

**THE MERITAS GUIDE TO EMPLOYEE NON-COMPETE
AGREEMENTS IN EUROPE, THE MIDDLE EAST AND AFRICA**

April 2013

INTRODUCTION



CONNECT WITH CONFIDENCE TO A MERITAS LAW FIRM



Meritas began in 1990 as a result of a US lawyer becoming frustrated at the inconsistent service he received when referring instructions to other US states. He started to develop his own criteria for evaluating performance and service, and from those beginnings Meritas has evolved into an integrated, non-profit alliance of almost 180 independent commercial law firms located in over 70 countries.

When you work with Meritas you will have no fewer than 7,000 experienced lawyers at your disposal, all around the world, in firms that are carefully evaluated and selected and whose work is quality controlled by Meritas.

This guide has been produced by the Meritas Europe, Middle East and Africa Employment Group which is an ongoing collaboration between

28 local firms on multi-jurisdictional labour and employment law issues.

The Group also enables member firms to share information on substantive and procedural developments in their local markets, to stay current on new and emerging workplace issues and further improve client service.

For help and advice drafting non-compete agreements or navigating non-competition disputes, or any query relating to this area of practice, please contact the Meritas member law firm in the relevant jurisdiction in this guide. Each firm offers substantive and procedural knowledge in every facet of workforce management, including negotiating complex employee relation issues, providing advice and representation on expatriation, and merger/transfer employment issues.

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Meredith Stone
Vice-President General Counsel
Americas
NACCO Materials Handling Group,
Inc. (NMHG)

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ABOUT THIS GUIDE

Business practices are changing. Markets are becoming more global and employees are on the move around the world. Employees are key assets driving sales, productivity and profit over different markets. It is therefore vital that your non-compete agreements keep up with these changes in order to protect your business.

This is a challenge when the legal framework in each country is different and is also changing.

Meritas therefore presents an easy reference guide to employee non-compete agreements across borders. It sets out the key considerations to take into account when drafting, updating and enforcing non-compete agreements and restrictive covenants in different jurisdictions in Europe, Africa and the Middle East.

It is critical that HR professionals, in-house legal and commercial managers of expatriate staff have an international perspective and take an international approach to business protection. As this guide shows, the placement of employees in certain countries has a huge impact on the validity and enforceability of non-compete provisions and restrictions they may have signed up to in another country. In many cases, a foreign non-compete agreement may not be worth the paper it is written on.

This guide will ensure that businesses;

- have the necessary knowledge to optimise non-compete agreements when mobile staff are first taken on; and

- have the foresight to implement new/'localised' agreements to safeguard the business when staff move to other countries and when the business expands into new markets.

In other words, protect your business! Don't be taken by surprise; use this guide to avoid action taken in isolation in one country from jeopardising business protection in another.

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RESTRICTIONS DURING EMPLOYMENT

As long as the employment contract is effective, employees have a duty of confidentiality concerning the business and trade secrets of their employer. Employment contracts often confirm such obligations. Employment contracts often confirm or expand on the statutory obligation not to compete during the employment relationship.

In addition, during employment white collar workers are neither allowed to run an independent business without the permission of their employer nor to make trades on their own bill or on the bill of their employer. If the employee does not comply with this regulation, the employer may claim compensation for the damage incurred or, alternatively, require that the bills issued on behalf of the employee are viewed as closed. This does not apply to blue collar workers.

RESTRICTIONS AFTER EMPLOYMENT

A duty of non-competition beyond the termination of employment is only possible if this has been explicitly agreed upon in the employment contract. § 36 AngG (Angestelltengesetz) places several restrictions on non-compete clauses. The clause is invalid if the employee was a minor when the agreement was entered into. In the case of non-minors, the clause is only valid if and to the extent that it:

- applies only to the business branch of the employer;
- does not exceed one year;
- does not put restrictions on the employee that, as compared to the business interests of the employer, inequitably impede the employee's job opportunities; and
- the employee has a monthly salary of a minimum of EUR 2,397.00.

Furthermore it is not possible for the employer to enforce a non-compete clause if the employer has caused the immediate or ordinary termination by the employee, or has terminated the employment without just cause. In this last case, the employer may still invoke the non-compete clause if it is willing to continue full payment of salary or wages to the former employee for the period of the non-compete clause.

In most cases, non-compete clauses are tied to a penalty clause. The penalties can average up to a year's salary of the employee. Any such clause is subject to equitable review and reduction by the Labour Court. One important point is that if there is a penalty clause, the employer is restricted from enforcing the non-competition clause by any means other than the penalty.

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- (1) Determine whether a non-compete provision is required; this clause should be tailored to each employer and should not be the same for all its employees.
- (2) Define the scope of the activities, the geographical scope and the duration.
- (3) Include a penalty fine in case of violation of the non-compete obligations by the employee.

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**RESTRICTIONS
DURING EMPLOYMENT**

An employee is not allowed to compete with their employer during employment.

**RESTRICTIONS
AFTER EMPLOYMENT**

After employment, the employee is not allowed to disclose company secrets or engage in unfair competition. The employee is allowed to engage in fair competition with their former employer, unless a valid non-compete clause is signed. Strict limitations apply in order for the clause to be valid. Some obligations are less strict for “international clauses”, which can be concluded for white-collar employees (not sales representatives) and companies with their own research departments or international activities. Specific rules apply for sales representatives.

A valid non-compete clause requires that:

- it is drafted in the correct language (Dutch/French);
- it is limited to 12 months (not for international clauses, for which a duration of 2 or 3 years has been accepted by courts);

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- the scope is limited to (1) similar activities, (2) for a competitor or an employee's own account;
- it is limited to 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 their activity area which can extend outside of Belgium);
- it provides for the payment of an indemnity of at least 50% of the gross remuneration for the duration of the clause (not required for sales representatives); and
- when the contract ends, the employee's salary exceeds EUR 64.508 gross (unless a CBA at industry or company level determines otherwise) or EUR 32.254 gross for sales representatives (amounts 2013).

