employment, do you think there are any circumstances where a non-compete clause should be enforceable? If yes, please explain.**

Of those who responded to the consultation, 40% thought that there should be circumstances where a non-compete clauses could be enforceable if the Government introduced a ban while 40% thought that there should be no circumstances where they are enforceable. 20% of respondents chose not to answer this question.

For those who thought that there should be circumstances where a non-compete clauses could be enforceable if the Government introduced a ban, some of the circumstances cited included:

- For directors and executive board members
- For small businesses
- Upon sale of a business
- Where dismissal is for gross misconduct
- Where the employer pays for legal advice regarding the clause
- Where the employee refuses to adhere to their notice period

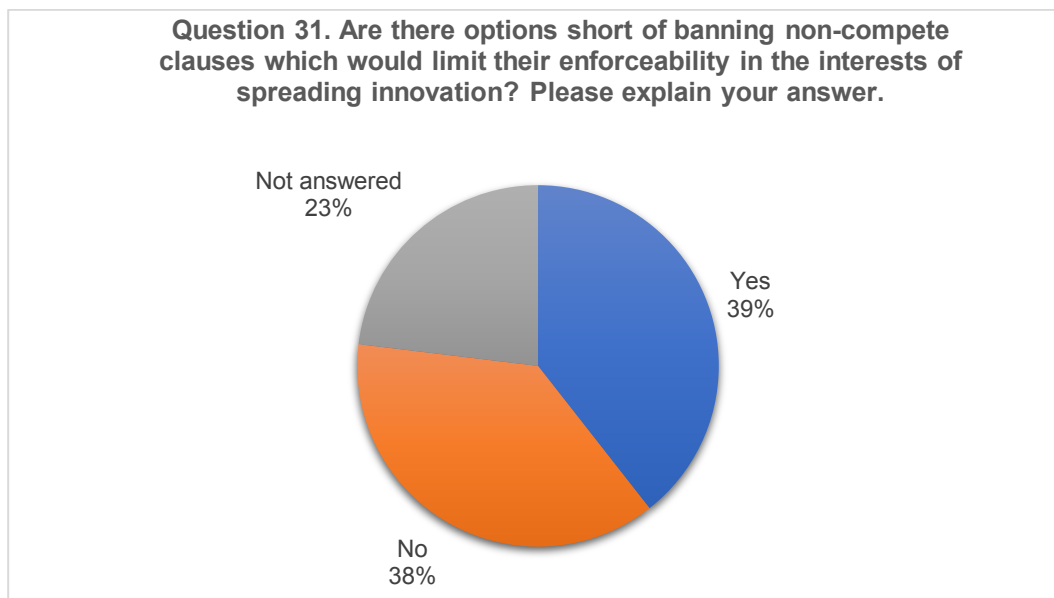


**Question 31. Are there options short of banning non-compete clauses which would limit their enforceability in the interests of spreading innovation? Please explain your answer.**

Of those who responded to the consultation, 39% thought that there are options short of banning non-compete clauses which would limit their enforceability in the interests of spreading innovation while 38% did not. 23% of respondents chose not to answer this question.

Of those who thought that there are options short of banning non-compete clauses which would limit their enforceability in the interests of spreading innovation, some of the options cited included:

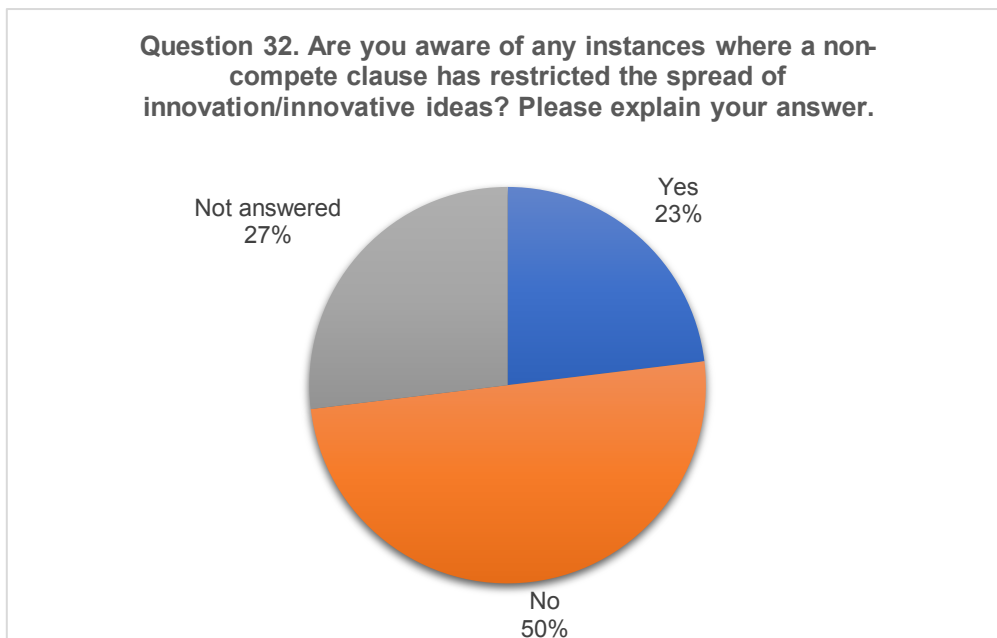
- Requiring businesses to limit and define the area of competition in terms of market, products and geography
- Allowing employees to easily and quickly challenge restrictions without risk of high legal costs
- Enforce the clauses through Employment Tribunals rather than the High Courts.
- Including a salary cap under which non-compete clauses are unenforceable
- Requirement for the employee to take independent legal advice before signing up to a non-compete clause



**Question 32. Are you aware of any instances where a non-compete clause has restricted the spread of innovation/innovative ideas? Please explain your answer.**

Of those who responded to the consultation, 23% said that they were aware of instances where a non-compete clause has restricted the spread of innovation/innovative ideas while 50% said that they were not. 27% of respondents chose not to answer this question.

Of those who said that they were aware of instances where a non-compete clause has restricted the spread of innovation/innovative ideas, some respondents described instances which had preventing themselves/people they knew from developing new and innovative ideas and starting their own businesses. Others described the role of non-compete clauses in restricting individuals from moving from established businesses to new innovative start-ups and the effect of non-compete clauses in encouraging anti-competitive behaviour to the detriment of innovation.



**Question 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.**

In response to this question respondents provided the following literature, research and evidence:

*Employee Competition: Covenants, Confidentiality, and Garden Leave*, edited by Paul Goulding.

*Restraining Competition by Employees – A Practical Guide to Restrictive Covenants, Injunctions and Other Remedies*, by Peter Linstead.

Robert W Gomulkiewicz, *Leaky Covenants-Not-to-Compete as the Legal Infrastructure for Innovation*, 49 UC Davis Law Review 251 (2015).

Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 Vanderbilt Law Review 1 (2015).

Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 Lewis & Clark Law Review, 497 (2016).

Norman D. Bishara. "Covenants Not To Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment" (Jan. 2006). University of Michigan Ross School of Business Working Paper No. 1187.

Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete* (24 May 2018). Forthcoming at *Industrial and Labor Relations Review*

Office of Economic Policy, US Department of the Treasury *Non-compete Contracts: Economic Effects and Policy Implications* (2016)

Eric A Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 *Antitrust Law Journal*, 165 (2020).

Posner, Eric A. and Triantis, George G. and Triantis, Alexander J. "Investing in Human Capital: The Efficiency of Covenants Not to Compete" (January 2004). U Chicago Law & Economics, Olin Working Paper No. 137, Univ. of Virginia Law & Econ Research Paper No. 01-08.

