

Labor & Employment Law Newsletter

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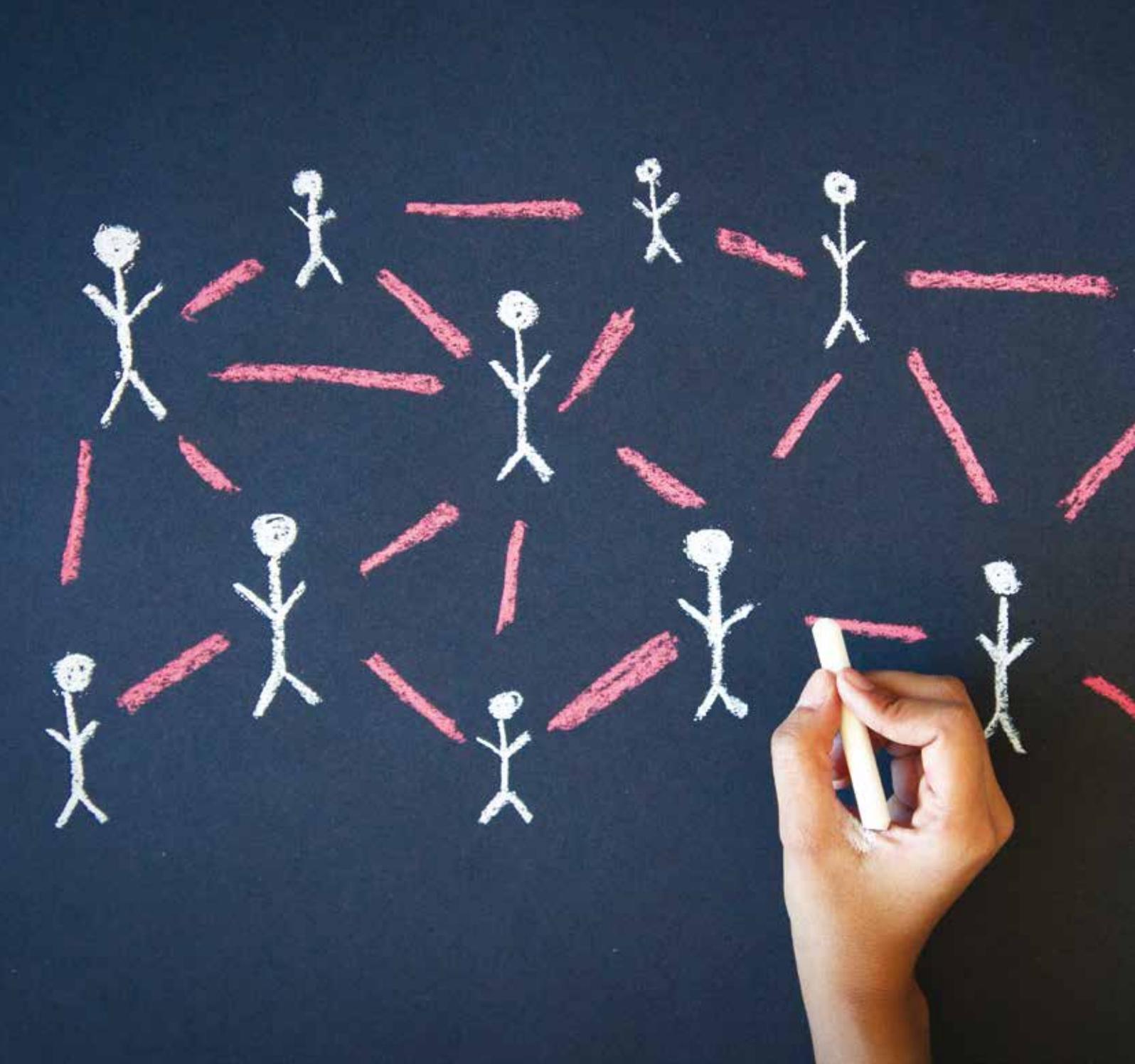
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Editorial



In today's globalized and highly competitive business world, corporations understand the importance of placing restrictions on certain employees, during and post-employment, to protect corporate know-how, confidential information, and competitive advantage. Yet, many corporations may not be aware of the degree of divergence of laws in different countries in this respect.

Indeed, each country has its own rules on the legality and enforceability of restrictive covenants; some countries require financial compensation, while others have a very restrictive view of time and place limitations. Even in Europe, each country has its own set of rules as there are no European Union directives on restrictive covenants.

In this edition of the Labor & Employment Law Newsletter, our 360° world tour will help corporations to understand the legal rules related to restrictive covenants, critical to the protection of a corporation's confidential information and competitive position.

Roselyn Sands

Labor and Employment Law Leader



Albania



Restrictive covenants of the employee under the Albanian labor law

The Labor Code of Albania, enacted in 1995, contains specific provisions on restrictive covenants governing the relationship between employer and employee regarding loyalty, confidentiality and non-compete covenants, which are summarized as follows.

Loyalty: the Labor Code provides that the employee should be loyal to the interests of the employer; this implies that the employee is not permitted to perform any paid job for third parties that may damage the employer's interests or compete with the employer.

Confidentiality: during the validity of the employment contract and after its termination, the employee shall not disclose any confidential information or secrets relating to manufacturing and other activities, of which the employee became aware while working for the employer. However, the employee has the right to provide to the competent authorities any confidential information about the employer's activity that is in violation of labor legislation or the employment contract (Article 26).

Non-compete: the Labor Code provides for the right of the employee and employer to enter into a non-compete agreement, pursuant to which, after the termination of the employment contract, the employee will not compete with the employer, and

especially will not establish a competing company. The employee will neither work for, nor show interest in a job position at, a competing company (non-compete agreement). The non-compete agreement is valid only if the employee becomes aware of manufacturing or business secrets of the employer due to the employment relationship, and the use of such secrets by the employee may cause serious damage to the employer. The non-compete agreement shall clearly determine the place, time period and type of activity prohibited to the employee in order not to damage the employee's economic interests in the future. The period of such prohibition should not exceed one year.

Moreover, in order for the non-compete agreement to be enforceable, the employer should offer the employee at least 75% of the salary that they would have received if the employment contract had not been terminated. If the salary is subject to change, the compensation is calculated on the basis of the average salary of the previous year and is indexed (Article 28).

The court may reduce these terms, if it considers them to be excessive, by taking into consideration all the circumstances, especially whether the remuneration given by the employer to the employee after the termination of employment exceeds the minimum of 75% of their salary (Article 29).

The non-compete agreement terminates with the expiry of the contractual term, or even before then if the employer is not interested in its continuation. The non-compete agreement is not enforceable if the employer terminates the employment contract without reasonable grounds, or in cases where the employee terminates the employment contract based on reasonable grounds that are related to the employer (Article 30).

The Labor Code provides for sanctions that can be imposed if there is a violation of the non-compete agreement. More concretely, an employee who has violated the non-compete agreement must indemnify the relevant damage caused to the employer. If the non-compete agreement provides for a fine to be paid by the employee, they may be allowed to continue their competitive activity only after having paid to the employer the respective fine, as well as any difference between the fine amount and relevant value of damage caused. The court may decide to reduce the fine imposed on the employee due to violation of the non-compete agreement, if it finds the amount to be excessive under the circumstances that led to the violation (Article 31).

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The questioned validity of non-compete covenants

In a growing competitive market where human capital and intangible resources exist, such as confidential information, trade secrets, know-how, business plans and client lists, employment contracts increasingly provide for non-compete covenants. Even if the validity of such covenants was initially challenged, they have become the appropriate tool for data protection.

Concerns that were once raised over non-compete covenants

The protectionist role of Argentine labor law, which upholds the premise in *in dubio pro operario* (“doubt always profits the employee”) as its guiding principle, has prompted several questions about non-compete covenants; their applicability was even tried in court and, in numerous cases, they were partially or totally nullified.

Many motions for nullity were based on the violation of fundamental rights, claiming that such covenants had substantial flaws since they violated rights such as the constitutional right to work, the protection bestowed upon the institution of work under the Argentine Constitution, the unwaivable nature of the rights set forth under the Employment Contract Law, the International Labour Organization (ILO) Conventions and norms of international law with constitutional rank regarding protected labor rights.

New outlook concerning protection of the company's know-how during the labor relationship

During the labor relationship, there are specific regulations that allow companies to protect their resources. Employment Contract Law establishes the duty of non-competition, which requires that workers refrain from engaging in negotiations that may affect their employer's interests, but restricts their actions to the duration of the

employment relationship. A similar limit is established by the Argentine Business Association's law regarding partners' actions. However, this clear obligation of the workers, related to their primary duty of loyalty, ends when the employment relationship is terminated, and therefore non-compete covenants become necessary.

These practices tend to establish restrictions for a company in order to protect its knowledge about essential issues, mostly related to competitive advantages, understanding that the employee assumes a negative obligation, and what prevails is the parties' free will when entering into this type of agreement.

The fact that this kind of covenant is usually entered into with senior personnel has allowed the prevailing trend to be reversed, and non-compete covenants have become a common practice for all those employees with high access to confidential information, including substantial amounts that are paid during the employment relationship to restrict, as much as possible, the likelihood of an employee disregarding the payment when negotiating the terms of termination. Thus, the company protects its resources and only complies with the agreement upon the termination of the employment relationship.

Case law precedent that set the limits

In 2006, the Argentine court ruled on the nullity of a contractual clause in a non-compete agreement.

The plaintiff worked for the company for 25 years, rising through several positions until he became a board member and CEO of the company.

Once both parties terminated the employment contract by mutual agreement, the worker was paid a bonus, and a confidentiality and non-compete covenant was executed for a 10-year term, by virtue of which the employee received an amount equivalent to nine times the bonus he had been paid.

Five years after the separation, the employee filed for nullity of the non-compete agreement claiming it had “substantial flaws” because it disregarded his fundamental rights. He claimed that the agreement seriously limited his ability to work for a longer period than normal, thus being unreasonable and violating his right to work. He also held that the amounts paid under the retirement, confidentiality and non-compete covenants were disproportionate, and that he had waived rights that he considered could not be waived.

The court considered that, having been a senior executive, with the broad powers and implications that this entailed, he had voluntarily agreed to limit himself in only part of the vast economic activity that he managed, and work areas about which he had knowledge and which allowed him to have profitable employment. It is evident that he had not entered into the agreement at a “vile” price, since he thought at the time that the agreed amount was convenient, so much so that only after five years he decided to challenge it, considering it excessive, and then only when his business activity generated the need to expand his company's profits.

Relevance. The case law precedent highlights the limits to the scope agreed upon by the parties, which is subject to two conditions: demandable, i.e., a specific term, and compensation for the worker. Moreover, the non-compete requirement must be limited to a very specific part of the whole universe of activities performed by the worker.

Following this precedent, companies usually use established guidelines to limit the risk of a challenge as much as possible.

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Australia



Non-solicitation in the digital environment

Digital technology has revolutionized the way in which people communicate with each other. Through the introduction of free applications such as Facebook, Twitter and LinkedIn (all of which have public dissemination capabilities), there are now multiple platforms on which people can readily connect with each other without being face-to-face.

Restraints in Australia

In the context of restrictive covenants involving non-solicitation of employees, clients or otherwise, the ubiquitous and ever-evolving nature of these communication tools has presented employers with much practical difficulty in identifying, proving and enforcing breach of a restraint. Added to this challenge is the fact that, in Australia, post-employment restraints are deemed void and unenforceable at first instance unless:

- ▶ They are necessary to protect the employer's legitimate business interests against harm (which have been recognized by Australian courts to include, subject to the specific circumstances, confidential information, customer connections and having a stable workforce).
- ▶ They are sufficiently and clearly confined in scope so as not to interfere with the interests of the public (i.e., freedom of trade and competition).

Whether the employer will be able to gain any remedial relief in terms of enforcement will therefore primarily depend on whether the employee is subject to a valid restraint. Importantly, courts will consider the validity of a restraint in relation to the circumstances existing at the time that the parties entered into the contract.

Example

In light of this, the following is an example of a scenario set in the digital environment. A former employee of ABC Company, who is subject to a valid restraint, starts at

rival XYZ Company. The former employee posts an announcement onto their public newsfeed stating that there is a new job opportunity at XYZ Company, making it available for connections to see and "like" the post. In this situation, merely making information available to the public, where people who choose to apply are doing so entirely of their own volition, will not count as solicitation.

However, this may cross over to become solicitation if the former employee responds to those who choose to apply. The situation would also be different if the former employee had "tagged" a few social media connections who are currently ABC employees to that post, or had contacted them via "private" messaging function. This is because the former employee is arguably "targeting" certain individuals.

Enforcement and remedies

Even where solicitation is suspected, there are multiple hurdles for employers to clear in order to gain any traction in relation to enforcement. However, that is not to say that employers are left without remedy. Provided that valid restraints are drafted into the appropriate agreements with relevant employees, and evidence is gathered, employers will have a contractual right to pursue an offending employee for breach and to seek remedial action.

Examples of employer remedies that have been allowed, or ordered by, Australian courts (in light of the current digital environment or otherwise) include:

- ▶ Seeking an interlocutory injunction against the former employee to prevent them from approaching employees or clients for a specified period of time (APT Technology Pty Ltd vs. Aladesaye, in the matter of APT Technology Pty Ltd [2014] FCA 966).
- ▶ Asking the new employer of the former employee to cooperate in preventing the former employee from breaching their post-employment restraints. This can

include requesting that the new employer secure any relevant "solicitation" emails sent via its registered domain or those of any related entity (CFC Consolidated Pty Ltd vs. Cooper [2015] WASC 185).

