

January 2016

Employee Business Protection

France

Summary

During the employment relationship employers enjoy relatively strong business protection. Any infringement of the employee's duty of loyalty, fidelity or discretion may lead to dismissal on disciplinary grounds.

As a general rule, any disloyalty by an employee or former employee or any attempt to destabilise the company may result in damages on the grounds of unfair competition.

An employer may strengthen its employees' obligations by including special provisions in the employment contract.

After termination of employment, protection of the employer's business is mainly achieved through express non-compete provisions. However, the conditions for valid non-compete clauses are strictly defined by case law.

Restrictions during the employment relationship

During the employment contract employees are bound by a general duty of loyalty, which includes:

- An **obligation of fidelity** that prohibits the employee from engaging in any competing activity, either on their own account or for third parties; and
- An **obligation of discretion** that prohibits the employee from disclosing to third parties any information the employee has access to in performing his or her duties, including manufacturing and business secrets.

It should be noted that specific secrecy rules apply to employees working in a number of areas (banking, finance etc.).

Breach of these obligations amounts to professional misconduct, and may justify dismissal on disciplinary grounds.



In addition, the intentional disclosure (or attempted disclosure) of trade or manufacturing secrets by an employee is punishable as a criminal offence, resulting in up to 2 years of imprisonment and/or a EUR 30,000 fine.

However, the definition of trade or manufacturing secrets does not cover all confidential information.

We would therefore recommend including, for employees who have access to confidential and strategic information, an express **confidentiality clause** which precisely defines the projects, techniques or methods to which it applies.

An employer may also enhance the protection of its business by including an **exclusivity clause** in the employment contract that prohibits the carrying out of any other professional activity (competing or non-competing) during the performance of the employment contract.

Employees are not entitled to additional compensation for these restrictions.

Restrictions after the employment relationship

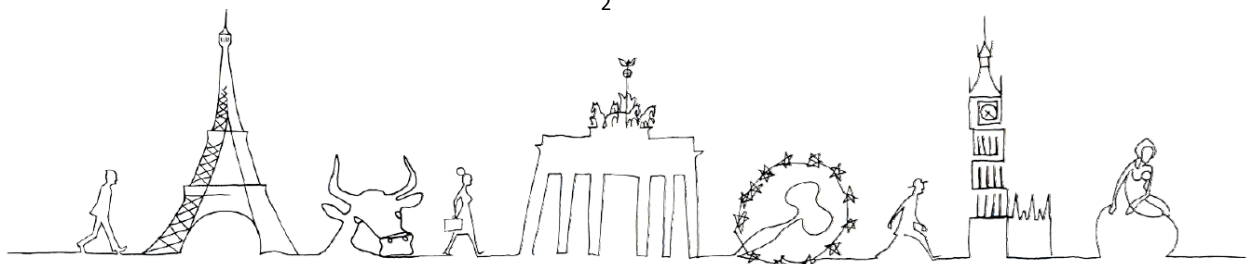
After termination of employment, employees are, in principle, free to work for a competitor or to start their own business.

An employer may, however, prevent an employee from competing with its business by including a **non-compete clause** in the employment contract.

However, such a non-compete clause would only be valid if:

- It is **necessary for the protection of the employer's legitimate interests**. For example, a non-compete clause may be justified for a sales manager or an engineer, but not for a secretary.
- It provides for **financial compensation**. The minimum amount of financial compensation is generally considered to be around 30% of the gross salary, subject to the applicable collective bargaining agreement. Non-compete compensation is considered similar to salary, and consequently tax and social security contributions are payable as normal.
- The **duration** (12 months would usually be considered a reasonable duration for a non-compete clause), the **geographic area** and the **scope of the products and/or activities** are limited.

The non-compete clause must not prevent the employee from finding a new job, having regard to his position, qualification and the relevant branch of activity. In other words, a balance should be struck between the employee's freedom to work and the employer's legitimate interest in protecting its business.



If one of these conditions is not met, the non-compete clause will be null and void. The employee is not required to comply with the (void) non-compete clause, and may also claim for damages.

Special attention should therefore be paid to the drafting of a non-compete clause.

If a valid non-compete clause is provided for in the employment contract, the employer may direct the former employee to cease any competing activity, stop payment of the financial compensation, and claim for damages before the Employment Court (a penalty clause is usually provided for in the agreement).

The employment contract may also include, without expectation of payment:

- A clause prohibiting **solicitation of the company's employees**.
- A clause prohibiting the **poaching of customers and clients**. Such a clause is, however, dangerously similar to a non-compete clause and the risk of "re-characterisation" as a non-compete clause is significant if special attention is not paid to its drafting.

It should also be noted that a confidentiality clause may apply post-termination of the employment relationship.

This material is for general information only and is not intended to provide legal advice.

**For more information regarding employment law in France, please contact:
François Mertz, BCW & Associés, at fmertz@bcw-associes.com.**