Non-compete clauses have effect if employment is terminated after the trial period, unless the employment was terminated by the employee for serious cause, or by the employer without serious cause.

International clauses can, if explicitly foreseen, also have effect in case of termination during the trial period (but not for longer than the effective employment) and after the trial period in case of termination by the employer without serious cause. Employers can waive the application of a non-compete clause within 15 days after the agreement is terminated. Employees who breach non-compete clauses are to pay back twice the indemnity received (unless a court would increase or diminish it). In a clause for sales-representatives, a maximum lump sum indemnity of 3 months can be included.

- (1) Carefully check whether the employee is (still!) a sales representative. If so, be aware that including a clause could make it easier for them to obtain a clientele indemnity upon dismissal.
- (2) Explicitly qualify international clauses as such and explain why having an international clause is possible.
- (3) Explicitly include the option of waiving its application (and ensure this is done in time and in writing, to avoid paying unwanted indemnities) and the indemnities due by the employee when breaching the clause.



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RESTRICTIONS DURING EMPLOYMENT

Anti-competitive restrictions are allowed during employment. One of the basic labour requirements of employees, set forth in Art. 126, item 9 of the Labour Code, is to be loyal to their employer, not to breach the employer's trust and not to disclose confidential information.

The employer is also entitled to prohibit employees from working for other employers during the employment relationship.

RESTRICTIONS AFTER EMPLOYMENT

Case law confirms that an obligation on an employee not to carry out any competitive activities after termination of the employment contract contradicts the Constitution of the Republic of Bulgaria because it limits the irrevocable constitutional right of labor of the individual.

Therefore, any anti-competitive restrictions after the termination of the employment agreement are regarded null and void. This means that such provisions cannot be enforced, even when the employer is prepared to pay compensation to the employee for the agreed non-compete period.

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- (1) Always include a prohibition against competitive activities during employment in the employment contract, including a prohibition against working for other employers.
- (2) Provide a definition for competitive activities in the employment contract.
- (3) Clearly identify any information which is deemed confidential or a business secret, duly notify the employee in writing of the prohibition to disclose such information and ensure the employee confirms in writing that they are aware of the applicable prohibitions. This will help in case of disclosure of confidential information or business secrets, should the employee start working for a competitor.



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RESTRICTIONS DURING EMPLOYMENT

Employees may engage in the same kind of activities as their employer only with their employer's prior written approval. An employer is entitled to withdraw their permission in writing but is obliged to explain the reason for the change in decision. If permission is withdrawn, the employee is obliged to promptly cease their activities.

This restriction does not apply if the employee is engaged in scientific, educational, journalistic, literary and artistic activities.

RESTRICTIONS AFTER EMPLOYMENT

After the termination of the employment agreement, the employee is free to compete with their former employer, unless restrictions were agreed upon. A non-compete clause must be in writing. The restriction may last no more than one year from the end of the employment relationship. A non-compete clause may be agreed with the employee only if this commitment may be fairly requested from the employee with regard to the nature of the information, know-how and knowledge of working and technological procedures that the employee acquired while employed at the employer and the use of which could seriously impede the employer's business.

The employer may rescind a non-compete clause (in writing) but only

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

while the employment relationship exists. No reason needs to be given.

The employer is obliged to provide the employee with monetary compensation during the period of restrictions pursuant to the non-compete clause. The compensation has to be at least one half of the average monthly income for every month that the commitments under the competition clause are observed. The compensation has to be paid to the employee on a monthly basis, unless some other arrangement is agreed.

A contractual penalty may be agreed in the competition clause in the event the employee breaches commitments laid down in the non-compete clause. Payment of the contractual penalty releases the employee from

commitments under the competition clause. The contractual penalty has to be agreed in an amount that is reasonable with regard to the nature and importance of the information, procedures and knowledge acquired by the employee during the employment relationship. The appropriateness of the contractual penalty will be assessed individually according to the specific circumstances of the case.

The employee may also withdraw from the non-compete clause if the employer does not pay the compensation within 15 days of the date due. The non-compete clause then expires on the first day of the calendar month following the month in which the notice of withdrawal was delivered.

- (1) Include the specific activity that the employee undertakes to refrain from after termination of the employment agreement.
- (2) If a probationary period is agreed upon, it is recommended that the non-compete takes effect only once the employee's probationary period ends.
- (3) Include at least the minimum compensation in the non-compete provision.



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RESTRICTIONS DURING EMPLOYMENT

All employees are subject to implied duties during their employment designed to prevent them from competing with their employer, including loyalty and fidelity and non-disclosure of confidential information. Duties of non-disclosure are not limited in time. However, employers are advised to make employees aware of these obligations by including express terms in their contracts of employment.

RESTRICTIONS AFTER EMPLOYMENT

Under Danish law, restrictive covenants are divided into either (i) a non-competition clause and/or (ii) a non-solicitation (of customers and/or suppliers) clause.

Non-competition clauses:

- can apply to “especially trusted employees”;
- are valid for a maximum of 24-36 months counting from the date the termination notice expires;
- apply to the employee unless the employment is terminated by the company without fault on the employee’s side; and
- must be expressly agreed in writing

Compensation:

For employees subject to the Danish Act on Salaried Employees (typically white collar workers) it must be agreed in writing that the employee is entitled to compensation for taking on the non-competition clause.

Compensation must be at least 50 % of the employee's salary and is to be paid monthly for as long as the non-competition clause applies.

The employer must pay out the first 3 months' compensation as a lump sum together with the employee's last salary payment (the "minimum-compensation").

The employer is entitled to set off against any compensation claim from the employee (in excess of the minimum compensation).