- ▶ Seeking undertakings from the former employee to the effect that they will remove any online content currently in breach, that they will refrain from posting any new material of the kind previously posted, and that they will not breach any other post-employment restraint or ongoing post-employment obligation (Planet Fitness Pty Ltd vs. Brooke Dunlop & Ors [2012] NSWSC 1425).

Of course, despite this, the appropriate remedy will largely depend on the situation and the potential costs. Often, a reasonable letter to the offending employee and their new employer will be enough for the former employee to cease and desist in light of the risks of litigation.

Takeaways

Employers should:

- ▶ Ensure that restraints are drafted carefully and in light of technological capabilities, setting out the type of conduct to be prohibited, so as to ensure all legitimate business interests are protected
- ▶ Review and amend any company policies and restraints to take into account the use of digital communication platforms insofar as it may relate to the employment relationship
- ▶ Act swiftly to enforce a restraint where there has been breach, as courts have refused to grant injunctive relief where employers have not taken action quickly

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Austria



Non-compete clause: legal rules and barriers

After the termination of their employment contract, an employee might work for competitor companies or intend to start their own company in the business field of their former employer. In both cases, the company runs the risk of losing either important long-term client relationships or other leading employees to the newly started company or to the competitor company.

As Austrian law does not provide legal regulations prohibiting such actions, employers often include a post-contractual non-compete clause in employment contracts. A non-compete clause restricts an employee from undertaking certain professional activities after the end of the employment relationship for a certain period of time. The extent of the restriction depends on the agreement. For example, it can be formulated as a customer protection clause, a supplier protection clause or an employee protection clause.

Restrictions on content

Austrian law determines several legal restrictions when it comes to agreeing on non-compete clauses in order to protect employees from being inadequately restricted in their professional development.

According to Article 36 of the Austrian Employee Act (Angestelltengesetz), non-compete clauses shall only be valid if the restrictions on the activities of the employee are within the field of the trade of the employer and do not exceed the period of one year. Moreover, the subject matter, period or location of the agreed restrictions must not constitute an undue hardship on the employee's career.

In case of a legal dispute on the validity of a non-compete clause, a court will compare the interest of the employer in the compliance with the non-compete clause and the interest of the employee to freely pursue their business in order to clarify whether there is an undue hardship on the employee's career. Usually, the court will order an expert's opinion on this matter.

According to consistent case law, a non-compete clause requiring an employee not to use their knowledge and prior work experience or to give up their trained profession and to start a new professional career with less income is considered to constitute undue hardship.

Non-applicability

A non-compete clause shall not be valid if the employment relationship is terminated by the employee for cause or by the employer without cause. In the latter case, the employer can still insist on compliance if they are willing to pay the employee their last salary for the time-period of the non-compete clause.

Liquidated damages

The parties are free to agree on liquidated damages in case of breach of the non-compete clause. Liquidated damages are subject to judicial discretion. If the parties agree on liquidated damages, the employer cannot require compliance with the non-compete clause, but only the payment of the penalty payment. Therefore, to ensure compliance, an employment contract cannot contain both a non-compete clause and liquidated damages.

In general, the statute of limitation for the payment of such penalties is three years, starting on the day one party had knowledge of the damage caused by the liable party. For each breach, a new

limitation period starts. Therefore, it is possible that, for the whole duration of a new working period, the statute of limitation is never met.

Change in case law

The Austrian Supreme Court recently changed its case law with regard to liquidated damages. Until then, the commitment of a new employer to settle the penalty payment, arising from the breach of the non-compete clause between the employee and the former employer, was considered unfair support of breach of contract and thus as anticompetitive practice. Henceforth, such action is considered to be an acceptable agreement of financial incentives and is feasible if the former employee and the new employer engage in no further anticompetitive behavior.

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Belgium



Non-compete clauses

1. Restrictions during employment

The employee is not allowed to compete with the employer during employment, and case law will almost always consider this to be a motive for the employer to terminate the employment contract immediately for serious cause.

2. Restrictions post-employment

After the termination of the employment with a specific employer, the employee's freedom is limited by two legal restrictions:

1. The employee may not abuse the knowledge they gained of trade secrets, commercial secrets or any confidential or personal information.
2. The employee may not compete in a dishonest way, e.g., by systematically contacting all their former employer's customers, or by damaging their former employer's name or reputation.

Besides these legal restrictions, the employee is allowed to engage in fair competition with their former employer, unless they waives their freedom to compete by subscribing to a non-compete clause.

If a non-compete clause is signed before or during employment, strict limitations apply in order for the clause to be legally valid. Some obligations are less strict for "international clauses," which can be concluded for white-collar employees only (not sales representatives) working at companies with their own research departments or international activities and which allow them to have access to processes or practices of which external use could damage the ex-employer. Specific rules also apply to sales representatives.

A valid non-compete clause requires that:

- ▶ It is drafted in the correct language (Dutch and French).

- ▶ It is limited in duration up to 12 months (not for international clauses, for which a duration of 2 or 3 years has been accepted by the courts).
- ▶ The scope is limited to (1) similar activities, (2) with competitor or on the employee's personal account.
- ▶ It is limited to the geographical area where competition is possible, not outside Belgium (international clauses may apply to an exhaustive list of other countries; clauses for sales representatives must be limited to the region of their activity, which can eventually also be larger than Belgium).
- ▶ It provides for payment by the employer of a special indemnity equal to at least 50% of the gross remuneration for the duration of the clause (not required for sales representatives).
- ▶ When the contract ends, the employee's gross annual salary at that moment exceeds €66.406 (unless a collective bargaining agreement at industry or company level determines otherwise) or €33.203 gross for sales representatives (amounts applicable for 2015; indexed every year).

Non-compete clauses come into effect in case of termination, unless the employment was terminated:

- ▶ By the employee for serious cause
- ▶ By the employer without serious cause (i.e., without notice or indemnity)

International clauses can, if explicitly foreseen, also have effect in case of termination after the first six months of employment in case of termination by the employer without serious cause.

Employers can waive the application of a non-compete clause at the latest within 15 days after the employment agreement is terminated.

Employees who breach non-compete clauses must return the indemnity received plus an equivalent amount (unless a court would increase or diminish it). In a clause for sales representatives, a maximum lump sum indemnity of three months of compensation may be included.

3. Top three drafting tips

When drafting a non-compete clause, it is advisable to:

- ▶ Check carefully that the employee is (still) a sales representative. If they are, including such a clause could make it easier for them to obtain a special clientele indemnity (covering the loss of clients) upon dismissal by the employer
- ▶ Qualify international clauses explicitly as such and explain why having an international clause is possible
- ▶ Remember to waive the clause in a timely manner and in writing, to avoid paying unwanted indemnities (if the ex-employee has no intention to exercise a similar activity with a competitor)

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Brazil

Restrictive covenants from a Brazilian labor and social security perspective

Clauses of non-compete or non-disclosure of confidential information are common in the Brazilian labor market, especially for executives or managers of large companies who manage their confidential or strategic information.

Through payment of compensation or indemnity stipulated in the non-compete clause, certain employees agree not to provide services to competitors in the same industry. Such compensation must be proportionate to professional gains during the course of their employment contract, and the time during which the non-compete clause applies should be reasonable. Employees who comply with such restrictions are bound by such clauses to pay fines for damage, should they breach the clause.

While Brazilian law does not address this issue specifically, local courts have dealt with it in while addressing two issues:

1. Labor implications

With regard to labor implications, the most important point is the possibility that such clauses generate losses for professionals because of excessive requirements. Brazilian jurisprudence therefore seeks to assess each case so:

- ▶ The duration of the agreement be limited in time
- ▶ The geographical scope of the agreement be limited
- ▶ The limitation does not prevent the employee from fully carrying out their work
- ▶ Compensatory damages are guaranteed to the employee during their non-compete obligation.

It is noteworthy that such clauses are sometimes considered invalid in the case of labor claims, given the generally protective stance of Brazilian labor courts.

2. In terms of the inclusion of amounts paid in compensation of professionals, and therefore on a social security contribution tax basis

Regarding social security implications, the most important question that arises in this type of procedure would be whether the compensatory payments have an impact on the social security contribution tax basis. It is worth mentioning that Brazilian legislation also has no rule that specifically addresses the issue in the social security field, and because of this, the subject ends up being subject to interpretation as to its nature, depending on the inspection of federal revenue as well as the Brazilian federal courts.

Although there is no specific indication of how to treat such compensation, the law considers as social security contribution tax basis the remuneration of employees for services rendered. In this sense, to consider any payment as salary is premise that some service or work was performed by the employee. In addition, local law considers that any payment made to employees to compensate for damage (compensation in general) should not be considered as remuneration and therefore should not be subject to social security contributions.

Based on these arguments, the Internal Revenue Service (Secretaria da Receita Federal do Brasil), through its administrative courts, as well as the Brazilian federal courts, has a tendency not to include compensation made to employees for reasons of non-compete or confidentiality in the social security contribution tax basis.

However, by because of Brazil's complex social security environment, local rules can be interpreted in different ways by the Internal Revenue Service and Brazilian federal courts. Moreover, Brazilian labor courts will generally favor the employee.

Is worth noting that soon (second half 2016) the Brazilian Government will implement a new project called eSocial. This ancillary obligation seeks to increase the level of labor and social security supervision over local companies, including cases in which employees are under a non-compete agreement, by virtue of non-compete or confidentiality clauses.

In conclusion, it is important that the policies used by companies established in Brazil, which provide the use of non-compete clauses and confidentiality, observe the premises evaluated by the labor courts mentioned above.

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Bulgaria



A non-compete clause is null and void

One of the most important issues for an employer concerns losing the company's professional secrets and internal confidential information due to the employees' misconduct and disloyalty. This is the reason why more and more employers look for methods to protect themselves from the potentially negative impact of breach of confidentiality. It is common practice for Bulgarian employers to include restrictive clauses regarding non-competition and confidentiality in their employment agreements.

Non-compete obligation

A non-compete obligation can be viewed from two different angles:

- ▶ A non-compete clause while working for your current employer
- ▶ A non-compete clause surviving the employment relationship

Concerning a non-compete commitment while in an employment relationship, the Bulgarian legislation is completely favorable to the employer, and the law allows the parties to agree in the employment contract that the employee may not start additional work (for another employer) without having prior authorization from their current employer. This means that there is no problem for the employer to prohibit employees from starting work not only with a competitive company, but also with any other employer.

Regarding the registered directors of the company, the Bulgarian Commercial Act explicitly forbids management from competing with their company's activity. This may be overcome with a decision of the general board meeting of the company, in to ensure that the employer's fundamental interests are protected.

The non-compete arrangement after an employment agreement has been terminated is not provided for by Bulgarian law and is therefore open to interpretation. In Bulgaria, employers tend to include in the agreement a contractual penalty for employees who do not observe their contractual obligation to refrain from competitive activities. These arrangements, however, according to the Bulgarian case law, are null and void. They produce no legal effect and, thus, they are not enforceable. Such clauses may have only a disciplinary effect on employees. This extreme court position is due to the fact that, according to Bulgarian law, depriving somebody of their fundamental right to work is not valid, since it is against the individual's constitutional rights. The employee's consent, given in advance, to refrain from work for a competitor is, in fact, not binding on the employee.

Bulgarian court practice goes even further by announcing that a non-compete clause surviving the employment relationship may not be included in civil agreements, service agreements or other similar agreements under the double condition that (1) it passed in the context of an existing employment relationship and (2) that is obvious that such a non-compete agreement would not be needed and signed if there was no employment relationship between the employer and the employee.

Confidentiality clause

In Bulgaria, it is a common practice to include confidentiality commitments in the employment agreement. These provisions are very often concluded for an indefinite period of time and survive the employment agreement's termination. Their violation may result in employees having to pay compensation to their employer, provided that the employee is responsible for the

breach of confidentiality, and the employer has clearly identified the information that is considered confidential and has suffered damage from the disclosure of the information by the employee.

Consistently, judges have found that for a confidentiality clause to be enforceable, it must define precisely what information should be kept secret by the employee. In case of breach by the employee, the onus is on the employer to prove the amount of damage incurred and the employee's willful misconduct.

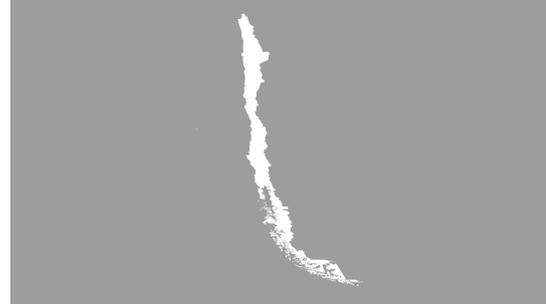
Apart from damages compensation, the Bulgarian Labor Code provides that not observing the professional secret is a serious violation of the labor discipline, which could trigger disciplinary dismissal of the guilty employee.

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Chile

Labor reform: bill to modify the Labor Code of unions and collective negotiation

On 29 December 2014, a bill entered into the Chilean National Congress, modifying the Labor Code, better known as "Labor Reform." Currently, the project is in legislative discussion in the Chamber of Deputies.

The project includes major reforms in collective labor law related to unions and the collective bargaining process. The most relevant aspects are the following:

1. Union monopoly

The project recognizes unions as the only labor representative. Negotiating groups, not set up as unions, can only negotiate in companies where unions do not exist.

