

January 2016

Employee Business Protection

Italy

Summary

In Italy restrictions such as non-compete clauses are common both during and after termination of employment.

Restrictions during employment

During employment, the restrictions on competition automatically derive from the general obligations of employees towards their employers provided for by the Italian Civil Code (Royal Decree 16th March 1942, n. 262, Art. 2105). In particular, the employee cannot:

- engage in business, either on their own account or on that of third parties, in competition with their employer;
- disclose information regarding the organisation and methods of production of the employer; or
- use information in a manner that may be prejudicial to the employer.

Directors and senior managers may be subject to additional fiduciary duties, which provide greater protection for employers.

Employees are not entitled to additional pay for these restrictions, while if an employee competes with their employer this is likely to justify their dismissal without notice.

Restrictions after employment

Pursuant to the Italian Civil Code (Art. 2125), after termination of the employment contract, a non-competition covenant is allowed only if the following legal requirements are met:

- it must be in written form;
- it must specify the forbidden activity;
- it must specify the duration (5 years for executives and 3 years for other categories of employees);



- it must specify the geographical extent; and
- compensation must be paid to the employee.

Compensation

The amount of compensation is not provided for by law. However, the amount must be fair in relation to the activity, the territory and duration, otherwise the entire non-competition covenant will be rendered null and void. Case law has set out that the compensation cannot be considered fair if it is manifestly unfair and disproportionate to the sacrifice requested from the employee and to their reduced possibilities of income, regardless of the benefit to the employer of the limitation.

Enforcement mechanism

If a non-compete agreement is breached, the employer can request a preliminary injunction preventing the employee from working for the competitor for the duration of the non-compete agreement. Non-compliance with such an injunction constitutes a criminal offence.

It is also possible to insert a specific clause in the non-compete agreement providing that, in the case of complete or partial failure to comply with the covenant, the employee has to repay the money received from the employer and will also be liable to pay a penalty. In this regard, according to the Italian Civil Code (Art. 1382, second paragraph), the penalty is due regardless of proof of damage. This means that if a clause providing for a penalty is inserted into the non-compete covenant, the employer is automatically entitled to the amount referred to in the penalty clause. If, however, the employer wishes to claim damages in addition to those provided for in the contract, it needs to raise a court action and must prove the additional damages.

Types of restriction

There are three main types of restrictive covenant in Italy:

1. **Non-Compete.** This restriction is aimed at preventing the employee from working for a competitor, or setting up in competition, during the employment or for a defined period after the end of the employment, as described above.
2. **Non-Solicitation.** During the employment relationship a non-solicitation restriction is automatically implied under the general obligations of the employee towards the employer as provided for in the Italian Civil Code (Art. 2105). It is also possible to include this obligation after termination of employment, by a specific clause in the employment contract or a separate agreement, although there are no legal provisions specifically regarding non-solicitation. No compensation is needed for a non-solicitation restriction.



3. **Confidentiality.** During employment, the disclosure of confidential information constitutes a violation of the duty of loyalty provided for by the Italian Civil Code. In particular, the employee can neither divulge information regarding the organisation and methods of production of the company, nor use it in such a manner as may be prejudicial to the employer. Violation of this obligation can result in disciplinary sanctions including dismissal for just cause.

The disclosure of trade secrets also represents a criminal offence. Indeed, anyone who knows a secret for reasons related to his position, office or profession, and discloses it without just cause, or uses it for his own profit or for the profit of a third party, can be punished with imprisonment for up to one year or with a fine of up to 516 Euro, if the fact has caused damage (Art. 622 of the Italian Criminal Code). In addition, anyone who knows, for reasons related to his position, office or profession, information to be kept confidential regarding discoveries or scientific inventions and discloses them for his own profit or for the profit of a third party, can be punished with imprisonment of up to two years (Art. 623 of the Italian Criminal Code).

Furthermore, after termination of the employment, use of confidential information by a company in competition could constitute unfair competition. An employer can bring an action asking the Court to prohibit the continuation of the unfair competition and make the appropriate provisions in order that its effects be counteracted, with a preliminary injunction.

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

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