Non-solicitation clauses:

- can apply to cover the employer's business relations that have been active within the last 18 months before the termination of the employment, but only where the employee has had direct contact with the business during his employment or if the business is specified on a separate list;
- are valid for a maximum of 24-36 months counting from the date the termination notice expires; and

- apply as a general rule regardless of which party has terminated the employment.

Compensation:

For employees subject to the Danish Act on Salaried Employees (typically white collar workers) it must be agreed in writing that the employee is entitled to compensation for taking on the non-solicitation clause.

Compensation must be at least 50% of the employee's salary and is to be paid monthly for as long as the non-solicitation clause applies.

However, the employee is not entitled to separate compensation if he is already entitled to compensation for a non-competition clause from the same employer.

The employer is entitled to full set off against any compensation claim from the employee (no requirement for payment of "minimum-compensation").

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- (1) Consider whether the company needs the protection of a non-competition clause or whether the protection of a non-solicitation clause is sufficient, allowing for the company to terminate the restrictions without having to pay any kind of compensation.
- (2) Restrictions should be as relevant and insensitive to time (changes in the business) as possible in terms of scope and geographical coverage. Duration should only in very specific circumstances be increased to 36 months.
- (3) Restrictions should be tailored to the employee's role and seniority.

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RESTRICTIONS DURING EMPLOYMENT

Employees have a general duty of loyalty to their employer. This also means that an employee is not allowed to embark on any action to prepare for competing activities.

An employee is not allowed to engage in competing activities for another party contrary to fair employment practices. An employee may neither utilise nor divulge to third parties their employer's trade or business secrets.

RESTRICTIONS AFTER EMPLOYMENT

After the employment relationship has ended, employers may only limit their employees from competing through a non-compete agreement.

A non-compete agreement can only be concluded (at the beginning of or during the employment relationship) for a particularly weighty reason in the assessment of which the following is taken into account:

- the nature of the employer's operations;
- the need for protection related to keeping a business or trade secret or to special training given to the employee by the employer; and
- the employee's status and duties.

A non-compete agreement does not bind the employee if the employment contract is terminated due to reasons attributable to the employer.

The maximum term for a non-compete agreement is six months starting from the end of the employment relationship, but it can be one year if the employee has received reasonable compensation for the imposed restrictions.

Restrictions on the duration and on the maximum contractual penalty do not apply to employees who, in view of their duties and status, are deemed to be engaged in the direction of the enterprise, corporate body or foundation or an independent part thereof, or to have an independent status immediately comparable to such managerial duties.

Instead of compensation for loss, non-compete agreements may provide for contractual penalties which cannot exceed the amount of pay received by the employee for the six months preceding the termination of employment.

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- (1) Define employee status and when necessary the nature of the employer's operations.
- (2) Include a provision for a contractual penalty.
- (3) Add separate provisions on recruitment freeze and non-disclosure.



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RESTRICTIONS DURING EMPLOYMENT

The employee is not allowed to compete against its employer during employment. The employee is subject to a duty of loyalty and also should not disclose confidential information. If the employee commits a breach of one of these duties (for example, the employee is preparing to compete whilst still employed), the employer could dismiss the employee for gross misconduct and may file a claim against him to seek damages.

RESTRICTIONS AFTER EMPLOYMENT

After the termination of the employment contract, the employee is not allowed to disclose company secrets or engage in unfair competition. The employee is allowed to engage in fair competition with its former employer, unless a valid non-compete clause is signed. If a non-compete clause is signed before or during employment, strict limitations apply in order for the clause to be valid. The collective bargaining agreement applicable to the employer could also include specific provisions regarding the non-compete clause.

The clause must be necessary for the protection of legitimate interests of the company (for example, the clause is legitimate for the manager of a travel agency but not legitimate for a window cleaner). The clause must also be time-limited.

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

Generally the clause is enforceable for one year, sometimes two years. Any clause with an excessive time limit will be considered void. In addition, there needs to be a geographical limitation (for example, France/Parisian region). The clause should take into account the specificities of the employee's position. The non-compete clause may not prevent the employee from finding a position corresponding to his level/expertise.

The employer needs to pay financial consideration for the duration of the non-compete obligation. The compensation may not be insignificant and should amount to at least 30% of the monthly salary of the employee. The compensation is paid each month.

If one of the aforementioned

conditions is not fulfilled, the clause is void, but only the employee can claim the invalidity of the clause.

The employer could decide to waive the clause at the end of the contract. This should be done within the time-limit indicated in the clause (provided that it is a short time-limit, e.g. 8 days). It is better to waive the non-compete clause as soon as possible (e.g. in the dismissal letter or in a cover letter in case of mutual agreement). In the case of a resignation, the case law provides that the employer must waive the clause when the employee effectively leaves the company, whatever the time-limit indicated in the clause.

Employees who breach non-compete clauses are required to pay back the indemnity received and could be ordered to pay damages on top.

- (1) Only introduce a non-compete clause if it is really necessary.
- (2) Include payment of the minimum financial compensation.
- (3) Explicitly include the possibility of waiving its applicability (and ensure this is done in due time if needed).



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RESTRICTIONS DURING EMPLOYMENT

According to section 60 German Commercial Code (Handelsgesetzbuch, "HGB") an employee is not permitted to enter into competition with their employer during the course of the employment. In the event that an employee does not comply with this obligation, the employer may impose sanctions such as dismissal or the withholding of remuneration. The employer can also claim damages or seek injunctive relief.

RESTRICTIONS AFTER EMPLOYMENT

After the end of employment an employee is not obliged to refrain from competition, unless a post-contractual non-compete agreement has been concluded by the employer and the employee. Such an agreement is only valid and enforceable if the statutory prerequisites are met:

- written form (e-mail or fax is not sufficient);
- maximum duration of two years;
- employee receives a document containing the non-compete clause, duly signed by the employer;
- agreement is required to serve the protection of legitimate business interests of the employer regarding place, time and subject of restriction. The appropriate geographical scope of a non-compete agreement usually depends on the nature and scope of the employer's business. The covenant must not go beyond the area where an employee can be in competition with the employer.

