Non-compete clauses
French vs. Danish legislation

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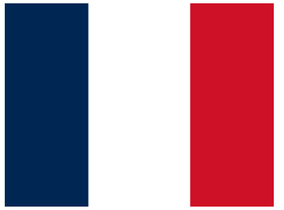
A non-competition clause is an agreement between an employee and the employer prohibiting the employee from being employed or otherwise carry out competing business during a fixed period after the employment has come to an end.

In Denmark, post-employment restrictions are regulated by the Danish Act on Restrictive Covenants. In addition to regulating the use of non-compere clauses, the Danish Act on Restrictive Covenants also regulates the use of non-solicitation clauses including the so-called combined clauses (combined non-competition clauses and non-solicitation clauses). The use of non-solicitation of employee's clauses have been prohibited in Denmark since 1 January 2016.



In France, the use of non-compete clauses is quite common, especially for sensitive and senior positions. The French Labour Code, the collective bargaining agreements (CBA) and case law which is abundant on this topic, helped define a framework.

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When does a non-compete clause apply?

Non-competition clauses apply after the end of employment. The clauses can have a duration of 6 months or 12 months.

During the employment, employees are bound by a duty of loyalty to the employer, which to some extent has the same effect as a non-competition clause, as the loyalty obligation prevents the employee from taking up employment with a competitor or otherwise engage in competing activities during the employment.

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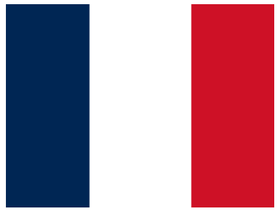

When does a non-compete clause apply?

In France, unlike other countries, the non-compete clause comes into force at the end of the employment contract. The article L.1121-1 of the French Labour Code provides that: "*No one may impose restrictions on the rights of individuals or on individual and collective freedoms that are not justified by the nature of the task to be performed or that are not proportionate to the aim pursued*". To comply with this requirement of proportionality, case law usually considers that a non-compete can only be imposed during a limited period of time, typically ranging from 6 months to 2 years.

Throughout employment, the duty of loyalty applies and prevents the employee from engaging in competitive behaviour against the company. For example, the duty of loyalty prohibits an employee from setting up a competing business, soliciting the employer's customers or undertaking training with a competitor of the company.

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Which employee may be subject to a non-compete clause?

The use of non-competition clauses is restricted to employees holding a “very special position of trust”. The word “very” represents an attempt to somewhat tighten up the use of restrictions.

The employment contract must therefore specify the responsibilities of the employee which justify the application of a non-competition clause. Non-competition clauses can be justified, for example, where the employee will have access to business sensitive information which could be used by a competitor to gain an advantage.

If the employee is not in a “very special position of trust” then the non-competition clause will be unenforceable.

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Which employee may be subject to a non-compete clause?

In France, a non-compete clause must be justified by the protection of the company's interests.

The company must therefore prove that it would be likely to suffer if the employee were to work for another company or set up their own business. It is typically the case for positions enabling the employee to have contact with the company's customers, access to the company's sensitive data or specific know-how. For example, it's common for a salesperson with access to the company's customers, a marketing director with a good understanding of the company's or even the group's strategy, or an engineer with knowledge of the company's or even the group's specific processes or know-how to be bound by a non-compete clause.

If the necessity to protect the company’s interest is not demonstrate, the non-compete clause would be considered unenforceable. For example, the French Supreme Court has ruled that a clause in the employment contract of a window cleaner, telemarketer or warehouse worker who has no contact with customers is not valid.

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What are the conditions of validity of a non-compete clause?

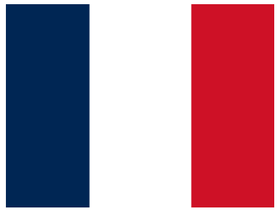
Non-competition clauses must be agreed in writing and will only be enforceable once an employee has been employed for 6 months.

The duration of the non-competition clauses or non-solicitation clauses can be agreed to cover a 6- or 12-month period following the last day of employment. If the company wishes to include both a non-competition and a non-solicitation clause in the contract, the maximum period permissible for the dual restriction is 6 months. A single restriction can be for a maximum of 12 months.

Employers are required to pay compensation for the duration of a non-compete clauses for the restriction to be valid. Compensation is made up of a one-off payment at termination (“minimum compensation”) covering compensation for the first two months of the restrictive period, in addition to monthly payments for the remainder of the restrictive period. The minimum compensation and the monthly payments are calculated at 40% of the total salary as of the termination date, if the non-competition clause has a duration of 6 months, and 60% of the total salary if the non-compete clause has a duration of 12 months.

The employee is under a duty to mitigate loss by applying for other suitable non-competing employment during the restrictive period and can lose their entitlement for compensation from the third month if it is evidenced that the employee has not fulfilled the duty to mitigate by looking for alternative employment.