2. Collective bargaining

The project proposes different processes of collective bargaining:

- ▶ **Regulated.** This applies only to unions subject to formalities and restrictions. It establishes a collective contract.
- ▶ **Not regulated.** This applies only to unions subject to lesser formalities and restrictions. It establishes a collective agreement.
- ▶ **Semi-regulated.** This applies only to negotiation groups subject to formalities and restrictions. It establishes an agreement negotiation group.

- ▶ **Intercompany process.** This applies only to intercompany unions subject to formalities and restrictions. It establishes a collective contract.

3. Extension of benefits

The project considers that benefits agreed upon by a union and established in a collective contract will be applicable to workers who join the union after the negotiation. The employer cannot unilaterally extend the benefits to workers who are not union members.

4. Information disclosure

The project establishes an obligation for the company to provide periodic information to unions, even after the collective bargaining process has been completed. This includes financial statements, investments plans, salaries and benefits.

5. Right to strike

A strike is recognized as a right that must be exercised collectively. Also, the replacement of striking workers is prohibited. It is prohibited to hire new replacement workers or reallocate current workers to functions affected by the strike.

6. Agreements on special labor conditions

Unions and employers may agree on:

- ▶ Workday exceptional systems
- ▶ Banking overtime hours

7. Term of collective Instruments:

The maximum term for collective agreements is three years.

According to the bill, the new law will enter into force on the first day of the seventh month following its publication in the Official Journal.

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China



Non-compete regulations

Under Chinese law, where an employer requires an employee to meet non-compete obligations following the termination or expiry of an employment contract the employer may, in the same contract or a separate agreement, agree with the employee on non-compete provisions. The non-compete covenant must include financial compensation for its duration, according to the Employment Contract Law of the People's Republic of China. The covenant may provide that, in case of breach, the employee may be liable to pay damages to the employer.

A non-compete covenant is enforceable if it complies with the Employment Contract Law, as follows:

- ▶ The employee subject to non-compete provisions shall be limited to senior management personnel, senior technical personnel and employees with confidentiality obligations.
- ▶ Employees and employer shall agree the applicable scope, geographical area and term for non-compete provisions, which may not violate laws and regulations.
- ▶ The non-compete period shall be valid for no more than two years following the termination or expiry of the contract.
- ▶ The employer must pay the employee the agreed amount of compensation on a monthly basis during the non-compete period.

Concerning the compensation, in accordance with the Fourth Interpretation on Several Issues Concerning the Application of the Law in Labor Dispute Cases (Fourth Interpretation), issued by the Supreme People's Court which came into effect as of 1 February 2013, where the non-compete provisions between an employer and an employee specify standards for manner of payment of the compensation, such standards shall be binding.

Where the non-compete provisions do not specify standards for the manner of payment of the compensation, in accordance with the Fourth Interpretation and the relevant laws and regulations in Mainland China:

- ▶ The employee may demand that the employer pay compensation.
- ▶ Where the employer requests that the employee continues to meet their non-compete obligations, a lump-sum compensation shall be paid in accordance with standards confirmed by the labor dispute resolution authority and in light of the non-compete terms agreed by the parties, and the employee shall continue to meet the non-compete obligations.
- ▶ Where the employer abandons the claim of continued performance of the remaining non-compete term, compensation for the portion of such term that has already been performed shall be paid in accordance with standards that have been confirmed by the labor dispute resolution authority.

In addition, in accordance with article six of the Fourth Interpretation, where the parties have agreed on a non-compete obligation, but have not agreed on the compensation to be provided to the employee after the termination or expiration of the employment contract (EC), and the employee concerned has met their non-compete obligation, the employer must grant the employee's request for monthly compensation payments of 30% of the employee's average monthly wages for the 12-month period prior to the expiration or termination of the EC.

If the 30% mentioned in the previous paragraph is lower than the minimum wage standard for the employment position to which the contract applies, the minimum wage standard shall apply instead.

In light of this, it is advised that, in order to minimize the possibility of labor disputes, the employer should first clarify which standards to use for calculating the compensation, and that the non-compete provisions should then be signed concomitantly to their employment contract. If not, the employer may have to negotiate non-compete terms with the employee upon their termination or resignation, when the employee would be in a position of advantage over the employer.

Concerning the termination of the non-compete provisions by the parties:

- ▶ Where, before the entry into effect of the non-compete provisions, the employer wishes to abandon its claim on the employee's non-compete obligations, a written notice shall be provided to the employee. Regarding the notice period, each locality has its unique local rules, for example, in Shanghai, the employer is required to provide notice one month prior to the beginning of the non-compete period, while there is no such requirement regarding the prior notice period in Beijing.
- ▶ Where, during the the non-compete period, the employer wishes to abandon its claim on the employee's non-compete obligations, a written notice is required and three months non-compete compensation shall be paid to the employee.
- ▶ Where, because of reasons attributable to the employer, compensation has not been paid to the employee for three months following the termination or expiration of the EC, the employee is entitled to revoke the non-compete provision.

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Top three unenforceable restrictive covenants

Even though the majority of restrictive covenants are not enforceable in Colombia, it is a common practice to include them in labor contracts. Clarifying the expected and non-expected behaviors, setting the scope of “good faith” involved in any contract, retaining employees and avoiding the risk of client deviation are some of the reasons to insert as common clauses, irrespective of their effectiveness.

Their effect is, in most cases, merely psychological. Indeed, Article 44 of Colombia’s Labor Code clearly states that any stipulation by which an employee agrees not to work in certain activities or not to provide services to the employer’s competitors’, once the labor contract is concluded, has no effect. This means that employers, individuals and even authorities are not able to enforce restrictive covenants, which are against an individual’s rights. The purpose of this regulation is to protect an individual’s freedom, the right of association, the right of free development of the personality and the right of work, which in Colombia are classified as fundamental rights.

Post-termination clauses

These clauses are written to restrict employees’ ability to work in similar activities following their termination. However, such clauses are not binding.

Article 25 of the Constitution establishes that work is a right and a social obligation and benefits from the special protection of the state. Similarly, Article 26 states that everyone is free to choose a profession or trade. Article 11 of Labor Code reinforces these principles by stating that no one can impede the work of others, nor even prevent them from being engaged in the profession, industry or trade they choose, as long as its exercise is legal.

Non-solicitation clauses

Non-solicitation covenants are intended to prohibit former employees or the competition from hiring or attempting to hire current employees. However, they are as ineffective as post-termination clauses. In Colombia, individuals are free to choose the activity that they will develop; any restriction to that right is against Colombia’s Constitution and labor regulations.

Non-compete clauses

Non-compete clauses prevent employees from working for the competition or from acting as a direct competitor by contacting the employer’s clients during an agreed period after the contract termination. Once again, such clauses are not enforceable, as individuals are free to choose their work, to build their own network and start their new business in good faith, within a legal competitive framework.

It is important to mention that, in Colombia, unfair competition is prohibited. Act 256 of 1996 in Articles 8 to 18 defines unfair competition behavior such as client deviation, acts of disruption, confusion, disrepute, comparison, imitation, unfair exploitation or violation of secrets.

So, any act of unfair competition is illegal. If the restrictive covenant only prohibits the employee from engaging in certain conduct or from acting in bad faith once the contract is terminated, the clause will be enforceable, as those actions are prohibited expressly by Colombian law.

To summarize, not every restrictive covenant is unenforceable in Colombia; there are some agreements that can restrict an individual’s freedom after termination, while protecting the employers’ rights. This is the case with non-disclosure or confidentiality clauses, which are enforceable after the contract termination, as they guarantee protection of data and intellectual property of the former employer.

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Costa Rica



Confidentiality and non-compete legal regulation

Even though confidentiality and non-compete agreements could be considered related subjects, in Costa Rica there are specific regulations for the legal treatment of both of them.

Firstly, all employees are tied by a confidentiality obligation. This obligation is properly established in the Costa Rican Labor Code. The Labor Code states that the employee should keep private any information about technical, commercial and industrial secrets, and in general, any information of an administrative nature, of which non-authorized exposure could damage the employer. This means that all the information that the employee has access to might be considered as confidential by virtue of the employment relationship.

In addition to this legal provision, a confidentiality obligation can also be provided for in the labor contract itself or regulated through collective labor agreements, internal labor regulations or labor proceedings, such as the Code of Conduct.

In case of non-compliance, and depending on the gravity of the fault, the sanction applied to the employee might range from a written warning up to the termination of the labor relationship. If the non-compliance of the employee causes economic damage to the employer, civil action could be taken against the employee in order to compensate the damage caused by the disclosure of information.

Furthermore, in accordance with Costa Rican law, the obligation of confidentiality remains indefinitely, even beyond the term of the working relationship ...

Secondly, employee competition, meaning leading activities that imply a conflict of interests or any kind of competition, during the employment, is prohibited unless specifically authorized by the employer. This is regardless of whether such activities take place during or outside the employee's working schedule, or whether they are performed through a third party. Non-compliance with this labor obligation could be qualified as objective loss of confidence which, in addition to a verified cause of economic damage, could be argued as motivation for dismissal.

A difference between non-compete and confidentiality obligations is that the first is subject to the working relationship term. In Costa Rica, there isn't a law that regulates non-compete agreements, therefore they risk being considered as a limitation on the right to work. Nevertheless, once the working relationship is over, a civil contract could be signed between the parties, in order to agree to a non-compete obligation, specifying the term, geographical limitations and the payment that the former employee will receive as compensation for not working for the competition or for not being able to work in the activities defined by the parties.

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Restrictive covenants in employment agreements

Under Cyprus law, employees owe an implied duty of loyalty to their employer. Employees should offer their services in a trustworthy and faithful manner. This implies, inter alia, that, during employment, employees are restrained from providing services to competitors and from soliciting clients. Such duty does not generally continue after termination of employment. Employers will therefore want to impose effective restraints on former employees to protect their business interests.

Non-disclosure

Non-disclosure covenants in employment contracts, during and post-termination of employment, for protection of the employer's trade secrets and confidential information are generally enforceable under Cyprus law.

Non-competition, non-solicitation and non-dealing

Post-termination restrictive covenants such as non-compete, non-solicitation and non-dealing are fairly common in employment contracts subject to Cyprus law. Such covenants tend to be quite onerous for employees as they may severely limit their ability to earn an income for the duration of the covenant period.

Constitution and Contract Law

Article 25 of the Constitution of the Republic of Cyprus provides for the fundamental right of every person to practice any profession or carry on any occupation, trade or business. This right may only be subject to limited restrictions prescribed by law. Section 27 of the Contract Law Cap 149 as amended, provides that every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind is to that extent void, with the

exception of sale of goodwill of a business and agreements between partners during partnership or prior to its dissolution.

Common law

By virtue of the Courts of Justice Law no.14/60 as amended, Cyprus courts apply inter alia, in exercising their jurisdiction, the common law and the principles of equity to the extent that these are consistent with the Constitution and laws enacted under or retained by the Constitution. The common law approach used to be similar to the provisions of Section 27 of the Contract Law rendering void any provision restraining anyone from exercising a lawful trade. As common law developed, this strict approach has gradually changed so that a restrictive covenant may be enforceable if reasonable (in geographical and time scope), to protect a legitimate business interest and is no wider than is necessary to protect that interest.

Enforceability

The enforcement of such restrictive covenants has not been tested before the Cyprus courts. In view of the relevant provisions of the Constitution and Contract Law, one could argue that non-compete, non-solicitation and non-dealing covenants lead to a restraint of trade and would therefore be void and unenforceable.

There is general consensus among legal practitioners in Cyprus that Section 27 of the Contract Law is outdated and should be amended to reflect modern commercial realities. Views of legal practitioners differ as to whether a Cyprus court would interpret strictly its provisions, thereby rendering all such restrictive covenants void (subject to the exceptions provided by law) or whether it would draw guidance from common law, enforcing a reasonable restrictive covenant made within the constraints of employment law. The fact remains that Section 27 of the Contract Law has not been amended.

In our view, an employer would most probably not be able to enforce a restrictive covenant leading to a restraint of trade before the Cyprus courts.

Severability

If such restrictive covenants are included in an employment contract, it is advisable to make them reasonable in geographic and time scope to improve the chances of them being enforceable, while they should be drafted so that, if held to be unlawful, they may be severed from the rest of the agreement without rendering other terms void. For example, such provisions should be drafted so that they can be removed without needing to add to or modify the wording of other terms, while remaining terms should be supported by adequate consideration.

Garden leave

To increase the chances of enforceability of restrictive covenants such as non-compete, non-solicitation and non-dealing covenants in an employment contract, a garden leave provision could be included in the contract. The employee would remain employed by the employer during the period in which the employer wanted protection, continuing to receive salary and other benefits, but the employee would not work during this time period and would be prevented from taking up other employment. Any such clause might still be subject to scrutiny by the court if challenged.

Remedies for breach

Restrictive covenants, if valid and enforceable, could be enforced by application to the court for a restraining order and compensation for damages, if the employer has suffered losses.

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Finland



Restrictive covenants

In this article, we summarize the key points regarding non-compete clauses and non-disclosure clauses, and how they affect employees and employers in Finland.

Non-compete clauses

The enforceability of non-compete covenants is governed in Finland by the Employment Contracts Act (55/2001, as amended). According to the Finnish Employment Contracts Act, during an employment relationship, employees shall not perform work for another party or engage in any activity that would, considering the nature of the work and the individual employee's position, cause manifest harm to their employer as a competing activity contrary to fair employment practices.

