

January 2016

Employee Business Protection

Poland

Summary

Relying solely on the protections arising directly from Polish law often does not go far enough to safeguard the interests of the employer. Employers are advised to regulate certain issues, at least to the extent permitted under labour law, in contracts executed with their employees. The basic instrument in this regard is the non-compete agreement covering the duration of the employment relationship as well as some time thereafter.

Another instrument used to secure the interests of employers is the confidentiality agreement obligating employees (again, during the employment relationship as well as for a certain period thereafter) to maintain confidentiality with respect to the employer's business secrets. Clauses to this effect may be incorporated into non-compete agreements, or they may assume the form of a standalone agreement.

Significantly, the employer may not impose liquidated damages or other forms of enforcement vis a vis the employee while their employment contract remains in force. Such a possibility is open to the employer only once the employment relationship has terminated.

Restrictions during employment

The catalogue of basic employee duties laid down by Polish labour law expressly obligates employees to care for the good interests of their employer, to safeguard their employer's property, and to maintain confidentiality with respect to information, the disclosure of which might occasion harm to the employer.

Seeing as there is some debate as to whether embarking on competitive activities or the provision of labour to competitors automatically amounts to breach of the general duty to care for the good interests of their employer, employers are advised to execute additional non-compete agreements with their employees. Such agreements are perfectly legitimate in the eyes of Polish labour law; while the statute speaks of "separate agreements", in practice provisions to this effect may be included in the employment contract.

In general, non-compete and/or confidentiality agreements are executed with employees who, as part of their work, have access to particularly sensitive information. However, this is not strictly necessary and some employers execute such agreements with all members of staff. The decision in this regard is left up to the employer.



A non-compete agreement executed for the duration of the employment relationship bars the employee from pursuing activities which compete with those of the employer and from providing labour (on whatever legal basis) to a competitor. As regards the mandatory elements of such an agreement, it must only prohibit competition. Apart from this fundamental feature, it may, however, include additional elements. The employee may receive additional remuneration by virtue of this agreement, although this is rare in practice. A non-compete agreement may not stipulate liquidated damages to be paid by offending employees during employment.

Controversy persists as to whether employees can be required to undertake that, for the duration of their employment relationship, they shall refrain from engaging in any and all additional activity, as opposed to just activity competitive with that of the employer. Some courts have found such clauses to be void.

Restrictions after employment

The rules concerning non-compete agreements after termination of employment are more extensive.

A non-compete agreement covering a period after the employee's work with the given employer ceases should include three elements:

1. Definition of the prohibition on competition;
2. Duration of the prohibition on competition; and
3. Compensation.

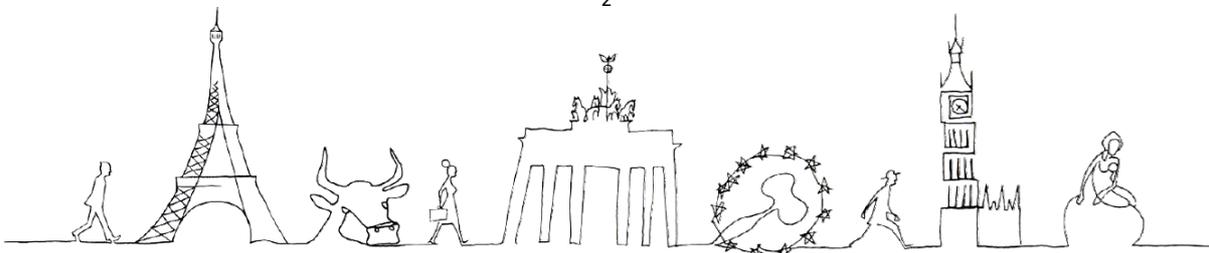
Only the first two points specified above (i.e. definition and duration) are mandatory, with failure to include them rendering the agreement null and void. If an otherwise sound non-compete agreement does not specify the compensation payable to the former employee while the non-compete clause remains in force, recourse is had to the general provisions of Polish labour law, which provide that this may not be less than 25% of the remuneration received by the employee prior to termination of their employment over a period equivalent to that for which the non-compete clause is to apply.

The law does not specify the duration of a non-compete clause; in practice, periods of between 6 and 12 months are the most common. An excessively long period with low compensation may be regarded as an abuse of the non-compete protections available under Polish law.

Employers often aim to provide for some manner of penalty which they may apply vis a vis former employees who breach the non-compete clause, and also to ensure that they may unilaterally terminate the non-compete clause.

Sanctions

An employee bound by a non-compete agreement following the termination of their employment must refrain from competitive activity, whether as an employee of a competing employer or on their own account. A type of sanction is provided for by means of compensation, which is received by the former employee for as long as they abide by the non-compete agreement, but which is forfeited if



they breach it. If this is deemed insufficient, liquidated damages may be stipulated. Significantly, any liquidated damages must not be unduly high compared to the aggregate amount of compensation payable to them; liquidated damages deemed to be excessive may be reduced by the courts.

As another form of security, the former employee may be required to regularly confirm that they are not engaging in competitive activity.

Unilateral termination of the non-compete clause

A non-compete agreement may be invalidated by way of:

1. Rescission by the employer;
2. Termination by the employer; or
3. Fulfilment of a predefined condition.

Any contractual right of rescission must be coupled with definition of a timeframe within which it might be exercised. The accepted rule is that, in general, the right to rescind is independent from the time of cessation of the employment relationship.

The fact that an employer may reserve the right to terminate a non-compete agreement is the result of long development of the judicial authorities. This process has led the courts to generally recognise an employer's right to terminate a non-compete agreement without citing any specific cause.

A non-compete agreement may provide that it shall cease to apply on fulfilment of a subsequent specified condition, for example if the business or industrial interest which was being protected ceases to exist. Whether the interest has in fact ceased to exist is a question for the employer, rather than the court.

A non-compete agreement may also be terminated by agreement.

Confidentiality

The Polish Labour Code, as well as the legislative act regarding counteraction of unfair competition, requires employees to maintain confidentiality with respect to:

1. Information, the disclosure of which may occasion harm to the employer;
2. Business secrets; and
3. Information classified under other laws (e.g. professional secrets or state secrets).

The first category is very broad and is understood to encompass all information concerning the employers' operations (core activities as well as side-lines) not readily available to other entities



active in the same field. In some situations, this category may be taken as far as to include specialised knowledge and experience.

“Business secrets” includes technical, technological, and organisational information which has not been released to the general public, and likewise other information which has business value.

Termination of the non-compete clause and business secrets

Unilateral termination of a non-compete clause by the employer is by no means tantamount to automatic permission to disclose the employer’s secrets. These benefit from statutory protection for a period of three years following termination of the employment relationship.

Other restrictions

Clauses falling under the general headings of non-solicitation of customers and clients, non-dealing with customers and clients, and non-poaching of staff are not characteristics of employment relationships regulated by Polish labour law. Rather, they are adaptations of solutions used in other jurisdictions.

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

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