

## Proceed with caution on non-competition clauses

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Many companies like to implement universal employment agreements, regardless of the jurisdiction in which their employees are working, as it is generally more efficient to administer one set of employment agreements than a mixed bag of tailor-made agreements unique to each jurisdiction. Employment matters, however, tend to be very jurisdiction specific, not only across the world but within the EU itself. This can become a tricky problem for companies wishing to implement non-competition clauses. What is reasonable in one jurisdiction may not cut it in another as an enforceable contract.

How do non-competition employment clauses stack up in Latvia? There is some jurisprudence on the issue, but it remains the case that non-competition clauses are to be approached with caution.

It is overly simplistic in Latvia, as in most other countries, to say that there is unqualified "freedom of contract." The mere fact of signing an employment contract does not confer an automatic right of enforcement upon the parties. If the courts find a clause unconscionable, the contract will not be enforceable, at least in so far as the offending wording is concerned. Nevertheless, the Labor Law was specifically amended some time ago to allow for the insertion of non-competition wording in employment agreements. But non-competition language is only enforceable if a number of criteria are met:

1) the non-competition language has to be there to "protect the employer from such professional activity by the employee that can cause competition for business of the employer." How might this be relevant? By way of example, if the employer is operating only in Latvia, and it is seeking to implement a non-competition clause that spans Europe, forget about enforcement. Such language would not meet the proportionality test between the level of potential competition to the employer and the restriction imposed upon the activities of the ex-employee. The same goes for casting the net too widely as to what the activities are that the employee may not perform. Restrictions on an employee's right to work for the employer of his or her choice in the place of his or her choice have to be reasonable and justified;

2) a duration of not more than two years, commencing from the termination day of employment relations;

3) for the duration of the period of restricted competition, the employer must compensate the employee's undertaking not to compete;

4) the clause does not constitute an unfair restriction of the employee's professional activity according to type, amount and duration of the restriction of competition, taking into consideration compensation payable to the employee;

5) the restrictive language must be in writing, setting out type, amount, place and duration of the restriction of competition and the amount of compensation payable to the employee.

How are courts likely to interpret non-competition clauses? In general, courts tend to prefer erring on the side of caution with respect to employee rights. There is a general prohibition against worsening the conditions under an employment contract from those provided for under the labor law. There is also the right under the constitution of Latvia of the individual to freely choose their occupation and work place according to their own abilities and qualifications. This suggests excessive competition restrictions would be considered unjust interference in the employee's right of choice.

In addition, last year the Supreme Court issued an opinion on Labor Law standards, under which it took a dim view of penalties or fines for breach of non-competition clauses. It is not strictly binding upon trier of fact, yet it may be instructive in predicting likely outcomes in enforcement proceedings.

In conclusion, it is best to obtain specific opinion of legal counsel before embarking on non-competition language insertion into your employment contracts, as there can be plenty of trouble ahead when it comes to enforcement.

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