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Competition from employees ceasing to work for an employer – prevention and safeguarding interests

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When an employee ceases to work for an employer, loyalty to his[1] employer is put to the test. There is a great temptation to solicit the former employer's clients for personal gain and to exploit manufacturing or other trade secrets for the employee's personal benefit or the benefit of a competing business.

This newsletter shows how companies can prevent this and how they can defend themselves against prohibited conduct by employees who no longer work for them.

Measures to counter competition:

- **Preventative contract drafting**
- **Enforcement of post-termination non-solicitation and non-competition clauses**
- **Criminal complaint on the grounds of suspected unfair competition or other criminal offences**

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Client relationships, as well as manufacturing and other trade secrets, are core assets of a company. When an employee leaves the company, these assets are at risk. Depending on their position in the company and the function they exercised, employees ceasing to work with a company are well networked with their colleagues in the company, may have fostered close relationships with the company's clients for years, and may also have been given insight into company trade and manufacturing secrets. All of this entails the risk that employees ceasing to work for a company will sway long-term clients to leave the company, poach devoted employees from the company, and exploit confidential company information for personal gain or the gain of a competing business.

Companies can protect themselves through preventative contract drafting. If prohibited conduct still occurs, there are various legal remedies available.

Prevention through preventative contract drafting

Competition or solicitation of employees by former employees at a later date may be prevented when the initial contract of employment is entered into with the employee. Contract clauses regarding post-termination non-competition and non-solicitation and specific duties of confidentiality in the initial contract of employment often have a preventative effect. In addition, provision may be made in the initial contract to stipulate that the only equipment (in particular mobile phones, tablets and laptop computers) that may be used for business purposes and communication is exclusively equipment that is provided by the employer and properly secured. The storage of data in cloud services and sending of business e-mails to personal addresses of the employee or persons closely associated with the employee may likewise be prohibited by contract. With respect to the obligations at the end of the employment relationship to return and hand over assets, it is advisable to specify in the contract that electronically stored data must be permanently deleted and that no copies may be made and retained.

Agreement on post-termination non-competition and non-solicitation

Post-termination non-competition and non-solicitation contract clauses will only be binding under strict conditions and require the agreement of the employee (see box). If one of these conditions is lacking, the contractual prohibition will not be binding (Article 340 of the Code of Obligations).

Contractually agreed non-competition clauses are only enforceable if they are appropriately restricted, relative to the prohibited activity, in terms of place, time and scope (see box). Contractual agreements that make the future economic advancement of an employee overly difficult will be limited by the courts to the extent permitted by law. In assessing the appropriateness of any prohibition, the court will take into account any consideration paid to the employee by the employer (Article 340a of the Code of Obligations).

For easier enforcement, it is further recommended that the contractual prohibition be protected by a specified amount as a contractual penalty. Unless otherwise agreed by contract, the employee may exempt himself from the prohibition by paying the contractual penalty. It is seldom in the interests of an employer for an employee to be able to decide for himself whether to comply with or accept the prohibition,

[1] Where the male or female form is used, this shall be deemed to include the other gender.

Requirements for non-competition clauses to be binding

Any non-competition clause in a contractual employment agreement is only binding if the following requirements are met (Article 340 of the Code of Obligations):

1. The employee has capacity to act;

2. The prohibition of competition is agreed upon in writing;

3. During the employment relationship, the employee gains insight into the clientele of the employer or its manufacturing and trade secrets;

4. Use of the knowledge so gained might cause the employer substantial harm.

Statutory requirements for appropriate restrictions

1. The prohibition of competition must not unfairly compromise the future economic advancement of the employee (Article 340a of the Code of Obligations).

2. The prohibition must be appropriately restricted with regard to place, time and scope.

3. The length of the prohibition may only exceed three years in special circumstances.

4. In assessing the appropriateness of the prohibition, the court will take into account any compensation for non-competition or other consideration paid by the employer.

or to exempt himself through payment of the contractual penalty. Any contract of employment should therefore expressly exclude the exemption option.