After the termination of an employment contract, as a general rule, non-compete covenants can bind employees only on the grounds of particularly important reasons deriving from the nature of employer's operations or the employment relationship. While determining whether such particularly important reasons exist, the following elements must be taken into account: (1) the nature of the employer's business and the need for protection due to business reasons, (2) the employee's access to trade secrets or special training that has been provided and (3) the employee's position and tasks. In practice, the criteria on such important reasons are most often met when the employee holds a leading position.

A non-compete agreement might be appropriate, for example, when the employer is engaged in research and

development activities and possesses, contrary to competitors, unique knowledge and skills, or when the employer wants to protect the interests of its customers.

In Finnish case law, the criteria for certain of these reasons are relatively strict. In the Finnish Supreme Court decision (KKO 2014:50), it was ruled that a non-compete contract between an employer that manufactured robot automation software and an employee who worked for the employer as a software engineer was deemed void and that the employer did not have a particularly important reason for establishing the non-compete covenant. According to the Finnish Supreme Court, the following elements illustrated the lack of particularly important reasons: the employee did not have any subordinates; the employer and employee had agreed upon a non-disclosure agreement that adequately protected the employer's trade secrets and the employee did not take part in the employer's sales activities during the employment relationship.

A non-compete agreement may restrict the employee's right to make a new employment contract with the employer's competitor or engage in competing activities for up to six months after the end of employment. If the employee is deemed to receive a moderate compensation for the agreement, the period can last up to one year. An agreement restricting the employee for more than six months or one year is, in principle, null and void after six months or one year has passed. However, these restrictions are not applied to employees who are considered to possess a leading or equivalently independent role at the company.

Non-disclosure

According to the Finnish Employment Contracts Act, an employee may not disclose their employer's business secrets during the employment. However, if the employee has obtained a business secret unlawfully, the prohibition continues after the termination of the employment relationship. The Finnish Criminal Code regulates that a violation or misuse of a business secret is a criminal offense during and after the employment.

In addition, Finnish employment contracts often include a separate non-disclosure covenant. The purpose of this is to protect the employer's own trade and business secrets, as well as those of other companies belonging to the same group, and of clients and cooperation partners. The content of the non-disclosure covenant is not regulated. However, a proper covenant should specify the confidential materials in detail and should not impose an unnecessarily extensive scope for non-disclosure. Furthermore, the confidentiality obligation of the covenant should not be expanded to cover the employee's professional competence or previous experience. It is recommended that the secrecy obligation be limited in scope and applied only to the period of time when the information subject to confidentiality can be of financial value. Indefinite secrecy obligations are generally considered invalid by the court. However, the obligation to keep unlawfully received information confidential automatically remains in force after the end of employment.

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France

Restrictive covenants in France

Restrictive covenants aim at protecting companies from being potentially damaged by abusive or illegal use of company information by current or former employees.

As a general matter, all employees in France are bound by a general duty of care and loyalty toward their employer. This duty is widely considered as being too broad and difficult to enforce. As a result, it is best practice for employers to include in French employment contracts additional restrictive covenants. These covenants take different forms, each with their own special rules, and apply during or post-employment.

Non-compete covenant

The protection for employers applies only post-employment.

This covenant seeks to balance two key interests: the employee's right to find gainful employment and the company's right to ensure that its former employee does not compete in an unfair way by working for a competitor. To achieve this balance, French case law has established the following four conditions for a non-compete covenant to be valid:

1. It must be necessary to protect the employer's legitimate business interests.
2. Its necessity in protecting the company must be specific as to the employee's role within the company.
3. The duration of the covenant and its geographical scope must be limited.
4. The covenant must provide for specific financial compensation.

To justify that the covenant is necessary to protect its legitimate business, the employer must be able to demonstrate that its business is likely to be damaged, if the employee undertakes the same or similar professional activity within a competing company. The courts take several elements into consideration, including the employee's skills set, access to confidential information, and the amount of direct contact the employee may have with the company's customers.

The covenant must also take into consideration the specific functions and duties that were fulfilled by the employee. For instance, the covenant cannot prevent the employee from working for a competing company but in a completely different market.

The duration and geographical scope of the covenant must also be limited. There is no scale that would allow employers to establish a linear ratio between the duration of the non-compete obligation and its geographical scope. The general principle is that, in order to be valid, the covenant cannot make it so difficult for employees to find new employment, such that they are without working possibilities. Certain industry-wide collective bargaining agreements may provide maximum duration and/or geographical scope of the covenant.

Lastly, the covenant must provide for a specific financial compensation. There is no minimum amount set forth by law or scale that would allow employers to establish whether or not the compensation is sufficient. In general, compensation at least equal to 35% of the employee's remuneration for the duration of the covenant is considered to be fair. Certain industry-wide collective bargaining agreements may provide for a minimum amount exceeding 35%.

If any one of the above conditions is not satisfied, the agreement is, in principle, null and void and, therefore, is not binding upon the employee. However, the judge can "blue pencil" the agreement in order to render it valid and, for instance, increase the amount of the financial compensation, or reduce its duration, to save the clause.

Under existing case law, the employer is free to choose not to enforce the covenant and thus not pay the financial compensation, subject to certain conditions. The employer must inform the employees within a short time after the termination of the employment contract and, therefore, that they can work for the competition and will not receive any financial compensation in this regard.

Penalty clauses are often added by the employer in the event of a violation by the employee.

Confidentiality and exclusivity covenants

This protection for employers applies only during employment.

Employment contracts can include exclusivity clauses, through which an employee is prohibited from working for another employer for the duration of the employment relationship, and confidentiality clauses, through which an employee undertakes not to divulge information considered confidential by the employer. In general, such clauses do not require specific additional remuneration, as these obligations are viewed as part of the employee's general duty of care.

Non-solicitation and non-poaching covenants

This protection for employers applies only post-employment.

Employment contracts can also provide for clauses that prevent former employees from soliciting former clients or "poaching" former colleagues. However, their duration must be limited in time and in a manner which is proportionate to the employer's business needs. Indeed, if their duration is excessive or if they are too broad and imprecise, they can be deemed by the courts as disguised non-compete covenants, and thus null unless they provide for specific financial compensation.

Conclusion

There are different ways that employers in France may protect their know-how, confidential information, and competitive position. Each method has its own conditions for validity and enforceability. Some apply during and/or post-employment.

Employers should be aware of the options available to them and properly ensure that employment documentation reflects these business needs in order to protect the interests of the business.

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Germany



Post-contractual non-compete clauses

Non-compete clauses are contractual clauses that may be contained within an employment contract. They restrict the employee's right to conduct activities in competition with their former employer after the end of the employment relationship.

It is the employer's right to protect the legitimate business interests by way of post-contractual non-compete clauses. Legitimate business interests include the employer's trade secrets, company know-how or confidential information, the employer's connection with the clients and the stability of the employer's workforce.

In assessing whether such a clause is enforceable and valid, the German court will consider the following:

- ▶ Is the clause reasonably limited in time and in geography?
- ▶ Is the clause exceeding the legitimate business interest necessary to protect?

These requirements apply for restrictions regarding employees (including executive employees).

Non-compete clauses are subject to strict requirements in Germany regarding form and content. In particular, employers must comply with the following requirements:

- ▶ A post-contractual prohibition of competition is enforceable only if it is expressly agreed in writing.
- ▶ The non-compete covenant has to be unconditional.
- ▶ The parties must agree upon the employer's obligation to pay a waiting allowance (compensation, Sec. 74 para. 2 HGB) amounting to at least 50% of the individual's last total remuneration to be paid during the term of the covenant. This remuneration includes not only the last monthly salary, but also bonuses,

commissions and other payments that were paid during the employment relationship, as well as benefits.

- ▶ The maximum term of such restrictions must not extend beyond a period of two consecutive years after the end of the employment.
- ▶ The covenant must not extend beyond the geographic area in which the employee is active.
- ▶ The non-compete clause must not unreasonably hinder the employee in their professional advancement (legitimate scope of prohibited actions depends on the previous position of the employee).

A restrictive covenant is only binding and enforceable against the employee to the extent that the statutory requirements are met. If non-compete clauses go further than the permitted scope, the scope of the covenant, by operation of law, is, in general, automatically reduced to the maximum scope permitted by law. If the employee obeys this permitted scope of the covenant, they are entitled to the waiting allowance, even though the allowance was originally envisaged for a non-compete clause with a broader scope.

In case of non-compliance with the non-compete restrictions, the employer may seek injunctive relief. Additionally, non-compete covenants should generally be backed up by a contractual penalty. According to the German Federal Labor Court, penalty clauses must clearly define the circumstances under which a (new) breach of the non-compete clause occurs. The employer may waive their rights under the post-contractual non-compete clause at any time prior to the termination of the employment contract (Sec. 75 HGB). However, a notice period of one year has to be observed. Thus, in case of a waiver, the employee will be released from the post-contractual competition ban as soon

as the employment has terminated. The employer, however, will be released from the obligation to pay the waiting allowance not earlier than one year after notification of the waiver. Therefore, if the employment is terminated earlier than the one-year period, the employer has to pay the waiting allowance, even though the employee is already allowed to work for a competitor.

For board members and managing directors, Sec. 74 et seq HGB does not apply, as they are generally not considered to be "employees." Regarding non-compete clauses with those individuals, the following differences should be observed:

- ▶ There is no legal requirement to agree on non-compete restrictions in writing, but for evidentiary reasons, it is recommended.
- ▶ The term of the non-compete covenant is typically restricted to two years. Under special circumstances, however, non-compete clauses may be longer.
- ▶ If the agreed scope of the post-contractual non-compete clause is too broad, it will not automatically be reduced to the maximum scope permitted by law. Instead, the whole clause will be considered null and void unless expressly agreed otherwise.
- ▶ It is controversial whether companies may compensate managers with the equivalent of 50% or less of the manager's fixed salary only.

In summary, post-contractual non-compete covenants are a complex area of employment law. There is no "one size fits all solution" and all post-contractual non-compete clauses have to be tailored to each single case.

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Greece

Restrictive covenants under Greek law

Restrictive covenants such as non-compete and non-disclosure clauses are regulated by general provisions of the Greek Civil Code, as well as case law provided by Greek courts.

As such, the non-compete covenant is a clause included in employment agreements under which the employee agrees not to enter into or start a similar profession or trade in competition with the employer, either during the term of the employment agreement or following its termination. The use of such clauses is premised on the possibility that the employee may begin working for a competitor or start their own business, and gain a competitive advantage by exploiting confidential information from the former employer's operations, trade secrets or sensitive information such as customer or client lists, business practices, upcoming products and marketing plans.

The Greek Civil Code and Constitution establish the principle of non-abusive use of rights, according to which it is considered unlawful to use a right in order to cause intentional harm. Pursuant to this principle, Greek case law concluded on the following main points:

- ▶ During the term of an employment agreement, said covenants are permissible since they are founded on the employee's duty of loyalty, i.e., their obligation to render loyal, diligent and faithful services to the employer even in the absence of any specific agreement. This means, in particular, that an employee owes a duty to act with the utmost good faith in the furtherance and advancement of the employer's interests.
- ▶ Based on the freedom of contract, the contracting parties may agree on restrictive covenants, the validity of which is mainly judged on the grounds of the principle of non-abusive exercise of legal rights. To this end, Greek case law has set specific criteria to establish the validity of restrictive covenants. These criteria include their duration, their geographical scope and the existence or not of provisions indemnifying the employee restricted by the covenant.

While non-compete covenants are one of the most common types of restrictive covenant, there are also others serving specific purposes, such as:

- ▶ Confidentiality covenants, by which the employee agrees not to use or disclose the employer's confidential information.

- ▶ Non-solicitation covenants, by which the employee agrees not to solicit and, if well drafted, not to accept business from the employer's customers or hire the employer's employees.

If a restrictive covenant is ruled invalid by Greek courts, it is considered as never having been concluded. However, if it is valid, it produces all the legal obligations and rights provided thereof.

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Guatemala



The viability of non-compete covenants

In Guatemala, as in numerous other jurisdictions, the legal principle is that of the stability of the employment contract. Therefore, according to Guatemalan labor law, the preferred type of employment contract is the indefinite term contract and the other types of contracts are contracts of exception.

The purpose of this principle aims to ensure stability in employment. This guarantees financial and, to some extent, psychological security. In addition, the employee can be provided with education and training during the course of their employment.

However, once the employment relationship is terminated, the question lies as to how to treat the former employee, and what obligations they should bear. Indeed, it is logical that an employer would want to prevent an employee from competing against their own economic interests, especially if specific training was given to the employee during the course of their employment, at the employer's expense.

In order to protect the interests of both parties, Guatemalan law allows for non-compete covenants through which an employee is obliged not to compete with their former employer.

However, in principle, the Guatemalan Constitution guarantees freedom of work as well as freedom of commerce and industry, and a non-compete covenant could be viewed as breaching such protection. In addition, such freedom cannot be waived by the employee. Therefore, given that the purpose of such covenants is to restrict freedom of work, legal doctrine has established that three criteria need to be met for such covenants to be valid:

- ▶ It should include only the "generic interests" of the employer.
- ▶ The geographical scope and duration should be clearly limited.
- ▶ The employee must receive some form of financial compensation.

The "generic interest" of the employee may be considered as the employer's clients, including its suppliers and its employees, as well as all information, knowledge and procedures owned by the employer, which provides a competitive advantage over competitors who do not have such information or knowledge.

In order to ensure the validity of the covenant, the economic capacity of both parties must also be taken into account. Therefore, mutual interest must be ensured and the employee must be financially compensated. In addition, the covenant cannot be generally restrictive, and the employee must be able to work in other areas.