Blog maintained by the law firm Beck Reed Riden LLP:  
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*Beck Reed Riden LLP, Employee Noncompetes, A State by State Survey (18 December 2020).*

*Garmaise, Mark J. "Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment." *Journal of Law, Economics, & Organization*, vol. 27, no. 2, 2011, pp. 376–425. JSTOR.*

*Seyfarth Shaw LLP, Will Biden Ban Non-competes? (9 December 2020); Beck Reed Riden LLP, President Biden's Proposed Ban of (Most) Noncompetes: Protection Strategies and Steps to Take Now (2 December 2020):*

*Ronald J. Gilson, The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete, 74 *New York University Law Review* 575 (June 1999).*

*John M. McAdams, Non-Compete Agreements: A Review of the Literature (31 December 2019).*

*Evan Starr and Natarajan Balasubramanian and Mariko Sakakibara, Screening Spinouts? How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms (1 July 2016). US Census Bureau Center for Economic Studies Paper No. CES-WP- 14-27,*

*Bruce Fallick, Charles A. Fleischmann and James B. Rebitzer, Job-Hopping in Silicon Valley: Some Evidence Concerning the Microfoundations of a High Technology Cluster (NBER Working Paper 11710, 2005),*

*Bruce H. Kobayashi, Antitrust, Non-Competition and No-Poach Agreements in Digital Industries (11 November 2020), at 713. *The Global Antitrust Institute Report on the Digital Economy 20,**

*Matt Marx, Jasjit Singh and Lee Fleming, Regional Disadvantage? Employee Non-Compete Agreements and Brain Drain, 44 *Res. Pol'y* 394, 394–404 (2015)*

*Camila Ringeling, Joshua D. Wright, Douglas H. Ginsburg, John M. Yun and Tad Lipsky, Noncompete Clauses Used in Employment Contracts, Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University (February 7, 2020). *George Mason Law & Economics Research Paper No. 20-04,**

*Umit G. Gurun, Noah Stoffman and Scott E. Yonker, Unlocking clients: The importance of relationships in the financial advisory industry (1 July 2020).*

<https://hbr.org/2014/01/how-noncompetes-stifle-performance>

[https://www.uu.nl/sites/default/files/rebo\\_use-wp\\_2019\\_1920.pdf](https://www.uu.nl/sites/default/files/rebo_use-wp_2019_1920.pdf)

<https://fee.org/articles/why-non-competes-are-anti-competitive/>

[https://www.hamiltonproject.org/blog/the\\_chilling\\_effect\\_of\\_non\\_compete\\_agreements](https://www.hamiltonproject.org/blog/the_chilling_effect_of_non_compete_agreements)

<https://www.americanprogress.org/issues/economy/reports/2019/01/09/464831/the-freedom-to-leave/>

<https://www.forbes.com/sites/omribenshahar/2016/10/27/california-got-it-right-ban-the-non-compete-agreements/>

<https://www.epi.org/publication/noncompete-agreements/>

<https://www.openmarketsinstitute.org/publications/open-markets-afl-cio-seiu-60-signatories-demand-ftc-ban-worker-non-compete-clauses>

<https://www.nakedcapitalism.com/2021/01/michael-olenick-from-intel-to-apple-noncompetes-are-bad-business.html>