A contractual prohibition of competition and solicitation is only necessary for the period following termination of the employment relationship. During the employment relationship, the employer is adequately protected by the legal duty of loyalty (Article 321a of the Code of Obligations).

If a contract of employment does not contain a post-termination non-competition and non-solicitation clause, an employee will generally be able to compete with the employer and solicit its employees following termination of the employment relationship. However, the provisions of the Swiss Federal Act on Unfair Competition form a restraint in this regard. Under competition law, it is prohibited, for example, for an employee to induce any client of his employer to breach its contract with the employer in order to conclude a contact with the client himself (Article 4 lit. (a) of the Unfair Competition Act). Any person who utilizes, without authorisation, any work results entrusted to him such as calculations, plans or bids, commits an act of unfair competition (Article 5 lit. (a) of the Unfair Competition Act). A further restraint is contained in criminal law. It is punishable, in particular, to betray any manufacturing or trade secret (Article 162 of the Criminal Code).

Lapse of post-termination non-solicitation and non-competition clauses

If unauthorised competition or solicitation is proven, contractual prohibitions may be enforced through legal action. It should be noted that even prohibitions that are contractually agreed and are reasonably restricted may subsequently be extinguished if the employer terminates the employment relationship without the employee having given the employer good cause to do so. The contractual agreement will also lapse if the employer no longer has any substantial interest in maintaining the prohibition or if it gave the employee good cause to terminate the employment relationship (Article 340c of the Code of Obligations).

A prohibition of competition or solicitation would likely normally lapse in the event of termination of contract by mutual agreement. If it is therefore intended that the prohibition be maintained, this should be expressly specified in the written termination agreement.

Legal remedies against former employees

If an employee infringes the validly agreed non-competition and non-solicitation clause, it may be sensible, as a first step, to warn the employee in writing and request that he comply with the prohibition. If the employee, although requested to refrain from doing so, continues to infringe the non-competition and non-solicitation clause, an agreed contractual penalty will need to be claimed before the courts.

If any damage is suffered as a result of the competition that exceeds the amount of the agreed contractual penalty, the employer may claim additional damages. However, exceeding damage is often very hard to prove. In practice, the courts frequently assess the contractually agreed penalty as being excessive and reduce it to an amount that corresponds to a few months of an employee's salary. The requirements by the courts in regard to proof that the competition caused damage in excess of the allowable contractual penalty are even more strict.

Provided this is specifically agreed on in the contract of employment, an employer may also request rectification of the situation that breaches the terms of the contract. In such a case, the employee will be prohibited by means of a court order from continuing to exercise the competing activity. However, any legal action to request such decisions of the court are a race against time. The permitted length of the prohibition is often shorter than the

«Careful contract drafting is a key element for the prevention of competition and solicitation.»

length of time required for a proceeding to obtain a legally binding and enforceable court decision. If an interim measure is requested in addition to this, which is intended to prohibit the disputed activity immediately, the courts routinely weigh very precisely and strictly whether the interests claimed by the employer actually outweigh the interest of the employee to continue to exercise his new professional activity.

If there is conduct by the employee that is relevant from a competition or criminal law point of view, a criminal complaint may further be filed. In addition to this, the Swiss Federal Act on Unfair Competition also provides for civil law remedies through which damages and rectification of the unlawful situation may be claimed (Article 9 of the Act on Unfair Competition).

Remedies against the new employer or other third parties

Employers may not only defend themselves against their former employees but, under certain circumstances, also against any new employer or other third parties. However, remedies are normally only available under the Swiss Federal Act on Unfair Competition and under criminal law.

Conclusion

Careful drafting of contracts of employment and termination is a key element for the prevention of competition and solicitation of clients and employees by former employees. Several remedies are available to employers if, despite careful contract drafting, there is activity amounting to prohibited competition or solicitation. Chances for success must be closely evaluated in each particular case.

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How can we assist you?

We would be delighted to assist you with issues relating to the prohibition of competition and solicitation of clients and employees, as well as with all other aspects of employment law. We regularly advise companies and managers, whether as employees or as entrepreneurs. If a court proceeding is unavoidable, we are able to rely on our wealth of experience and provide effective representation of your interests.

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