The non-compete covenant, which is agreed upon within a determined territory and for a limited period, does not imply renunciation, limitation or distortion of labor rights in itself, because the worker has the right to choose any other occupation while they are remunerated for not engaging in a certain activity.

The employee is considered to have breached their non-compete obligation when their actions have damaged the former employer's business interest, as well as when their activity is likely to damage them in the future.

Non-compete covenants are often provided in employment contracts, as they protect the employer's business interests, as well as any investment made in training, while ensuring that employee freedoms are protected. Indeed, given that the employee is guaranteed financial compensation and is allowed to work in other areas, the employee's constitutional freedom is not violated.

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Employee retention

With reference to an employee's duty of loyalty in employment relationships, Article 2105 of the Italian Civil Code states that, during employment, workers are forbidden to conduct business on their own account or on behalf of third parties in competition with their employer, or to disclose information relating to the company's organization, or to use such knowledge in a way that will damage the employer.

In addition, the parties may sign a non-compete covenant providing that, after the termination of the employment relationship, the employee will be prohibited from working in competition with their former employer.

Such an agreement, regulated by Article 2125 of the Italian Civil Code, can be signed at the start or in the course of the employment relationship, or even just after it has terminated. In order to be valid, the restrictive covenant must be in written form, establishing the kind of activity subject to the restriction, the geographical scope of the covenant and its duration, which cannot exceed three years (five in the case of executives).

It also has to provide specific and fair compensation for the employee. The enforceability of the restrictive covenant is intended to protect the interests of the employer, and it must be well defined and limited in order to prevent it from having an excessive impact on the employee's ability to carry out any other job and to allow them to maintain their professional expertise. If the employee disputes the lawfulness of the covenant due to the lack of one of

these legal requirements, the courts can declare the covenant void, but this would then require the employee to pay back any amounts received from the employer in respect of that covenant.

An employee and employer may also sign a non-disclosure agreement, in order to restrict the disclosure or the spread of knowledge, confidential information or company intellectual property of which the employee may become aware during their employment. This agreement is usually structured so that it extends the obligation of confidentiality, even after the termination of the employment relationship, but it can also be an effective instrument to specify the content of Article 2125, making it clear what data and information should not be disclosed during the employment relationship.

In accordance with Article 2105 of the Italian Civil Code, the employee shall not use confidential information or improper methods to infringe the fair competition law. This also means that current and former employees are generally forbidden from planning a team move to a competitor if the only reason for that move is to weaken the former employer rather than purely to improve the competitor's own workforce. Former employees are also generally prohibited from taking clients from their former employer. In order to strengthen these provisions, the parties may also sign a non-solicitation clause, clearly defining the employees who cannot be hired by reference to their seniority, grade or level, or the customers who cannot be approached due to their importance for the company. This kind of clause shall be

set for a defined period after the employee has left the company. However, in practice, it is difficult for employers to prove that a non-solicitation covenant has been broken, because merely showing that the employee has been hired by a former colleague does not necessarily involve a breach of the covenant.

Furthermore, the employer may propose a minimum guaranteed term clause, in order to improve the loyalty toward the company of high-performing employees. With a retention agreement, the parties agree that they will not terminate the contract for a fixed period of time, granting the employer the professional contribution of top employees for an agreed period. The clause may provide an obligation for both the parties not to withdraw from the contract for a certain period, or provide a voluntary extension of the notice period generally established by the National Collective Bargaining Agreement applied by the employer. In order to be valid – and attractive for the employee – this kind of pact needs to provide the employee with an appropriate level of compensation in exchange for agreeing not to change employer. The parties commonly choose a periodic payment of a relatively significant amount of money conditional on the continuation of the employment relationship, but they can also opt for a wage increase, a career move or a personal welfare plan. In the case of younger employees, a prestigious scholarship may also be an attractive way to encourage talent to commit to the company.

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Lithuania



Non-compete clauses

Introduction

Non-compete clauses prevent the employee from competing with their employer after the termination of the employment agreement. Non-compete clauses may limit the employee's activities by prohibiting them from working for the employer's competitors, or establishing a competing business. Also, non-compete clauses may take a form of, or include, non-solicitation clauses, preventing former employees from dealing with former employer's customers or soliciting former employer's employees.

Non-compete clauses in Lithuania are not subject to labor laws, but are regulated by the Civil Code, as they are considered civil contracts instead. Therefore, these clauses are regulated by analogy in applying the Civil Code provisions regulating the basic principles of prohibition of competition in the activities of commercial agents (Article 2.164 of the Civil Code). As a result, the main source for legal regulation is case law.

Requirements

Time limits

In applying analogy with provisions regulating the activities of commercial agents, Lithuanian courts have confirmed that the time limit in a clause, prohibiting an employee to compete with its employer, cannot exceed two years.

Compensation

According to the Lithuanian case law, non-compete clauses are valid only if they contain a specified amount to be paid to an employee as compensation

for non-competing with the employer.

The latest case law has confirmed that the amount of such compensation has to be reasonable, fair and just in the light of the individual circumstances of each employee, i.e., specific to the employee's work, importance, potential influence on the former employer's business if in competition, amount of confidential information received. Case law in Lithuania indicates that 50% of the average monthly salary constitutes sufficient compensation, and this amount is therefore used in practice. However, it is important to note that the reasonableness of compensation is considered on a case-by-case basis.

Geography

According to case law, for a non-compete clause to be enforceable, it should contain a geographical scope. However, geographical specifications should comply with the requirements for reasonableness, fairness and justice. Therefore, an employee may challenge non-compete clauses that overextend the geographical coverage for non-competition.

Subjects of non-compete clauses

According to Lithuanian case law, not every employee may be bound to a non-compete clause, including employees who perform functions of a managerial nature. Therefore, the enforceability of non-compete clauses depends on the individual circumstances of an employee and their functions performed in the given company and their possible influence on competition.

Damages

Employer

The employer may claim damages, should the former employee breach the non-compete clause. According to the Civil Code, the employer may apply to the court for a specific performance, or to claim damages. Also, if provided in the non-compete clause, the employee who is in breach of this clause may be sentenced to pay a penalty for the breach. However, the amount is subject to the court's scrutiny and to the test of reasonableness, fairness and justice.

Employee

The employee may challenge a non-compete clause by asking the court to annul the clause, or force the employer to pay the agreed compensation (in the case of non-payment by the employer).

Non-compete under the Law on Competition

There may be situations when, even in the absence of a non-compete clause, an employee may be held liable for engaging in unfair competition practices, breaching the Law on Competition. However, the case law is not uniform, and it is unclear whether the former employee may be held liable for engaging in unfair competition practices (using confidential information), or whether only the company, in employing the former employee and knowingly exploiting their "know-how," may be held liable. Therefore, it is always advisable to conclude non-compete clauses with employees who have business sensitive information.

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Mexico



Labor non-disclosure agreements

Information and knowledge are key assets for any company. In Mexico, such assets are protected by various legal regulations that are scattered across its legal system. From the labor standpoint, they are primarily protected by the Federal Labor Law; however, other legislations apply such as the Industrial Property Act, the Copyright Act, the Federal Criminal Code and the Federal Civil Code and Federal Law for Personal Data Protection.

One of the top priorities for companies is to guarantee that the information that allows them to maintain a competitive and economic advantage over third parties is not disclosed by their employees or former employers. Therefore, legislation has provided for coercive tools such as confidentiality or non-disclosure agreements, in order to protect such assets and competitive advantage.

In a systematic but not limited manner, the following is considered as confidential information: documents, processes, customer lists, items, designs, systems, inventions, software, spreadsheets, studies, programs, brochures, publications, manuals, drawings, outlines, blueprints, photographs and intellectual work. Confidential information also includes contracts, agreements, deeds, strategies of any kind, electronic and magnetic media, optical disks, microfilm, film, video, voice files, procedures, trade secrets, activities, behaviors, systems, business aspects, events, and facts that are made known to an employee or have been carried out by them in providing services for the employer.

Confidentiality or non-disclosure agreements are pacts that have their ground on solid legal basis, which provide employers with powerful legal resources intended to protect their information.

The Federal Labor Law sets forth in connection with inventions of the employees that, in cases where an employee is engaged in research or improvement works of the procedures applied in the company, on its behalf, the property of the invention and the right to exploit the patent will correspond to the employer. This regulation also indicates that in any other case, the ownership of the invention will correspond to the person or people who made it, giving the employer a preferential right to the exclusive use or to the acquisition of the invention and its related patents.

The Federal Criminal Code imposes imprisonment of six months to six years and a fine of 300 to 3,000 times the minimum wage for anyone who uses, in a malicious manner, for profit and without the corresponding authorization, any information protected by the Copyright Act. Disclosure to the detriment of a confidentiality agreement would feature in such conduct.

With regard to the disclosure of a trade secret, the Federal Crime Code imposes 30 to 200 community work shifts, to anyone who, without just cause, to the detriment of someone and without consent, reveals any confidential secret or communication known or received by reason of their employment, office or position. The Federal Crime Code also imposes sanctions from 6 to 12 years in prison and from 300 to 600 days of fine to anyone who reveals, discloses or uses unduly or to the detriment of others, information or images obtained in an intervention of private communication.

The Federal Law for Personal Data Protection incorporates criminal conducts aiming to protect such information; it imposes a penalty of three months to three years in prison on a person who causes a breach of security to databases under their custody.

Also, sanctions, without prejudice to any civil or criminal liability that may result, are applied against the person responsible for personal data when transferring data to third parties without communicating to them the privacy notice that contains restrictions on the disclosure. The person responsible for such disclosure may be liable to pay a fine to the person whose data has been disclosed in the amount of 200 to 320 days of minimum wage.

The employer who discovers that an employee has breached their covenant of confidentiality must be able to exercise the legal actions above mentioned.

The employer also could draw upon the legal forms referred at the Federal Civil Code consisting in the damage and the injury in response to the civil unlawful act regarding the transmission of knowledge when an employee is bound not to disclose it.

Therefore confidentiality agreements executed between employers and their employees, not only have full legal validity, but Mexican law provides for different forms of legal action to the companies to prevent the breach of them, turning these pacts into strong binding instruments that protect the companies confidential information from the illegal disclosure.

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Netherlands



Non-compete clause

Statutory provisions

An employer and employee may include a non-compete clause in an employment contract in the Netherlands. A non-compete clause can prevent an employee from working for a competitor, or even personally setting up a competing business, after the termination of the employment contract.

In the Netherlands, a non-solicitation clause is considered to be a non-compete clause. It generally prohibits the employee from maintaining business relations with contacts of the (former) employer, upon termination of the employment contract.

The statutory provisions with regard to the non-compete clause are included in Article 7:653 of the Dutch Civil Code. Due to the fact that a non-compete clause may have extensive consequences for the employee, the article sets two cumulative requirements for its validity:

1. The non-compete clause has to be agreed upon in writing.
2. It must be agreed between an employer and an employee who has reached the age of majority.

In addition, at the request of the employee, the court may declare a non-compete clause null and void, wholly or partially, if the court is of the opinion that the employee is unfairly prejudiced by the clause. Hereto, the court will weigh the interests of the employer (maintaining the non-compete clause to protect its business) against the interests of the employee (free choice of employment).

The non-compete clause is often agreed for a specific period of one or two years from the termination of the employment contract. By limiting the duration of the validity, the employer aims to avoid a situation in which the court will be of

the opinion that the employee is unfairly prejudiced by the non-compete clause.

As well as a time limitation, the majority of employers will adopt a geographical limitation to the non-compete clause. This serves the same purpose: minimizing the impact on the employee's right to free choice of employment. The more severe the limitation of this right, the more likely it is for the court to opine that the employee is unfairly prejudiced by the employer and therefore to render the non-compete clause, wholly or partially, null and void.

Not observing the prescribed notice period will also render the non-compete clause null and void in the case of termination of the employment contract. Under certain circumstances, it is even possible for the court to order the employer to pay damages to the employee to compensate for restricted choice of employment, due to the non-compete clause.

Work and Security Act

On 1 January 2015, Article 7:653 of the Dutch Civil Code was amended in line with the Work and Security Act.

An extra requirement was added to the requirements of the clause, as mentioned previously. This third requirement states that a non-compete clause can only be valid if the employer and employee have entered into an employment contract for an indefinite period. A non-compete clause in an employment agreement for a fixed period is therefore rendered null and void.

There is, however, one exception to this rule: if the employer can substantiate in writing in the employment contract that the adoption of a non-compete clause is necessary due to a major business or service interest of the employer. This interest needs to apply to two different points in time: when the non-compete clause is adopted and upon termination of the employment agreement.

The existence of the stated major business or service interest will be assessed by the court based on all available facts and circumstances. Currently, we are awaiting the first case law that will give a more specific direction as to what constitutes a major business or service interest.

In addition to the limitation of a non-compete clause in an employment contract for a fixed period, the Work and Security Act states that the employee will be released from the non-compete clause if the employer has demonstrated seriously culpable conduct or omission toward the employee. Case law will also be required to interpret what is to be considered seriously culpable conduct or omission.

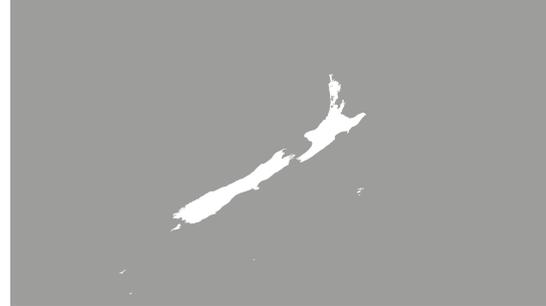
All other statutory provisions mentioned in this article will remain in full force and effect. Employment law in the Netherlands faces an interesting new era, since the consequences of the Work and Security Act exceed the scope of the non-compete clause and seriously affect our entire system of dismissal.

