

January 2016

Employee Business Protection

Luxembourg

Summary

The Luxembourg legal framework regarding business protection during the employment relationship is governed by a general obligation on both parties to act in good faith. This encompasses the employee's obligation of loyalty consisting of a duty of fidelity and a duty of confidentiality towards the employer.

During the employment relationship, the obligation of loyalty precludes the employee from competing with their employer and damaging the employer's legitimate business interests.

Once the employment contract ends, the employee may compete with their former employer provided, however, that they are not subject to a non-compete clause and that their behaviour does not constitute an unfair trade practice.

Restrictions during employment

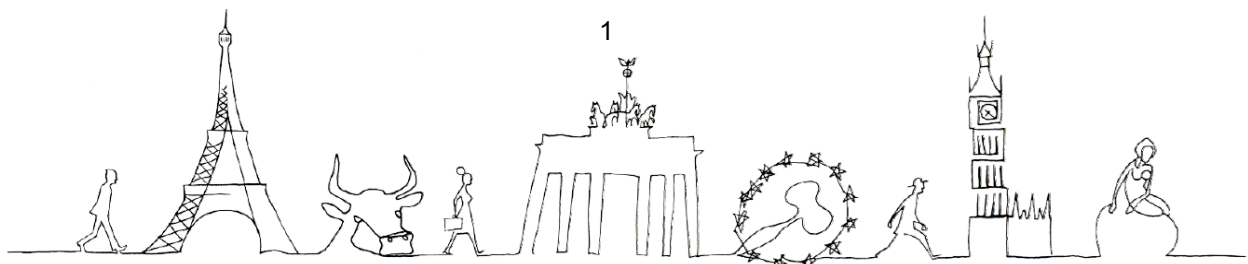
Under Luxembourg labour law, it follows from the implied contractual obligation to act in good faith that both parties should not impair their mutual interests.

As a direct consequence, the employee is restricted from (i) carrying out competing acts contrary to the employer's business interests and/or (ii) taking advantage of the corporate infrastructure, or of the knowledge they gained to compete with their employer.

However, Luxembourg case law permits the employee to prepare for future professional activities during employment, provided that the planned activity does not begin before the employment relationship has ended.

Post-contractual restrictions

Once the employment contract has terminated, the obligation of loyalty remains, although it is reduced. In the absence of a non-compete clause, the employee may compete with their former employer provided they respect the usual business practices and do not commit disloyal acts of competition.



Enforcement mechanism

The Labour Court has jurisdiction where (i) the disloyal acts began during the employment relationship, including disloyal acts that continue after the end of the contract and/or (ii) the acts are a contractual breach of an obligation set out in the employment contract.

Otherwise, the District Court has jurisdiction.

The employer must evidence either a violation of an obligation as set out in the employment contract, or a breach of the obligation of good faith by the employee, and must demonstrate that it has suffered damage as a result of the employee's conduct.

In addition, criminal courts have jurisdiction regarding the violation of industrial or business secrets.

Types of restriction

Non-compete

The employer can include a non-compete clause in the employment contract, by which the employee is prohibited from carrying out activities similar to those of the employer after the termination of the employment relationship.

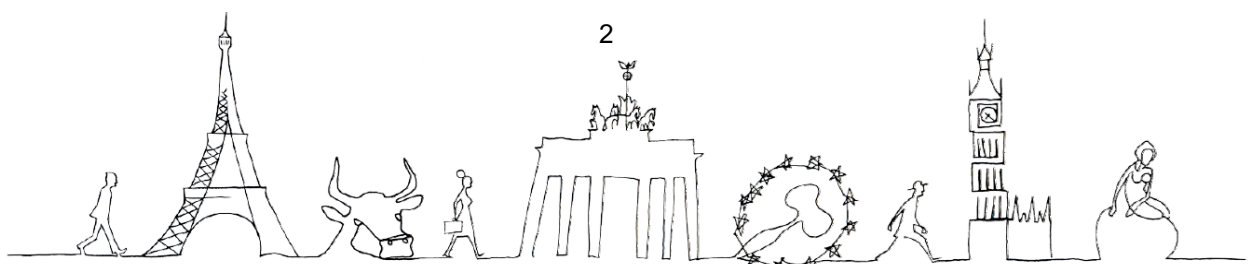
The Luxembourg Labour Code provides that to be valid such clause must be in writing, and only applies to an employee who has an annual gross salary of at least EUR 52,843.89 (amount based on the cost of living index) on the day they leave the employer. The clause (i) cannot exceed 12 months, (ii) shall be limited to the national territory and (iii) has to refer to a specific professional sector and specific activities, similar to the ones performed by the employer. No compensation has to be paid to the employee with respect to a non-compete clause.

A non-compete clause can only prevent an employee from running their own business competing with the employer; it does not apply to an employee working for a competitor.

Lastly, the clause is not applicable if the employment contract was wrongfully terminated by the employer.

Non-dealing

A non-dealing clause preventing the former employee from dealing with the employer's customers, would very likely be held valid, provided it fulfils the same conditions as set out for a non-compete clause.



Non-solicitation

Due to their general obligation of fidelity and loyalty, the employee is restricted from actively soliciting customers of his/her employer throughout and after the employment contract.

A specific non-solicitation clause will be construed as a reminder of the general obligation to act in good faith and must be (i) proportionate, (ii) limited to the protection of the employer's legitimate business interests, and (iii) limited in time.

Non-poaching of staff

A non-poaching of staff clause may forbid the employee from soliciting employees to perform services for any other entity or from attempting to induce an employee to leave the employer.

Pursuant to the same standards as those applicable to a non-solicitation clause, in order to be valid such clause must be proportionate, limited to the protection of the employer's legitimate business interests, and limited in time.

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

