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Employee Business Protection

Germany

Restraint on competition and other restrictions during employment

Employees are not allowed to compete with their employer during their employment. This rule, codified only for commercial clerks in sec. 60 of the German Commercial Code (*HGB*), is universally accepted to apply for all employees. Thus, employees are not allowed to work for a competing employer, run their own commercial enterprise within the employer's field of operations, or do business in this field either for their own or for another employer's account and they are not allowed to canvass clients or to recruit colleagues.

Furthermore, the equally generally accepted duty of loyalty towards the employer comprises an obligation of secrecy regarding business and trade secrets.

Express terms in the employment contracts concerning competition during the time of the employment relationship for the most part only reflect the statutory resp. generally acknowledged rules, as substantial extensions are often declared void by the Labour courts, especially if they are general terms and conditions.

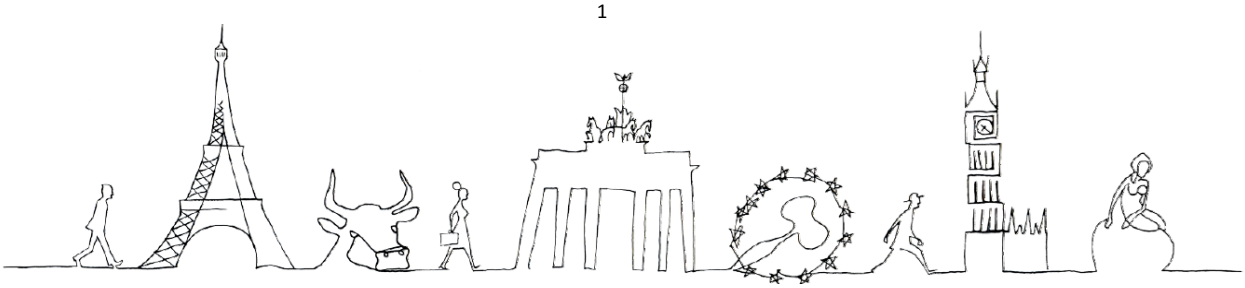
Post-contractual restraint on competition

Generally speaking, after the end of the employment, employees are free to use their capacity to work as they see fit and to solicit customers, clients and colleagues. Although the former employees are not allowed to divulge confidential and sensitive information gained in their previous employment, they can make use of any knowledge and skills they have acquired.

However, it is possible to stipulate a non-competition covenant for a maximum period of two years. In this case, pursuant to sec. 110 of the German Trade Regulation Act (*GewO*), the specific rules of sec. 74 to 75 f HGB have to be observed:

Post-contractual restraints on competition need be in in writing as well as clearly and carefully worded and they must contain a compensation payment. The latter must amount to at least half of the employee's last contractual remuneration (cash and benefit-in-kind). In practice post-contractual restraints on competition clauses are often void because they lack a clear and appropriate promise of a compensation payment.

Thus, also taking into account the involved cost, it is advisable that post-contractual restraint on competition should be considered only for key employees.



Please note that somewhat different rules apply for management board members, as for these non-employees sec. 74 to 75 f HGB do not apply. While the courts thus do not require a compensation for the post-contractual non-competition to be valid, the scope of restrictions must not go further than necessary to protect the company's interests and a maximum duration of 2 years has to be observed too.

Agreements on a restraint on competition should contain a penalty clause which contains an appropriate sum that is to be paid by the employee in case of a violation of the agreement. If no contractual fine is stipulated the principal enforcement mechanisms are an (interlocutory) injunction to enforce the restrictions and/or a claim for damages.

Non-solicitation of customers and clients

After the employment relationship has ended, the former employees are generally allowed to actively canvass customers and clients of their former employer. A contractual prohibition of non-solicitation of customers can be agreed on, but as it will usually fall under sec. 74 HGB a compensation payment (cf. above) is necessary. In order to be effective, these clauses need to be carefully drafted.

Non-poaching of staff

During the employment employees are not allowed to actively persuade their colleagues to get a different job. This obligation follows from the duty to serve their employer loyally and in good faith. A serious infringement can even justify an extraordinary termination without notice. As this is established in law, it is uncommon in Germany to include a restriction preventing an employee from poaching employees.

After termination of the employment, former employees are generally free to approach their former colleagues and offer them a new job. This can be avoided by a contractual agreement which prohibits the former employee to entice workers of the employer during a certain time period. However, such covenants may fall within the scope of sec. 74 HGB with the effect that compensation payment is necessary and they are unenforceable should the former employee now be employer her-/himself.

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

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