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Restrictive Covenants

In New Zealand, the starting position in respect of restraints is that they are invalid in common law, because they are seen as anticompetitive and contrary to public policy.

Despite this, restraints are commonly used. However, they will only be enforced to the extent that they are necessary to protect the legitimate proprietary interests of the employer, including:

- ▶ Confidential information
- ▶ Client contacts
- ▶ Stability of the workforce

Determining “reasonableness”

The reasonableness of a restraint is determined at the time it is entered into. The following factors are relevant in determining whether a restraint is reasonable and enforceable:

- ▶ Scope, duration and geographical area
- ▶ Whether the employer has a genuine proprietary interest
- ▶ Payment of consideration
- ▶ Relative bargaining power of the parties
- ▶ Effect of the restraint on the employee and their ability to obtain other work

Different types of restraint

During employment, an employee has a duty of trust, confidence and fidelity to the employer. This (as well as any contractual provisions) protects the employer’s confidential information and client relationships.

However, once the employment agreement is terminated, this duty only applies in a restricted form to highly confidential information. Accordingly, many employers consider that additional protection is necessary.

The main types of restraint used are:

- ▶ Garden leave – paying an employee to stay away from work. The employee remains employed, but is not required

to perform work for the employer (thus limiting exposure to clients and confidential information). Recent case law has confirmed that, where an employee serves garden leave and then has a further restraint, the courts will consider whether the combined garden leave and restraint period is reasonable.

- ▶ Non-compete – restrains an employee from working for a competitor or setting up business in competition. As the most onerous restraint (effectively preventing the employees from using their skills to support themselves), it is used to protect relationships with clients and confidential information. Twelve months is usually seen as the upper limit, with three- and six-month clauses being the most common.
- ▶ Non-dealing – allows the employee to be employed, but prevents them from dealing with any clients or customers of the former employer. These clauses, which are seen as a bridge between a non-compete and a non-solicitation clause, are becoming more common.
- ▶ Non-solicitation – can be used to restrain employees from contacting clients, suppliers or current employees of the employer. Because this restraint does not prevent the employee from working, it is more easily enforced.

Consideration

The courts require that an employer provides some form of consideration in exchange for a restraint. Where the restraint is included in an employment agreement from the outset, the provision of employment is usually the consideration. However, where restraints are added later, employers should be aware of the need for some form of consideration.

Restraints of trade in sale and purchase agreements

It is common that, upon the sale of a business, one or more of the shareholders of that business will remain with the

purchaser as an employee. In this situation, the purchaser often requires that, as part of the sale and purchase arrangements (and the subsequent employment agreement), the shareholder or employee enters into restraint arrangements to protect the goodwill that the purchaser has bought.

Even when these restraints are enforced through the employment courts (as opposed to the normal civil courts), a more liberal approach is adopted on the basis that sale or purchase restraints are negotiated between two commercial parties (without the power imbalance that is present in employer and employee negotiations). This can often result in longer restraints (in some cases up to three years) being enforced against former business owners.

Enforcement and modification of restraints of trade

Restraints in an employment context are usually enforced by the employer applying for an interim or substantive injunction, preventing the employee from breaching the restraint (along with a claim for damages if a breach has already occurred). The parties are usually required to attend mediation in an attempt to reach a settlement before any formal proceedings are heard.

If certain procedural requirements are met, the courts are able to modify the terms of an unreasonable restraint to make them reasonable (decreasing the term, geographic boundary or scope), binding both parties to the modified restraint. Any modification is at the discretion of the authority or court; however, this will not extend to wholesale redrafting of the relevant provisions.

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Norway



The Norwegian Government proposes changes to the rules on restrictive covenants in employment relationship

The Minister of Labor and Social Affairs has proposed a public bill to amend the Working Environment Act regarding restrictive covenants in employment relationships. The proposal includes non-compete, non-solicitation and non-recruitment clauses. If the proposal is adopted, it will have important consequences for both employers and employees.

The most relevant rules of the proposal

The proposed rules will require specific conditions to be met for a restrictive covenant to be valid.

A non-compete clause restricts an employee's ability, upon termination of employment, to accept a position with a competitor or to start, operate or participate in competing activities. The key elements of the proposal are:

- ▶ Non-compete clauses, in order to be binding, must be agreed in writing.
- ▶ Non-compete clauses may only be enforced if the employer has a particular need for protection against competition.
- ▶ Non-compete clauses may only be enforced for a maximum of 12 months after the employment has terminated.
- ▶ An employee may, at any time, require the employer to confirm in writing whether and to what extent a non-compete clause will be enforced. The employer must respond within four weeks of the request and, if the non-compete clause is upheld, explain its particular need for protection against competition. If the employer fails to do so, the non-compete clause will lapse.

- ▶ An employee will be entitled to compensation equal to their full salary for the period during which the non-compete clause is enforced, capped at 18 G, which is 18 times the Norwegian base amount (approximately NOK1.6 million). The compensation can also be reduced by half if the employee receives remuneration from another source during the same period.

A non-solicitation clause restricts the right of an employee to solicit the employer's customers after termination of employment. Currently, non-solicitation clauses are not regulated by statute, and the proposal is an important clarification of the law. The key elements of the proposal are:

- ▶ Non-solicitation clauses, in order to be binding, must be agreed in writing.
- ▶ An employee may, at any time, require the employer to confirm in writing whether and to what extent the clause will be enforced. The statement must indicate which customers are covered by the clause. If the employer fails to provide such a statement within four weeks, the clause will lapse.
- ▶ Non-solicitation clauses are only enforceable toward customers for whom the employee has been responsible or with whom the employee has had contact during the 12-month period immediately preceding the employer's written statement.
- ▶ Non-solicitation clauses may only be enforced for a maximum of 12 months after the employment has terminated.
- ▶ There are no requirements for compensation in non-solicitation clauses.

A non-recruitment clause is an agreement entered into between two or more entities that limits an employee's right to take employment with another entity. The bill proposes to prohibit non-recruitment clauses, with exceptions for entities that are entering into negotiation on a merger or acquisition.

The bill does not propose to regulate non-solicitation clauses.

Exemptions for the managing director

The managing director of a company may waive their rights related to non-compete and non-solicitation clauses, provided, however, that the managing director has entered in advance into an agreement on severance payment.

Necessary amendments to existing employment contracts due to the proposal

The bill will apply to both new and existing employment contracts. For existing contracts, the rules will apply for one year after they enter into force. Existing employment contracts with restrictive covenants must therefore be reviewed and amended where appropriate to comply with the new rules.

If a managing director has waived dismissal rights in the Working Environment Act, the employer should be aware that such a clause will not suffice to waive the proposed rights regarding restrictive covenants. The employment contract must therefore be amended to include a waiver of these rights.

It has not yet been decided when the new rules will enter into force.

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Poland



Restrictive covenants under Polish labor laws

In Poland, restrictive covenants in employment contracts are regulated by the Labor Code and the provisions of an act on fighting against unfair competition. Such covenants may be of particular concern with regard to the obligations of non-competition, non-disclosure and non-solicitation.

Non-compete agreements

The Labor Code provides for two types of non-compete agreements: during the employment relationship and post-employment.

► Non-compete agreement during the employment relationship

The provisions of the Labor Code on non-compete agreements during the employment relationship stipulate that employees may not engage in any activity competitive to the employer and may not perform work in an employment relationship or on another basis to the benefit of any entity involved in such an activity. A non-compete obligation may be a covenant included in an employment contract or it may constitute a separate agreement. If the parties decide to conclude such an agreement, it must be in writing.

An employer suffering damage due to an employee's breach of the non-compete obligation may claim compensation for the damage suffered, limited to up to three months' worth of remuneration, should the employee cause unintentional damages. However, the non-compete covenant may not provide for penalties should the employee violate their obligation.

A breach of a non-compete obligation constitutes a basis for termination of an employment contract by an employer.

Not concluding a separate agreement with an employee does not necessarily mean that an employee may, at any time,

perform a competitive activity. According to the established jurisprudence, a non-compete obligation may also be derived from the principle of loyalty to the employer.

► Post-employment non-compete

More restrictive provisions apply to a post-employment non-compete agreement. Such an agreement may be concluded with an employee who has access to particularly sensitive information, the disclosure of which could cause damage to an employer.

Mandatory elements of the covenant are a specific duration and the amount of compensation for breach of a non-compete obligation. The maximum term is not stipulated in the Labor Code; usual market practice does not exceed two years. The amount of the employee's compensation must not be less than 25% of their remuneration received prior to the end of the employment relationship, during the valid period of the non-compete clause.

An agreement for post-employment non-competition must be in writing; otherwise, it will be null and void.

The agreement may provide for a contractual penalty.

Non-disclosure

According to the provisions of the act on fighting against unfair competition, the obligation of non-disclosure of an employer's business secrets applies, irrespective of any agreements concluded in this matter with an employee.

A business secret constitutes technical, technological or organizational information of an enterprise, or other information of economic value to an enterprise that is not publicly available and whose confidentiality is protected by the entrepreneur. The statutory period for an employee is three years from the end of the employment relationship; An agreement may shorten or extend that period.

An employer who has suffered damages may demand that the particular employee refrains from disclosure of business secrets, redresses damages or pays compensation and hands over wrongly acquired benefits. An employee who, despite their commitment to an employer, discloses a business secret to another person or uses it in their own business activities, causing serious damage to the employer, may be liable to imprisonment of up to two years.

Non-solicitation

The non-solicitation obligation is also regulated by the provisions on fighting against unfair competition and applies regardless of any specific agreements or covenants.

This obligation applies in two areas. Firstly, statutory provisions prohibit the inducement of a person employed by an entrepreneur on the basis of an employment relationship or other legal basis to neglect their duties or other contractual obligations, or perform them improperly, in order to gain benefit or cause disadvantage to the employer. Secondly, the obligation applies to the inducement of an entrepreneur's customers or other persons to terminate a contract between them and the entrepreneur, or to neglect or perform such a contract improperly in order to gain benefit or cause disadvantage to the entrepreneur.

An entrepreneur who has suffered damage from the breach of a non-solicitation obligation may use the same civil law remedies that apply to the breach of a non-disclosure obligation. The breach of an obligation of non-solicitation is not a punishable offense.

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Slovakia



Restrictive covenants under Slovak law

In general, only restrictive covenants enacted by the Labor Code (Act No. 311/2001 Coll. as amended) are enforceable in Slovakia. Enforceability of covenants enacted otherwise is limited in practice.

During employment, non-disclosure and non-compete covenants are automatically applicable, based on the Labor Code, while the employer and employee may agree on a non-compete post-termination restrictive covenant in an employment agreement.

Non-disclosure covenant

The employee is obliged to keep in confidence any matter that they become aware of during the term of employment and which, in the employer's interest, must not be disclosed to third parties. The only exception is when the employee gives notice of a crime or other wrongdoing committed by the employer – i.e., whistle-blowing. The employer is entitled to determine the extent of the matters which cannot be disclosed in their internal guidelines, but this non-disclosure duty remains in force only during the term of employment. After termination of employment, the employer cannot rely on the Labor Code but can seek protection in accordance with the provisions regulating protection of business secrets under the Commercial Code.

Non-compete covenant

During the employment contract, the employee must comply with the non-compete covenant stipulated by law. This means general prohibition from performing competitive gainful activities, without the prior written consent of the employer.

The prohibition applies to activities recorded as the scope of the employer's business activities in the Commercial Register. The employee's ownership of shares in a company conducting competitive activities is not considered to be performing competitive gainful activities, unless the employee is an executive or member of the board of directors or supervisory board of such a company.

If the employees intend to start performing such competitive activities, they have to submit a written request to the employer. If the employer does not answer this request within 15 days, it is deemed that the approval was granted. Granted consent can be withdrawn at any time in writing by the employer, based on the serious reasons stated in the withdrawal and, consequently, the employee is obliged to stop performing competitive gainful activities. The approval is not required for scientific, pedagogical, lecturing, training, publishing, literary or artistic activities. If an employee breaks the non-compete obligation, this is considered to be a serious breach of discipline, resulting in the employer's right to terminate employment immediately.

Post-termination non-compete covenant

A post-termination non-compete covenant can be agreed in the employment agreement. Based on this covenant, the employee must refrain from performing competitive activities during an agreed period, up to a maximum of one year. During this period, the employer is obliged to pay at least 50% of the employee's average monthly earnings as financial compensation. A contractual penalty may also be paid for the employee's failure to comply with their obligation, up to the agreed amount. The employer has the right to withdraw in writing from such an agreement during the employment term, while the law does not require any specific reason for doing so. A collective agreement can limit the post-termination covenant to a certain group of employees.

In conclusion, the autonomy of the parties in the employment relationship under Slovak law is considerably reduced by three types of covenant: the non-disclosure covenant and non-compete covenant are legally in force during the whole term of employment, and a post-termination non-compete covenant applies if included in the employment agreement. Any additional restrictive covenants agreed between the employer and the employee are potentially unenforceable.

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Spain

Non-compete obligations under Spanish labor law

The Workers' Statute establishes the basic framework for non-compete obligations under Spanish law. As a general rule, Spanish legislation allows employees to perform several professional activities for different employers without requiring any previous consent, provided that it does not lead to unfair competition. The aim of this article is to review in which circumstances this general rule allows exceptions imposed by law or by the provisions included in the contract of employment.