If the employee obtains other suitable employment the compensation is reduced to 16% of the total salary if the restrictive period is 6 months and 24% of the total salary if the restrictive period is 12 months.



What are the conditions of validity of a non-compete clause?

In France, to be valid, a non-compete clause must meet specific conditions, i.e.:

Protect the company's legitimate interests. The specific tasks associated with the employee's job must be considered;
Be limited in duration, usually between 6 months and 2 years;
Specify a geographic scope. This area depends on the geographic scope of the employee's position and their responsibilities. Usually a few regions in France, more rarely the entire French territory or even abroad;
Provide for a financial compensation in proportion to the prohibition set by the covenant. French courts usually consider that a monthly compensation of at least one-third of the average monthly gross salary is a minimum;
Leave the possibility for the employee to find a new job or to perform a new activity which is in line with their professional experiences, trainings and knowledges.

Non-compete clause which do not meet all those requirements are invalid, the employees are released form the non-compete obligation. Additionally, employees subject to invalid restrictive clause are likely to be entitled to claim damages if they can prove an actual harm.

The employer should never forget to check the rules set by the applicable CBA, if any, which often provide for a specific minimum compensation or for specific rules.

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Can the parties to a non-compete clause be sanctioned in case of a violation?

It is customary for non-competition clauses to contain provisions on the payment of fines, if the employee is in breach of the non-competition clause. Such provisions are usually drafted to the effect, that the employee is liable for the payment of a fine for every instance of a breach, and if the employee's breach consists of the maintenance of circumstances that contravene the non-competition clause, then the employee is liable for the fine per calendar month.

The size of fines in cases of breach of a non-competition clause is not regulated by the Danish Act on Restrictive Covenants. Instead, it is left to the courts to assess whether a fine is too high, and this assessment will be based on the general rules of contract law. A typical fine for breaching a non-competition clause will be in the range between 3 and 6 months of salary.

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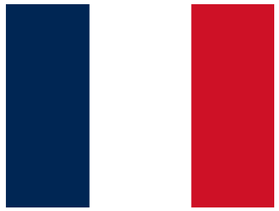

Can the parties to a non-compete clause be sanctioned in case of a violation?

In France, an employee who does not respect a non-compete clause loses their right to financial compensation for the present and the future. The employee must repay the financial compensation to the former employer, except for the period during which the non-compete obligation was respected. The employee may also have to pay damages to compensate for the former employer's loss and/or to stop the new activity.

The non-compete clause may include by a penalty clause. This clause sets a sum that the employee who breaches the non-compete clause must pay to the former employer, who does not have to prove any harm.

The employee's new employer may also be ordered to pay damages to the former employer. This would be the case if the former employer can prove that the new employer hired the employee knowing that she or he was subject to a non-compete obligation.

Can the non-compete obligation be waived?

If an employee is dismissed, and the employer has no reasonable reason for doing so, a non-competition clause will not be enforceable, however the company is still obliged to pay the compensation amount. Furthermore, if the employee is dismissed due to the company's economic situation, i.e. in a redundancy situation the restrictions will not be enforceable, however the company will be required to pay the minimum compensation.

The company is entitled to terminate a non-competition clause with one month's notice to the end of a month and thus avoid paying compensation. However, the employee will be entitled to receive the minimum compensation if the employment is terminated to expire within 6 months of the company terminating the non-competition clause and if the employment is terminated for reasons which would have entitled the company to enforce the clause.

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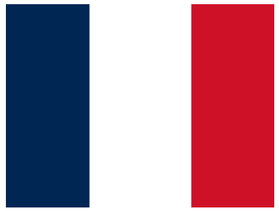

Can the non-compete obligation be waived?

In France, the employer can unilaterally waive the non-compete clause if the employment contract or the CBA provides for this possibility. If the contract or CBA remains silent, the waiver also requires the employee's consent. The waiver releases the employer from the obligation to pay a compensation to the employee provided for in the clause and releases the employee from the non-compete obligation.

The employer must strictly comply with the waiver procedures set out in the employment contract or CBA. In addition, the waiver must be express, unequivocal and individually notified to the employee. Employers who fail to comply with the formalities for waiving the clause are not released from their obligations and must still pay the compensation.

The time limit given to the employer to waive the non-compete obligation is set out in the employment contract or in the CBA. In any case, the non-compete must be waived before the employee effectively stops working, meaning that, if the employee is put on garden leave during the notice period, the non-compete must be waived in the dismissal letter.

Conclusion

In Denmark and France, the non-compete clause is a useful tool to protect companies' interests in the event of an employment contract termination.

However, employers must bear in mind that this tool is only relevant for certain positions and actually impacts the costs of a termination. Indeed, a non-compete clause must provide financial compensation to be paid to the former employee.

Please feel free to contact **Mads Bernstorn** at mb@mklaw.dk for questions regarding Danish law and **Alexandra Frelat** afr@mgglegal.com for questions regarding French law.

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