For example, if an employee worked in Germany only, a worldwide non-compete obligation would not be enforceable. The mere interest of the employer to keep an employee away from the market will not be considered as a legitimate interest in this respect; and

- mandatory financial compensation for the agreed non-compete period in the amount of at least 50% of an employee's benefits of the previous year (fixed salary and all bonuses). If such compensation is not agreed upon, the non-compete clause is null and void. If the agreed compensation does not meet the statutory level, the clause is not binding. An employee may then decide whether they want to accept the lower level of compensation and remain bound to the clause, or to be released from it.

The employer may waive the non-compete obligation any time during the course of the employment in written form. In case of such waiver, an employee is immediately released from complying with the non-compete obligation. However, the employer still has to pay the agreed compensation for a further 12 months!

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- (1) Only agree on a post-contractual non-compete clause if it is really necessary (e.g. key employee with close relations to customers or knowledge of important confidential business information) and carefully weigh the costs of the post-contractual financial compensation against the benefits.
- (2) Ensure compliance with procedural formalities (e.g. written form, hand the signed agreement to the employee and have the receipt confirmed by the employee).
- (3) Use tailor-made clauses that impose only reasonable restrictions on an employee (instead of pre-formulated standard clauses) – otherwise the entire clause might be null and void.

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RESTRICTIONS DURING EMPLOYMENT

Non-compete clauses during employment are in principle considered permissible restrictions on the employee since the duty of an employee not to engage in competitive activities vis-à-vis the employer derives from the employee's general fiduciary duty. Similar clauses are therefore not subject to much scrutiny unless they are considered as overburdening the employee's freedom to work.

RESTRICTIONS AFTER EMPLOYMENT

- Non-compete restrictions after the termination of the employment agreement, although considered as deriving from the general contractual freedom of the parties, are more strictly scrutinized.
 - There is no standard applicable test regarding the enforceability of such clauses and the matter is considered on a case-by-case basis. However, in principle, a post-employment non-compete clause may be enforceable under Greek law provided that it does not overburden the employee's freedom to work.
 - territorial radius: the clause should be of a specific territorial radius, so as to allow the employee to be able to seek work within reasonable proximity from his home base;
 - activities concerned: the clause must be restricted to activities as similar as possible to the employer's; and
 - professional specialization of the employee subject to the clause along with the employee's position in the employer's business.
- In general financial consideration is not necessary unless the relevant clause is viewed as overburdening.

Most commonly applicable criteria to this effect are:

- duration: the clause should be of a limited duration, normally not in excess of one (1) to two (2) years after the termination of the employment;

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- (1) Draft the clause as narrowly as possible; to this effect limit its duration to not more than 1-2 years post-employment, include a specific territorial radius and restrict it to business activities similar to the employer's.
- (2) Avoid imposing post-termination non-compete restrictions on non-executive employees and employees with no substantial access to the employer's trade secrets, know-how etc.
- (3) Include financial consideration if the non-compete clause does not fully comply with the above or if the employee's professional specialization is very narrow and strongly interrelated to the employer's professional sector.



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RESTRICTIONS DURING EMPLOYMENT

An employee may not endanger the legitimate economic interests of their employer during the term of their employment. Based upon this regulation, an employee must primarily refrain from performing work for a competitor. An employee shall hold any business secrets obtained in connection with their employment in strict confidence. In addition, an employee may not disclose to any unauthorized persons any data they obtained in connection with their employment, which if disclosed may have a detrimental effect on their employer.

RESTRICTIONS AFTER EMPLOYMENT

- An employee is free to establish new employment after the termination of their employment, unless they have signed a non-compete agreement.
- Under a non-compete agreement, an employee may not violate or endanger the legitimate economic interests of their former employer for a maximum period of two years after the termination of their employment.
- An employer shall pay adequate compensation for the above undertaking. When determining the amount of compensation, the extent of the employee's hindrance in establishing a new employment – considering especially his/her education and experience – shall be considered. Should the amount of compensation be later deemed inappropriate, the court is able to make an adjustment or to classify the entire non-compete agreement as invalid. The amount of compensation for the term of the non-compete agreement cannot be less than one third of the employee's base salary for the same period. Compensation can be paid in one lump sum or in several instalments.
- Non-compete agreements can be concluded anytime during employment.
- An employee may rescind the non-compete agreement if they terminate their employment with immediate effect (as a result of a serious breach of the employer's obligations). The parties may establish a mutual right of rescission of the non-compete agreement on other grounds as well, or may even agree that the employer may rescind the non-compete agreement before the termination of employment without good reason.
- An employee shall hold their employer's business secrets in strict confidence even if a non-compete agreement has not been established.
- A non-compete agreement should be in writing.

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- (1) Define the scope of the restricted activities, the geographical coverage and the duration.
- (2) Include a penalty in case of violation of the non-compete agreement by the employee.
- (3) Define the circumstances in which the non-compete agreement may be rescinded.

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RESTRICTIONS DURING EMPLOYMENT

Employees are bound by duties of confidentiality, however, for clarity, employers should set out any restrictive terms in a written contract of employment. Contracts typically include clauses on:

- exclusive service – the employee should not carry on or be engaged in any other business or occupation unless prior consent has been obtained; and
- confidentiality and trade secrets – any trade secrets or confidential information should be protected. Confidential information entrusted should not be used in a way which may injure or cause loss to the employer or its business. This restriction can continue to apply after termination of the agreement.

RESTRICTIONS AFTER EMPLOYMENT

In drafting post-termination restrictions there is a balance between the rights of an employer to protect its business and the right of an employee to earn a livelihood.