1. The legal obligation of non-competition

Relevant judgments issued by the Supreme Court have contributed to the establishment of a general principle of non-competition, which is the main exception to the general rule. By virtue of this principle, activities carried out by what are sometimes referred to as "moonlighters" must not concur, i.e., one employee must not render services for several employers in the same sector of activity if it can potentially cause economic damage to either of the two (or more) employers. The non-compete obligation is therefore implicit in the contract of employment. However:

- ▶ In case of conflict between the employer and the employee, the former is obliged to prove that it has an effective industrial or commercial interest in the enforceability of non-competition.
- ▶ The non-compete principle might be suppressed if the affected employers give their consent to the employee.

2. The inclusion of restrictive covenants in the contract of employment

The Workers' Statute foresees the possibility of including full-availability clauses and post-contractual non-compete covenants in the contract of employment.

a. Exclusivity covenants

Employers might lawfully seek their employees to be involved exclusively in their company while the employment contract is in force. It is therefore admitted that they can introduce exclusivity clauses, which implies that the employee gives up their right to "moonlight" in exchange for adequate economic compensation. In the absence of such compensation, exclusivity shall be understood to be unenforceable and the employee would therefore be allowed to moonlight.

b. Post-contractual non-compete covenants

In addition, Spanish labor legislation envisages the possibility of extending non-compete obligations even after the termination of the contract of employment. The Workers' Statute provides that a post-contractual non-compete covenant is enforceable if the following circumstances are met:

- ▶ The post-contractual non-compete obligation foreseen by the covenant may not last longer than two years for employees considered as "technicians" (i.e., qualified white-collar workers), or six months for other workers.
- ▶ The employer must prove an effective industrial or commercial interest in the inclusion of the non-compete obligation.

- ▶ The employee shall receive an "adequate" economic compensation. In accordance with case law, the compensation can be considered adequate when it is bound to reward the employee for damage caused by the limitation on performing certain jobs after the termination of their previous contract.

If the employer fails to comply with such requirements, the covenant will not be enforceable. On the other hand, if the employee starts rendering their services for another company that competes with their previous employer while the post-contractual non-compete covenant is in force, they shall reimburse all the reward so as to compensate the damage caused to the previous employer.

Conclusions

In general terms, Spanish labor law tries to reduce restrictive covenants related to non-compete obligations with a view to promoting the freedom of employment. An employer willing to introduce one of these covenants in a contract of employment must always compensate the potential damage caused to the employee and justify the inclusion of such covenants so that the measure is not seen as arbitrary.

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Sweden



Will there be a fundamental change of the playground?

Non-compete restrictions in Sweden are regulated by the Swedish Contracts Act (*Avtalslagen*) Section 38. The Act states that an employee shall not be bound by a non-compete clause if the undertaking is more extensive than may be considered “reasonable.”

In addition to the Act, non-compete restrictions in Sweden are largely regulated through a collective bargaining agreement established in 1969: the CBA of 1969 (*1969 års överenskommelse*). The agreement contains specific rules and restrictions in relation to non-compete clauses. These rules and restrictions are generally binding for all employers who are members of the Confederation of Swedish Enterprise (*Svenskt Näringsliv*) and employees who are members of certain trade unions; which covers a substantial part of the Swedish labor market.

However, the CBA of 1969 was terminated in December 2014 by the Confederation of Swedish Enterprise. The reason for the termination was that the agreement was considered to be out of date and too limiting for certain employers. Employers who are bound by the agreement are only allowed to include non-compete clauses in employment contracts if specific conditions are met. These conditions are only applicable for a fairly small range of industries. The purpose of the termination is therefore to broaden the range of industries where non-compete restrictions may be used in the future. This may change how non-compete restrictions can be used in Sweden.

Current regulation

According to the CBA of 1969, certain conditions must be met in relation to the employer’s business and the employee’s work tasks in order to justify the use of a non-compete clause. Employers may only make use of it if there is a true need to protect trade secrets or know-how, and if the disclosure of such would cause the employer substantial harm. In addition, only an employee who possesses certain know-how or has knowledge of trade secrets, and is able to make use of this specific knowledge in a future employment, may be subject to the restriction.

As a consequence, the opportunity to use non-compete restrictions is limited to industries where patentable trade secrets naturally occur, such as high-level manufacturing within the research and development area. Thus, employers within the pure sales or consultancy industry who are bound by the CBA of 1969 are not generally allowed to make use of non-compete restrictions. The Labor Court may deem it “reasonable” for a consultancy firm to use a non-compete clause, but this is only the case as long as the consultancy firm is not bound by the CBA of 1969. This means that it is more difficult for employers within the consultancy industry who are bound by the CBA of 1969 to make use of non-compete clauses, in contrast to employers who are not bound.

Future regulation

The Confederation of Swedish Enterprise is currently negotiating with trade unions concerning a new agreement to replace the CBA of 1969. The parties are aiming to reach this agreement during this summer, which may broaden the range of industries where non-compete restrictions can be used. Until a new agreement is reached, the CBA of 1969 will remain valid.

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Non-compete clauses in employment contracts

Introduction

With specific accrued sensitive information, former employees, especially on a management level, may cause major harm to a company. Competing with the past employer is, however, not automatically prohibited by law. Employers often have to implement a non-compete clause in the individual employment contract or negotiate an agreement after the work relationship if they want protection. Since such clauses have a negative impact for employees' future job prospects, the Swiss Code of Obligations, in Art. 340-340c, provides several general restrictions, which must be respected. This conflict of interest has been subject to many court cases in the past.

Legal conditions

To be valid, as well as the formal prerequisite that the non-compete clause must be in writing, there are several material prerequisites to consider. The employee must have access in their work either to the employer's client information or manufacturing and commercial secrets. Furthermore, there must be a potential risk of serious injury to the employer, when using the gained insight. Eventually, a causal link between the acquired sensitive information and the potential harm is required. The Supreme Court consistently declares non-compete clauses invalid, when the damage arises largely due to the personal abilities of an employee. This court practice excludes professions such as lawyers, architects, engineers, medical professions and, in some cases, even asset managers from the range of addressees of non-compete clauses. In these formations, typically, the client has a close personal relation with the actual employee.

The non-complete clause further may lapse by law, when an employer no longer has a substantial interest in its continuation

and can equally be extinguished due to termination conditions, e.g., if the employer terminates the employment relationship without good cause.

Restriction to the clause

To prevent the employee from an effectively future working ban but still ensuring the employer's interest in their secrets, the prohibition must be restricted appropriately, in particular with regard to place, time and subject. The scales for those values have been defined by a variety of court decisions and vary by case. At a local level, a competition clause shall normally not exceed the territory in which the employer operates. According to law, the duration – except in special cases – is limited to three years. In the concrete situation, it depends for how long the employer has an actual interest in maintaining the non-compete clause. Finally, the restraint must be limited either to a particular activity or to the activity in a competing company. Overall, the parameters of time, place and subject are considered together. A tight limitation in local and material terms may justify a longer duration of the competition ban.

Clauses with excessive thresholds remain valid but are limited appropriately by the judge. In cases where the employee was reimbursed with a onetime or a periodical waiting allowance in favor of the non-compete clause, courts tend to decide in favor of the employer. Such payment can help legitimate a broad non-compete clause.

Legal claim

In case of violation, the employer can claim for the damage caused by the employee while competing. Such a claim carries many practical difficulties, since proof of the suffered loss and its scale is hard to establish, and the burden of proof lies with the employer. Frequently, therefore, a contractual penalty is agreed in advance. Up to the amount of the penalty the employer is exempt from proof of loss.

However, courts may reduce the penalty if it is considered excessive. They consider, in particular, the economic situation of the employee, and practice shows that a penalty exceeding an annual salary would rarely be found admissible. Finally, when agreed, the employer can also claim for termination of the infringement. Courts, however, grant such measures only when the employer awaits a serious financial threat and if it remains reasonable for the employee.

Practical advice

We recommend considering the following essential obstacles when drafting or using non-compete clauses:

- ▶ The sense and purpose of a non-compete clause should be reasoned carefully.
- ▶ Where appropriate, the clause should be in writing, in the individual employee contract
- ▶ To avoid restrictions by the court, a non-compete clause should be tailored to each individual employee and be limited to the actual scope of work of the employee regarding place, time and subject.
- ▶ The reimbursement of the employee due to a waiting allowance should be considered.
- ▶ A reasonable contractual penalty should be part of the clause.
- ▶ The right to terminate the infringement must be mentioned explicitly. Moreover, when striving for an urgent termination of the threat, consider the use of interim measures.
- ▶ Special attention must be paid to the circumstances of the termination of employment, since an existing non-compete clause may cease to apply.

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Ukraine



Are restrictive covenants in employment agreements enforceable?

Ukrainian labor law and regulations regarding restrictive covenants in employment agreements are not as common as in other countries. Indeed, the Labor Code of Ukraine was adopted in 1971, when the Soviet economic system did not provide for any level of competition among companies and, therefore, there was no need to protect employers from the potential leak of information or having key employees snatched by competitors. However, with the development of the market economy in Ukraine, employers have started to pay more attention to restricting the use of internal information by introducing restrictive covenants to employment agreements with employees. Generally, employers use non-compete, non-solicitation, non-dealing and non-disclosure restrictions. In order to ensure that a restrictive covenant is not just a deterrent, but a real protective mechanism for business interests, enforceability of such covenants should be carefully analyzed, and each of the respective clauses should be properly formalized in the employment agreement.

Non-disclosure clause

In practice, Ukrainian employers follow one of two ways to protect their confidential information: either including a non-disclosure clause in the employment agreement or concluding separate confidentiality agreements with employees. The latter is not foreseen by Ukrainian law, so general provisions of civil law are applied to such agreements. Usually, employment or confidentiality agreements contain a clause specifying the information that should be treated as confidential. Such an approach is in line with the law on information, which defines

confidential information as that to which access is limited by individual or company, and which can be shared in certain order defined by the owner.

The violation of non-disclosure clauses will be treated as failure to comply with a company's internal rules and policies, and may lead to disciplinary sanctions (i.e., reprimand or dismissal) for the employee. Additionally, according to the Criminal Code of Ukraine, disclosure of commercial secrets, in certain circumstances, may be treated as a criminal offense.

Non-compete clause

Many Ukrainian employers stipulate this type of restriction in employment agreements, to prevent their employees from working for competitors. Such restrictions may be formalized as prohibition to have a second job or to work in certain business sectors for a certain period after termination of employment relations with the former employer. It is worth mentioning that non-compete restrictions during employment relations are enforceable. In particular, there are some legal acts that constrain the possibility of having a second job (e.g., such restrictions are applied to employees of state companies, establishments and organizations). Moreover, the Labor Code of Ukraine foresees that an employee may work simultaneously for several employers unless otherwise provided by the law, collective bargaining agreement or agreement of the parties. However, after termination of employment relations, this restrictive covenant is unenforceable in practice.

Non-solicitation clause

Non-solicitation clauses, which prevent employees who have left the company from soliciting other employees or customers of the former employer, are rather uncommon in Ukraine and are rarely included in employment agreements.

Moreover, the Ukrainian labor law does not specifically address non-solicitation clauses and, therefore, they are almost unenforceable in practice.

From the Ukrainian labor law standpoint, termination of employment relations with the employee means the dissolution of the employment agreement and, as such, including non-solicitation clauses, which are designed to take effect upon termination of employment relations, in the employment agreement is rather unreasonable.

In practice, in those rare cases when employers impose non-solicitation restrictions on their former employees, the respective clauses are generally included into the termination agreements with such employees. However, such provisions are still unenforceable and are usually included in the termination agreement only for their psychological effect.

Non-dealing clause

Non-dealing covenants, which prevent a former employee from dealing with former clients or suppliers, are, similarly to non-solicitation clauses, mostly unenforceable in practice in Ukraine.

Doing business with the company's clients or suppliers is regulated by the commercial laws of Ukraine, and fair dealing, in particular, is regulated by the law on protection against unfair competition.

In conclusion, as the level of enforceability of the restrictive covenants in Ukraine is not that high, Ukrainian employers may also consider implementing other mechanisms, which will prevent a potential leak of business information: namely, designing a comprehensive system of data protection and sophisticated HR policies, and building a strong corporate culture to protect employers' economic interests.

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Restrictive covenants and the duty of fidelity

A recent case from the UK demonstrates the care that needs to be taken when drafting and implementing restrictive covenants, and the consequences of failing to do so.

Employees in the UK are subject to a duty of fidelity during their employment and must act in good faith and in the interests of their employer. However, as soon as the employment relationship comes to an end, employees are no longer subject to this obligation. As a result, employers often include restrictive covenants in employment contracts to help ensure that their interests are protected following the termination of the employment relationship.

On the grounds of public policy, restrictive covenants in the UK are unenforceable unless it can be shown that they are reasonably necessary to protect a legitimate proprietary interest of the business. In the UK, there is no requirement for ongoing payments to be made in support of restrictive covenants, provided consideration (sufficient real monetary or other benefit) is provided in exchange at the time the employee agrees to the restrictive covenant.

In the case of *Re-Use Collections Limited vs. Sendall*, the High Court found that the restrictive covenants to which Mr. Sendall was subject were unenforceable, on the grounds that Re-Use Collections Limited did not provide consideration in exchange for these covenants. The court also found that the covenants were not of a reasonable duration. However, the court found that Mr. Sendall had breached his duty of fidelity.