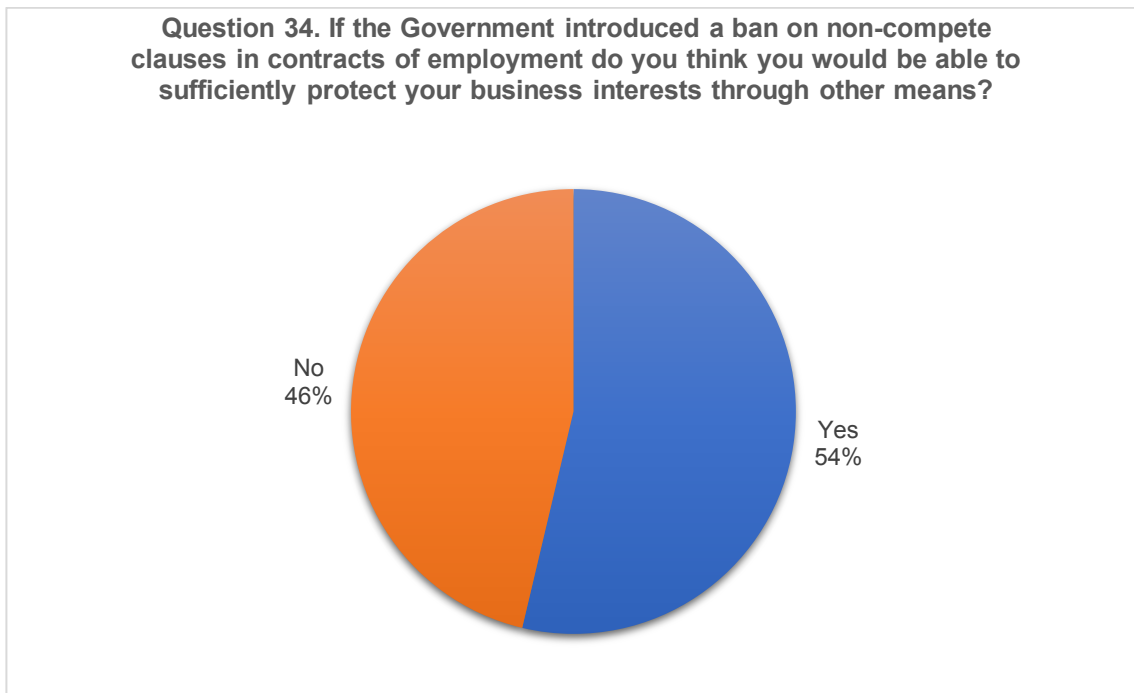


Questions 34-37 were specifically for employers, so the data does not include those who did not respond to these questions to avoid the high number of these responses skewing the data.

**Question 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?**

Of those who responded to this question, 54% thought that they would be able to protect their business interests through other means if the Government introduced a ban on non-compete clauses. 46% thought that they would not be able to protect their business interests through other means.

Of those who thought that they would not be able to protect their business interests through other means, frequently cited reasons for this included the difficulty in enforcing against breaches of intellectual property law and confidentiality clauses, the costs involved in doing so, and the lack of protection they provide regarding relationships with clients, suppliers and other key business contacts.

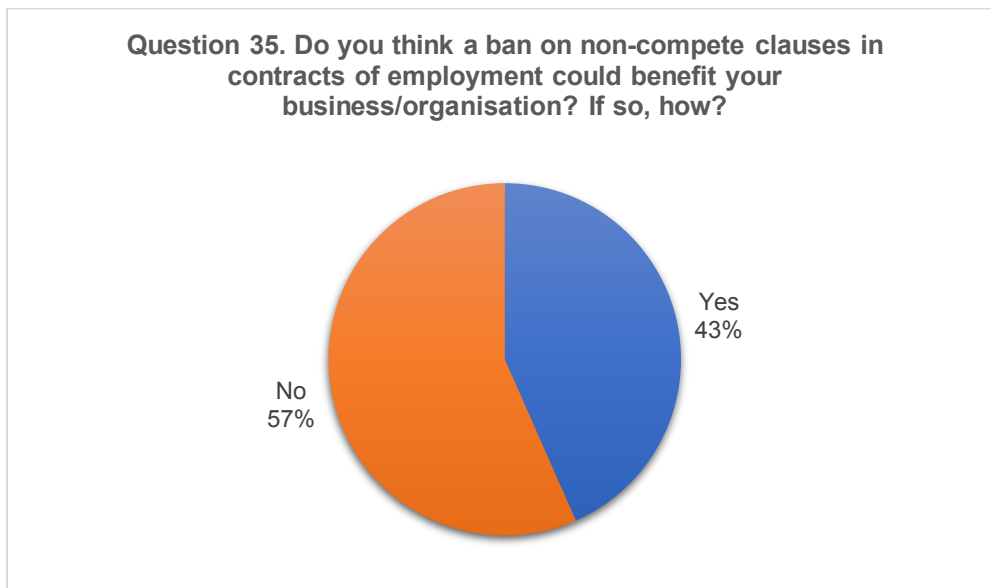


**Question 35. Do you think a ban on non-compete clauses in contracts of employment could benefit your business/organisation? If so, how?**

Of those who responded to this question, 43% thought that a ban on non-compete clauses in contracts of employment could benefit their business/organisation while 57% did not.