The scope of the restrictions must be clearly defined, particularly in respect of the scope of activity restricted, the duration and geographic area covered.

Post-termination restrictions are enforceable but must go no further than what is reasonably necessary to protect the employer's business. What is reasonable will vary in each situation and each case is looked at on its own merits. In assessing the reasonableness of the duration the courts will assess how long it will take for the employer to take the

necessary steps to protect the goodwill of the business. A clause providing for in excess of 6 to 12 months will be subject to challenge.

Post-termination restrictions can be critical in protecting an employer's business. Boilerplate clauses are not appropriate and each restriction should be carefully drafted, with regard to the level and role of the employee and their ability to influence key customers.

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- (1) Clear and concise wording – any ambiguity will be read against the employer!
- (2) Be reasonable – know what business interests need to be protected and be effective in protecting those interests!
- (3) Be upfront – get the restrictions in place when the employee is first employed. It will be difficult to introduce them at a later stage!



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RESTRICTIONS DURING EMPLOYMENT

Under Article 2105 of the Italian Civil Code, during the employment relationship an employee is forbidden from acting in competition with their employer, or in favour of competitors of their employer, irrespective of any specific agreement between the parties. If the employee breaches this restriction, an employer can lawfully dismiss for serious misconduct. This restriction is only effective during the employment relationship, unless there is a specific agreement for it to continue after employment ends (see further).

RESTRICTIONS AFTER EMPLOYMENT

After the termination of the employment agreement, the employee is free to compete with their former employer, unless restrictions were agreed upon. Such agreement is aimed at preventing the employee from performing certain functions, duties and activities after the termination of the employment relationship, in return for specific compensation. In any case, the non-compete clause should not frustrate the employee's working chances, preventing them from performing any activity.

To this end, according to Section 2125 of Italian Civil Code, the agreement shall be deemed as null and void in the absence of the following requirements:

- it is in written form;
- it provides for certain and specific compensation;

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- it specifies time limits as to the duration of any restrictions;
- it specifies territorial limits (which can be extended even outside the National boundaries, if compensated with suitable remuneration or balanced by other objective limits); and
- it specifies objective limits (such as specific tasks, jobs, activities, competitors or categories of them).

In case of challenge, all the above elements must be as specific as possible to avoid the clause being deemed unclear/uncertain and therefore nullified.

The Italian Civil Code expressly provides mandatory time limits, which vary depending on the employee's classification, as follows:

- Executives: maximum 5 years
- Other employees: maximum 3 years

If a longer duration is agreed by the parties, the duration will automatically be reduced to the abovementioned limits.

Payment of adequate compensation is required. The territorial extent of the non-compete obligation, the duration of the agreement, and the activities which are the subject of the agreement, must be taken into consideration when determining the compensation. Moreover, the compensation should take into account the employee's residual skills and activities which are not frustrated by the obligation. The compensation can be paid as a one-off payment or in multiple installments.

The duration of the non-compete agreement must be predictable "in advance". Therefore, the employer's right to unilateral withdrawal is limited.

- (1) Specify the territorial limits and the time limits of the non-compete agreement.
- (2) Provide a detailed list of the activities restricted by the non-compete agreement.
- (3) The compensation should not be less than 25-30% of the annual gross remuneration of the employee to be deemed fair.

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RESTRICTIONS DURING EMPLOYMENT

An employee, subject or not to a non-compete agreement, has an implied duty of fidelity and loyalty towards their employer and is expected to comply with the general principle of good faith. The employee is also under an obligation to act solely for the benefit of their employer, rather than for a competing company or for their own interests.

During the employment agreement, the employee cannot be prevented from preparing for a future activity that may be considered competitive if the employee starts their activity after the employment contract has come to an end.

RESTRICTIONS AFTER EMPLOYMENT

The non-compete clause may only be enforced under Luxembourg law provided that it complies with the following conditions:

- the non-compete clause must be agreed in writing and included in the employment contract or in an addendum to the employment contract;
- the annual gross salary of the employee should exceed a certain amount at the time of termination of the employment contract (around EUR 50.000);
- the non-compete clause must be geographically limited to a region where the employee can reasonably be considered as competitive. In any case, it cannot be extended outside the territory of the Grand-Duchy of Luxembourg;

- the non-compete clause must be restricted to a specific professional sector as well as to professional activities which are similar to those performed by the employer; and
- the non-compete clause must be limited to a 12 month period, which shall start at the end of the employment contract.

It is to be noted that financial compensation is usually granted to the employee, even if not formally required by Luxembourg law.

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- (1) Verify that the non-compete clause complies with all the legal requirements, failing which it may be considered void.
- (2) State in the employment contract the sanctions applicable (penalties) in case of breach of the non-compete clause by the employee.
- (3) Verify that the non-compete clause is clear and precise especially when describing the professional sector restrictions.

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RESTRICTIONS DURING EMPLOYMENT

If restrictions are needed during the employment of an employee, it is advisable to agree this explicitly in a non-compete provision. However, the Civil Code also stipulates that an employee has to comply with general principles of good faith. It can be argued that this implies that an employee is not allowed to compete with their employer during the employment relationship. There is also a general obligation for an employee to not disclose confidential business information to third parties.

RESTRICTIONS AFTER EMPLOYMENT

After the termination of the employment agreement, an employee is free to start working for a competitor, unless restrictions apply pursuant to a non-compete provision. The following conditions apply:

- The provision needs to be agreed in writing with an adult;
- The scope needs to be defined, together with the geographical area; and
- The duration needs to be stipulated. There is no maximum period included in the law. However, case law shows that, in general, a maximum period of 12 months is considered reasonable.

The law does not stipulate that the employer is obliged to pay monetary compensation to an employee for the period that the non-compete provision will be applicable. Payment of compensation is not common.