Mr. Sendall was employed by Re-Use as manager of Re-Use's depot at Dagenham. In mid-2012, he started to think about setting up his own business, making

preliminary enquiries to see if this was feasible. From November 2012 to April 2013 (when he resigned), Mr. Sendall took active steps to set up a new company called May Glass, which was in competition with Re-Use. This included arranging finance for the business, contacting potential customers and organizing the necessary equipment.

The High Court found that Mr. Sendall's actions from November 2012 to April 2013 were in breach of his duty of fidelity, since, during this time, he had taken real and substantive steps to establish May Glass, contrary to his duty to act in the interests of his employer. However, his conduct prior to November 2012, where he was merely considering setting up May Glass and making preliminary enquiries, did not breach his duty of fidelity.

Re-Use also sought to enforce restrictive covenants contained in Mr. Sendall's employment contract that would have prohibited him from being involved in competing businesses for 6 months or setting up a competing business for 12 months. He argued that these covenants were unenforceable, as he had received no consideration in return for these restrictive covenants, and that they were of an unreasonable duration.

The covenants were contained in a new employment contract that Mr. Sendall had signed shortly before he left his employment. Re-Use sought to rely upon a number of new benefits referred to in the employment contract and the salary rise that Mr. Sendall had received as constituting consideration for agreeing to the covenants. The High Court rejected this argument and found that Mr. Sendall already enjoyed many of these benefits and that the salary rise had no connection to the signing of the new contract. Finally, Re-Use sought to rely on Mr. Sendall's ongoing employment as consideration

for agreeing the covenants. However, the court again rejected this argument, as there was no evidence that Mr. Sendall's employment would have been at risk had he not signed the employment contract.

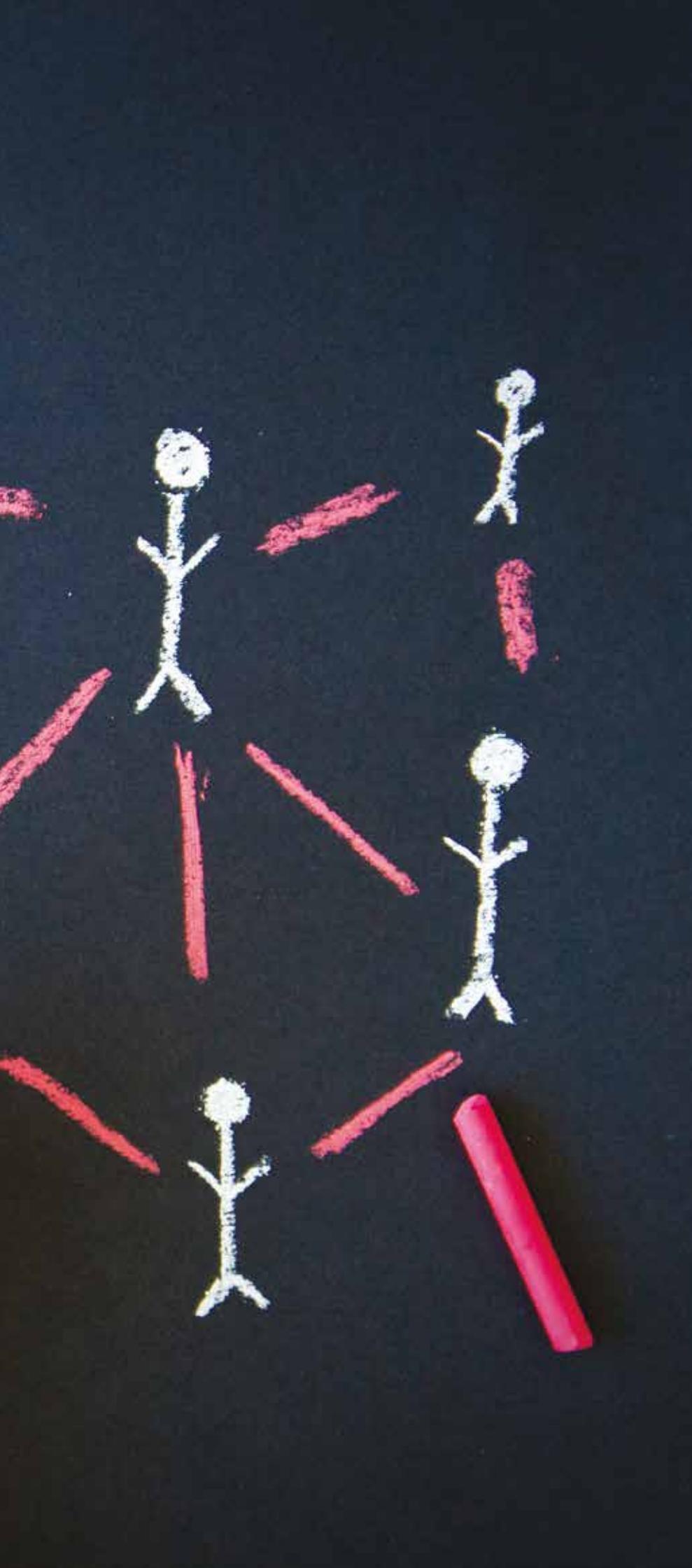
The High Court also found that, even if consideration had been provided to Mr. Sendall, the covenants were unreasonably long and therefore unenforceable.

To emphasize the importance of restrictive covenants, Re-Use had sought damages of approximately £750,000 for the loss of revenue it suffered as a result of Mr. Sendall's breaches. However, because the company was unable to rely upon the restrictive covenants contained in Mr. Sendall's employment contract, it was only awarded damages of just over £50,000 for the breach of his duty of fidelity. Had he only made preliminary enquiries and not taken any real steps until his employment came to an end, Re-Use would have had no claim against Mr. Sendall.

This case serves as a good reminder of the care that needs to be taken when introducing restrictive covenants during the course of employment, and the requirement to provide consideration for any new restrictions. Restrictions of this nature should ideally be introduced at the same time as salary reviews or other remuneration increases, making it clear that the increase in remuneration will only be provided if the restrictive covenants are agreed.

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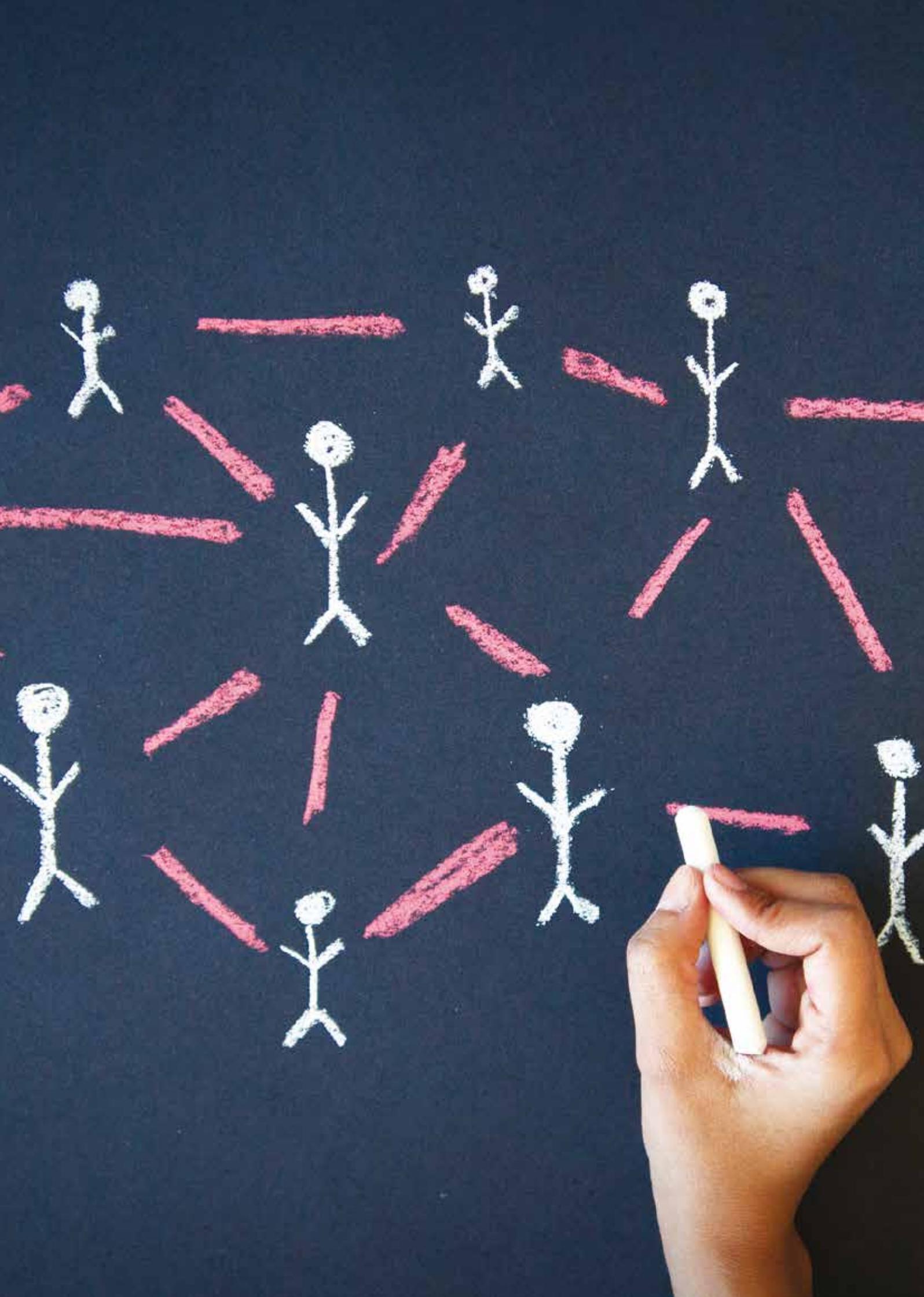
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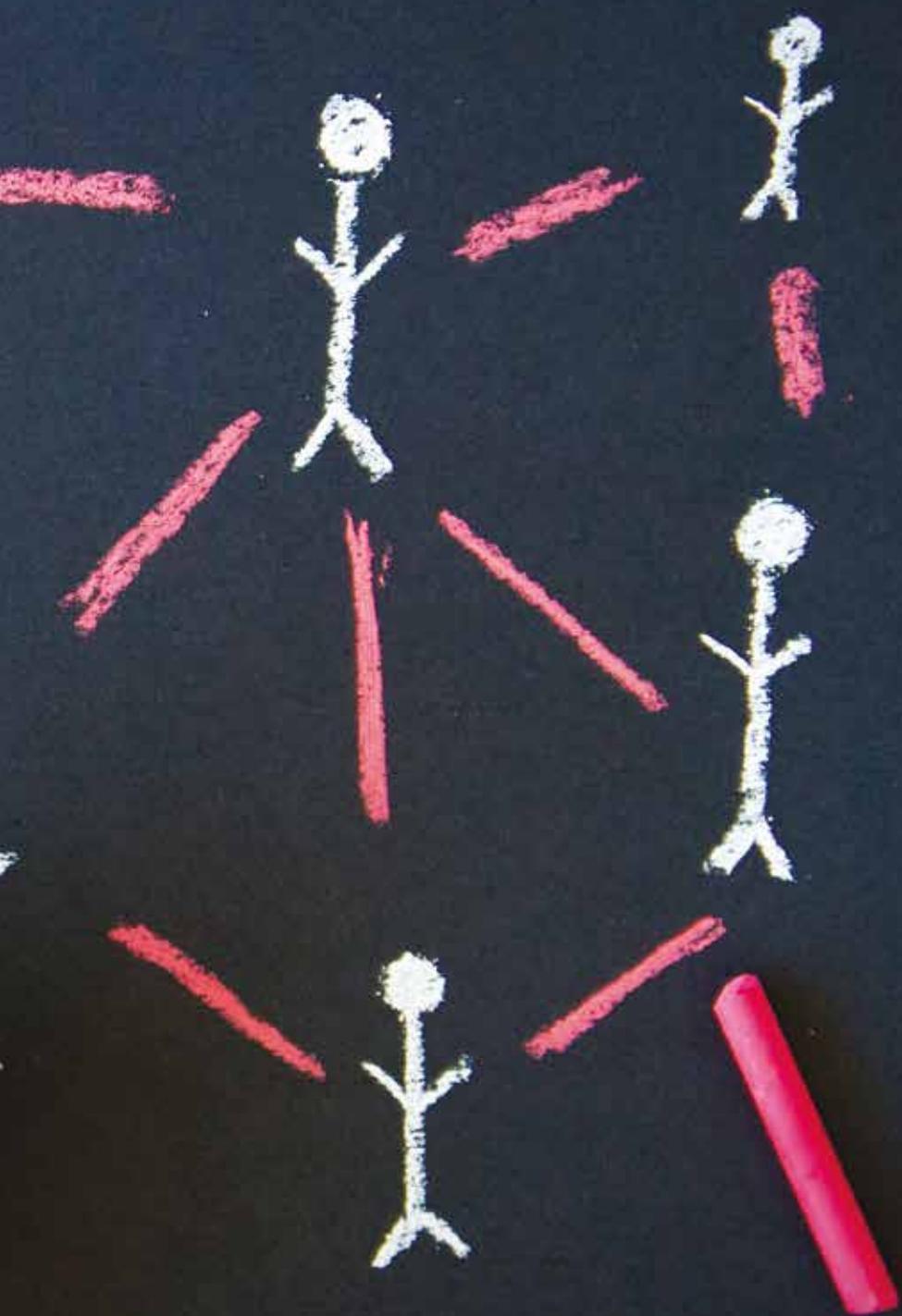
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