Of those who thought that there could be a benefit to their business/organisation, commonly cited benefits included:

- Quicker and easier recruitment process
- Greater access to talented employees
- Happier more productive employees
- Would level the playing field for employers who do not wish to use non-compete clauses
- Encourages a focus on positive incentives for retention rather than punitive measures

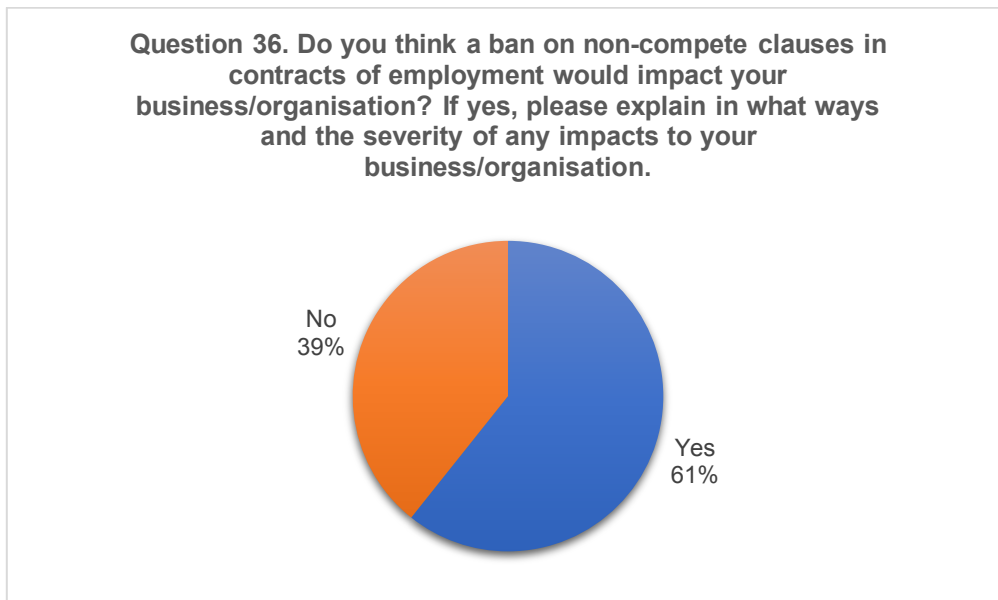


**Question 36. Do you think a ban on non-compete clauses in contracts of employment would impact your business/organisation? If yes, please explain in what ways and the severity of any impacts to your business/organisation.**

Of those who responded to this question, 61% thought that a ban on non-compete clauses in contracts of employment would impact their business/organisation while 39% did not.

Of those who thought that a ban on non-compete clauses in contracts of employment would impact their business/organisation, cited impacts included:

- Tightening of sharing confidential information
- Loss of staff and clients
- Disruption to the stability of the workforce
- Make it harder to attract investment
- Potentially lower recruitment levels in future
- Potential business failure



**Question 37. How do you think your business/organisation would respond to a ban on non-compete clauses in contracts of employment? Please explain.**

Respondents to this question provided some of the following ways that they could respond to a ban on non-compete clauses in contracts of employment:

- Strengthen their use of other restrictive covenants, confidentiality clauses and intellectual property protections
- Increase use of gardening leave
- Remove unpaid deferred compensation and benefits from employees who leave and join a competitor firm
- Move certain roles/functions abroad
- Tighten information sharing within the business/organisation
- Improve working conditions and pay
- Provide positive incentives to increase retention

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