The employer will always have to be able to demonstrate that it has a legitimate business interest to enforce the provision. The court is authorized to amend or even annul a non-compete provision after weighing all interests of both parties. A non-compete provision also ceases to be applicable in the event that the employer terminated the employment agreement unlawfully (for instance, for an urgent cause where no such urgent cause could be demonstrated by the employer).

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- (1) Ensure that the duration is reasonable and that the scope of the activities and the geographical area are defined.
- (2) Renew the non-compete provision when an employee starts working in another position within the company.
- (3) Include a (substantial) penalty fine for a breach of the non-compete provision.



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RESTRICTIONS DURING EMPLOYMENT

During employment and any notice period an employee may not compete with their employer even if this is not stated in the employment contract.

RESTRICTIONS AFTER EMPLOYMENT

After their notice period has expired, an employee is free to compete with their former employer, unless restrictions were agreed upon. The former employee may not use business secrets in their new position. This is information that is not commonly accessible.

It is advisable to agree on a non-compete clause with employees that have vital knowledge of the business. When the employer terminates the employment agreement of an employee, if the termination is not caused by the behavior of the employee, a non-compete clause will easily be found unreasonable and not binding.

If an employment agreement is drafted in connection with buying shares or an enterprise from the employee, it is advisable to include the non-compete clause in the share purchase agreement, or other purchase agreement, and not in the employment agreement.

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- (1) A non-compete clause lasting 6-12 months but not longer than 24 months, if more than 6 months include monthly compensation.
- (2) Referring specifically to possible competitors (both geographically and regarding business) to avoid the non-compete clause being found unreasonable by the courts.
- (3) A fixed penalty for violations.



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RESTRICTIONS DURING EMPLOYMENT

As a rule, an employee may compete with their employer during their employment. However, employers may ban competition through specific non-compete agreements separate to the employment contract; although in practice, such non-competition clauses are often included in the employment contract itself. Such agreement/clauses should specify the objective and subjective scope of the ban on competition (i.e. the competitive activities and entities they apply to.) An employee is not entitled to any additional remuneration or compensation for non-competition.

Polish courts have held that, in some situations, the ban on competition can be derived from the employee's general obligation to care for the employer's interests. However, these are very special cases.

RESTRICTIONS AFTER EMPLOYMENT

In order to ensure that a former employee does not compete with their former employer following termination of employment, a non-competition agreement to this effect should be executed either as a separate agreement or as part of the employment contract. To be valid, such agreement should be made in writing.

A ban on competition may be introduced only if an employee has access to particularly sensitive information and the employer could suffer damage if it was disclosed. Accordingly, as a rule, a non-competition agreement applicable following termination of employment can only be concluded with certain employees.

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

The agreement should specify:

- the term of the ban – it must be specified in detail in advance; it may be, for example, 2 years but it should not be longer than 5 years;
- the objective and subjective scope of the ban (i.e. banned activities and the entities for which they cannot be conducted); and
- the level of compensation for non-competition; compensation cannot be lower than 25% of remuneration received by the employee for a period corresponding to the time when the ban on competition applies (this includes not only base pay but also any bonuses or allowances paid etc.). Such compensation may be paid in a lump sum or in monthly instalments. If the compensation level is not specified in the agreement, the employee is entitled to compensation amounting to 25% of remuneration (see above);

Enforcement of a non-competition agreement is not affected by the procedure for termination of the employment contract;

It is very difficult for an employer to terminate a non-competition agreement unilaterally. In many cases, such termination may be deemed ineffective and the employer will still be obliged to pay compensation. In order to mitigate this risk, the agreement should list the specific circumstances where the employer may terminate it and not be obliged to pay compensation;

It is also possible to stipulate financial penalties in the event that an employee breaches their agreement not to compete. While the employee is liable for damages, they are often difficult to prove, so financial penalties are a better solution.

- (1) Always implement a specific clause/agreement preventing employees from competing during the course of their employment.
- (2) Provide an option for the employer to terminate the non-competition agreement early.
- (3) Stipulate financial penalties for employees who breach their agreement not to compete.



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RESTRICTIONS DURING EMPLOYMENT

During employment, unless the parties agree differently in the employment contract or any other agreement, employees have a duty of loyalty to their employer. This means that they must not perform any negotiations on their own or on behalf of a third party in competition with their employer.

This does not mean that the employee is prohibited from working for other employers (unless the parties agree this kind of restriction as well), provided that in doing so the employee does not compete with their employer or disclose any information regarding the employer's organization, methods of production or business.

RESTRICTIONS AFTER EMPLOYMENT

Generally, post-termination covenants not to compete, solicit or deal may be enforceable on the following terms:

- if the development of a particular activity by the employee is potentially capable of causing damage to the employer; and
- if the employee is given compensation for the period in which his or her activity is restricted.

These covenants are only allowed for a maximum of two years after the termination of the employment agreement and they must be agreed in writing, either in the employment agreement or in the termination agreement.

If the activity developed by the employee is based on a relationship

of trust or to the extent that such activity grants the employee access to particularly sensitive information, the maximum period may be extended to three years.

The employee is entitled to monthly compensation for such restrictions. The amount is to be agreed between the parties and is paid during the whole limitation period.

This amount may be equitably reduced if during employment the employer spent significant amounts on the employee's professional training (e.g. MBA).

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- (1) Post-termination restrictions should usually only be concluded with employees holding a senior management position, or having a high degree of responsibility.
- (2) Compensation for a non-competition agreement usually corresponds to 25% of the employee's base salary. Such compensation could alternatively be paid as an allowance during employment, in which case the amount could be lower.
- (3) Portuguese labour courts are quite demanding with the grounds used by employers for such restrictions. The restrictions should relate to and should not be geographically wider than the employer's activities and interests.



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RESTRICTIONS DURING EMPLOYMENT

The South African common law requires all employees to observe the duty of the utmost good faith to their employer whilst employed. This duty requires, inter alia, that the employees do not directly or indirectly compete with their employer and a contravention of this duty may result in the dismissal of the employee.

RESTRICTIONS AFTER EMPLOYMENT

Two fundamental competing principles affect the drafting and validity of restraint of trade and non-compete clauses. The first principle is the sanctity of contracts. The courts accordingly enforce the principle that contracts which are freely and voluntarily entered into remain legally binding and enforceable. The second principle is every person's constitutional right to choose their trade, occupation or profession freely.

Prior to the landmark decision in the case of *Magna Alloys and Research (SA) v Ellis* 1984 (4) SA 874 (A), South African law, like English Law, held agreements in restraint of trade to be invalid and unenforceable, unless it could be proved by the party seeking to enforce the restraint that it was reasonable under the circumstances and therefore not against public policy. The *Magna Alloys* case set a new precedent when it held that the

sanctity of contracts had greater precedence in our law. Thus restraint of trade agreements are valid and enforceable unless they impose an unreasonable restriction on a person's constitutional right of freedom to choose their trade, occupation or profession freely.

Practically, in order for a restraint agreement to be enforceable, an employer must have a proprietary interest to protect. In the matter of *Automotive Tooling Systems v Wilkens* 2007 (2) SA 271 (SCA), the Supreme Court of Appeal held that a restraint agreement is unenforceable if it does not protect a legally recognisable interest of the employer, but merely seeks to exclude or eliminate competition.

In the case of *Advtech Resourcing v Kuhn* [2007] JOL 20680 (C) the court noted that an employer's protectable proprietary interests during employment and post-employment are, inter alia:

- trade secrets;
- confidential information; and

- customer goodwill or trade connection.

When drafting any restraint contract, the employer must have consideration for what is the employer's proprietary interest and what may be an employee's own expertise, know-how, skill and experience. It was held in *Aranda Textile Mills v Hurn* (2000) 4 All SA 183 (E) that an employer training an employee in an established field of work and who has thereby provided the employee with knowledge and skills in the public domain, which the employee may otherwise have gained, is not a protectable interest in the hands of the employer.

By contrast, an employee who possesses information that is confidential and who has attended numerous training courses which develop the employee's skills and know-how specific to the employer's products and systems will be considered a protectable right of the employer (*Reddy v Siemens Telecommunications* 2007 (2) SA 286 (SCA)).

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- (1) The proprietary interests which the employer seeks to protect must be disclosed (for example: trade and design secrets; customer lists; marketing strategies; pricing policies, etc.).
- (2) The period and geographical area of the restraint must be reasonable.
- (3) The employer must state that the employee shall not directly or indirectly compete with the business of the employer.



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RESTRICTIONS DURING EMPLOYMENT

In the absence of a specific agreement only unfair competition is prohibited. Such prohibition is a direct consequence of an employee's legal obligation to perform their duties in good faith. This principle does not prevent an employee from working for several employers, but rather prevents them from engaging in unfair competitive practices whilst being employed.

These practices may be understood as any conduct potentially harmful towards their employer, carried out without consent and with the intention of benefitting from their employer's organization, or from the acquired knowledge of their employer's activities. To strengthen an employee's non-competition obligations during employment, parties can expressly agree additional covenants, such as exclusivity of employment, which, to be valid, requires paying additional financial compensation.

RESTRICTIONS AFTER EMPLOYMENT

Post-employment non-compete covenants can be agreed and included in an employment contract or they can be agreed by the parties at a later stage. In any event, enforcement of such restrictions requires an express agreement between the parties as they are deemed to restrict the free initiative of employees.

In order for a non-compete covenant to be valid:

- the prohibition must refer to the performance of similar duties to those which the employee was previously carrying out for their former employer, and be restricted to a territory;
- the employer must have an industrial interest to impose the non-compete agreement. It is therefore advisable to include a detailed explanation of the risk run by the former employer in the event the employee would use insider knowledge. Without a well-

documented legitimate interest the clause risks having little practical effect even if expressly agreed by the parties;

- the prohibition cannot exceed 2 years' duration for qualified technicians and 6 months for other employees, from the date of termination of the employment relationship; and
- the employer must pay adequate financial compensation. As the law does not give any indication of the amount of compensation, a factual assessment is required to determine an appropriate figure. The economic impact on the employee must be taken into account. There is no guarantee that any amount of compensation will be declared suitable by the courts.

An employee's breach of their non-compete agreement entitles the employer to claim compensation for damages. An agreed penalty may be included in the non-competition covenant, again based on a factual assessment of the situation. If the court considers the penalty to be disproportionate, the clause risks being declared invalid.

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- (1) Emphasize the employer's legitimate commercial or industrial interest as the basis for including the non-competition clause.
- (2) Fix an "appropriate" amount of compensation to be paid to the employee and specify in the employee's pay slip the amount paid as "compensation for the non-compete clause".
- (3) Fix a proportionate penalty to be paid by the employee in case of breach of the non-compete clause.



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RESTRICTIONS DURING EMPLOYMENT

For the duration of the employment relationship an employee may not perform any remunerated work for third parties if such work is in competition with their employer. According to the Swiss Federal Tribunal a competitor is someone who offers similar services, supplies the same wants and has at least partially overlapping clients.

RESTRICTIONS AFTER EMPLOYMENT

The employer and employee may agree that the employee refrains from engaging in any activity that competes with the employer beyond the termination of the employment agreement. Such an agreement is subject to the following conditions:

- the non-compete clause must be agreed upon in writing, this means it must be signed by both parties;
- the prohibition of competition is only binding if the employee has a personal relationship with the employer's clientele or knowledge of manufacturing and trade secrets;
- the competing activity must be potentially harmful to the employer;
- the non-compete clause must be geographically limited to the

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

region where the employee worked;

- the prohibition of competition may only exceed three years under special circumstances; and
- the scope of the non-compete provision must be appropriate and may not go further than the actual function of an employee.

A non-compete agreement is valid only if these requirements are met and may not be excessive. To determine whether a prohibition is excessive all three factors (region, time and scope) must be taken into account. It is possible to have, for example, a longer period if the prohibition is limited to a very small region. Should the prohibition be excessive it is still valid, but may be restricted by the court.

Even if the non-compete agreement is valid and adequately restricted, it is still possible that it is not binding. This is the case when the employer no longer has a substantial interest in its continuation, when the employer terminates the employment without any good cause, when an employee terminates it for reasons attributed to the employer, or if clients follow a former employee due to his personal characteristics, which is typically the case with, for example, doctors.

- (1) Include any form of competition, be that as an employee of a competing company, as a founder of a competing company or a shareholder of a competitor.
- (2) Specifically agree that the employer may request that the employee discontinues competition.
- (3) Specifically agree upon a penalty (liquidated damages) for non-performance.



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RESTRICTIONS DURING EMPLOYMENT

The Turkish Labour Code imposes a requirement of loyalty on employees to their employer. The employee cannot be engaged in any activity that is in competition with their employer. Therefore, it is not necessary to include an explicit provision on this matter in the employment agreement.

RESTRICTIONS AFTER EMPLOYMENT

There is no statutory requirement for an employee not to compete with their employer after the termination of the employment relationship. Nevertheless, employers can impose restrictions through a non-compete agreement. Case law requires non-compete agreements to be limited in time, scope and territory. Non-compete restrictions should not exceed 2 years and they should be limited to the employer's field of activity. Moreover, there should be a reasonable territorial limitation relevant to the employer's business.

It must also be noted that the Turkish Labour Code and case law do not require the employer to pay compensation to the employee for the non-compete period. However, there may be circumstances where compensation might be necessary in the interests of fairness.

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- (1) For a non-compete clause to be enforceable, it should be clearly limited in terms of scope, time and territory.
- (2) To avoid conflicts, restricted activities should be clearly defined.
- (3) A penalty clause can be included to deter an employee from breaching the non-compete agreement.



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RESTRICTIONS DURING EMPLOYMENT

There is no clear reference under UAE law for restrictions imposed on employees with respect to competition while working for an employer. Generally, an employee cannot work for another employer:

- during the period of their employment unless with the approval of their current employer and, where relevant, with the express permission of the UAE Ministry of Labour / Free Zone Authority; and
- while on annual leave or sick leave.

In the event that an employee breaches the above, the employer will have the right to terminate without notice and deprive them of their remuneration in respect of any period of leave.

RESTRICTIONS AFTER EMPLOYMENT

There are no non-compete provisions under UAE law that apply by default after the termination of employment. Hence, any non-compete restriction by an employer should be agreed in writing with the employee.

In order for a non-compete clause to be considered valid and enforceable by the Courts:

- the employee must be at least 21 years old at the time when they signed the non-compete restriction;
- the non-compete clause must be limited in its geographical scope;
- the non-compete clause must be limited in its duration (generally between 3 to 24 months); and
- the non-compete clause must be limited to the nature of the business activity of the former employer.

The purpose of a non-compete clause should be to protect an employer from damage where an employee discloses confidential information relating to its business or joins a competitor.

Non-compete clauses are not easily enforced. In the event of a breach, the employer must file a claim against the employee and prove to the Court that it has sustained damages as a result of such breach.

There is no statutory provision requiring employers to pay financial compensation to an employee committing to a non-compete clause/agreement, however parties can agree otherwise.

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- (1) Specify the time frame (not more than two years), geographical expansion and nature of business.
- (2) Use clear and detailed language, i.e. specify if possible the companies where the employee cannot work or the nature of the information they cannot disclose.
- (3) Specify the different aspects of engagements the employee can exercise whether by directly working for another employer or by being a partner of an enterprise that competes with their previous employer.



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RESTRICTIONS DURING EMPLOYMENT

All employees are subject to implied duties of loyalty, fidelity and non-disclosure of confidential information. Senior managers are also subject to higher level fiduciary duties, and Board Directors are subject to additional statutory duties, which give an employer even greater protection.

However, employers are advised to further protect their business by including express terms in their employees' contracts of employment, typically relating to confidential information and outside interests.

Where an employee is preparing to compete whilst still employed and commits a breach of a fiduciary duty or duty of confidence, the employer may seek an account of profits as an alternative to damages.

RESTRICTIONS AFTER EMPLOYMENT

Employees are free to do as they wish subject to:


- an implied duty to keep their employer's "trade secrets" confidential (very limited);
- any additional contractual obligations relating to confidential information; and
- any contractual restrictions agreed between the parties which are a proportionate means ("no more than necessary") of protecting the employer's legitimate business interests. Usual restrictions cover working for a competitor (in a specified geographical area), soliciting and dealing with clients/potential clients, and poaching staff. There is no obligation for an employer to pay the employee during a period of restriction. There is no maximum duration but shorter restrictions are more likely to be enforceable

than longer ones (especially in excess of 12 months). If an employer wrongfully terminates an employee's contract (for example, without giving notice), the employee is freed from any post-termination restrictions.

If employees breach their restrictions the principal remedies for employers are damages or an injunction to enforce the restrictions and stop the employee from competing. A special "springboard" injunction may be obtained to neutralise any head start/unfair advantage an employee has gained from any prior breach of a legal obligation.

TOP 3 DRAFTING TIPS FOR NON-COMPETE AGREEMENTS

- (1) Restrictions should be as narrow as possible in terms of scope, duration and geographical coverage.
- (2) Restrictions should be tailored to an employee's role and seniority and fresh agreement sought periodically but always upon promotion.
- (3) Consider including contractual provisions to allow payment in lieu of notice on termination (to avoid wrongful termination and invalidation of covenants).



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