GERMANY

I. SUMMARY OF THE LAW

Legal sources concerning the rules governing covenants not to compete are found in various laws and regulations depending on the subject matter of the respective covenant:

A. During contractual relationships the duty not to compete derives from the statutory provision of the Commercial Code (*e.q.,* sec. 60, 112 HGB) and, in general, from the employee's loyalty Obligation (German Federal Labor Court (BAG), in AP-No. 7 to § 611 BGB Treuepflicht) or the bona fide principles (sec. 242 Civil Law Code). In the noncompete context the latter requires that every partner to a contract has a duty of loyalty to each other.

B. After termination of employment/agency/authorized dealer contracts the parties are free to compete with each other unless they have agreed on a noncompetition clause. Such covenants not to compete are legally valid only if they are in writing, contain a liability to pay compensation, serve rightful commercial interests and do not exceed two-years. In general- and this applies equally to self-employed persons, partners, associates, shareholders and to contracts in connection with the sale of a business - covenants not to compete are legally binding only if "demanded by interests warranting protection and being reasonable according to the local, temporal and concrete circumstances" (German Federal Court of Justice (BGHZ 91, 1).

II. PARAMETERS OF THE "REASONABLENESS" TEST

A. Ancillary to an employment contract:

1. The Prohibition of competition is only binding where the principal is obliged. for the term of the restriction, to pay annual compensation equal to at least one half of the most recent contractual remuneration received by the employee (sec. 74, para 2, German Commercial Code).

2. A noncompetition provision is not enforceable to the extent it does not serve to protect a legitimate business interest of the employer or is an unreasonable interference with the employee's career with respect to the compensation allowed, the place, time or subject matter (sec. 74 a, para 1 German Commercial Code), it may not run for more than two years after termination of the employment contract (sec. 74 a, para 1).

3. The employee's Obligation not to compete may be secured by a penalty clause (sec. 75 c, para 1 German Commercial Code).

B. Incidental to the sale of business:

1. The Prohibition of competition is only valid as far as the above (See Section I.) mentioned pre conditions are observed.

   The maximum time limit of the restriction depends on the particular case (ten years upheld: timber trade business, BGH NJW 82, 2000; ten years not allowed: builder trade business, BGH NJW 79, 1605). Based on present case law, a covenant not to compete for a period of two years will, in most cases, be of the maximum permissible duration.

   A covenant which restricts the purchaser for an unlimited period without local definition is unenforceable (cleaner's business: BGH NJW-RR 89, 800).

   Also sec. 1, Act against restraints of competition in Germany, could be applicable if, and to the extent that, the covenant is not required to ensure, from a factual viewpoint, the consolidation of the business, including its goodwill, customer relations and know-how, in the hands of the purchaser (BGH NJW 1982, 2000).

III. GENERAL COMMENTS

A. An invalid covenant restraining an employee does not influence the validity of the whole contract as far as the parties would have closed the contract also without the invalid part. This cannot be taken as a general rule concerning self-employed persons (*e.g.,* BGH BB 1968, 60).

B. A covenant restraining competition of a self-employed person under a certain contract does not influence other activities of said person. For example, a leaseholder of a petrol Station who has an Obligation under his lease contract not to sell lubrication products other than those of the lessor/oil Company can sell other lubrication products in a garage which he is operating on his own account (BGH BB, 1968, 60). Additionally a restriction may be invalid if - for instance - regulating an insufficient compensation payment.

C. In the event of the routine termination of the contract through the employee, the restriction is put into force; in the event of the termination with good cause by the employee or a routine dismissal, the employee in principle has an Option to comply with the covenant or not.

D. If an employee violates the non-competition Obligation, the employer will be entitled to terminate the employment contract, usually without notice (BGH DB 1975, 1022 (Insurance agent)). If further competitive activities

are to be expected, the employee may be enjoined by preliminary injunction. The employer may also claim damages (sec. 61, para 1 German Commercial Code).

E. Attorneys' fees are recoverable in most cases where, *e.g.*, a violation of a covenant not to compete can be proved (sec. 91 ZPO).

F. A choice of law Provision in the contract will normally be upheld in cases where the parties have their principle places of business in different countries.

G. Sec. 310 para. 4, 305 Civil Law Code is applicable if the employment contract is based on a model contract that the employer uses for all employment contracts. In this case, the non-competition obligation could be inter alia considered as astonishing and therefore invalid.

IRELAND

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IRELAND

I. SUMMARY OF THE LAW

Irish rules governing restrictive covenants are primarily found in the case law of the Irish courts. UK case law is also of persuasive (although not binding) value in this area.

Restrictive covenants are usually included in the contract of employment. There is no definitive rule of law as to enforceability or otherwise of restrictive covenants. In general terms, the Irish courts evaluate the competing interests of an employer's right to protect his business from unfair competition against the employee's freedom to work and the public interest in competition in the market place in order to determine whether such covenants are enforceable. Restrictive covenants will only be enforced by the Irish courts if they are not too oppressive or far reaching.

The most common types of restrictive covenants found in employment contracts are covenants which seek to restrain an employee from competing against the former employer, covenants which seek to restrain solicitation of employees and covenants which seek to restrain solicitation of customers. These covenants are considered in more detail below.

II. CONTRACTUAL TERMS

A. Covenants in a contract of employment which restrain an employee's post employment activities will only be enforceable if the employer is in a position to show that the covenant (a) is drafted to protect a legitimate commercial interest capable of protection (the legitimate interest test) and (b) goes no further than necessary in order to protect that interest (the reasonableness test).

1. The Legitimate Interest Test Broadly speaking there are three types of interest which the Irish courts have recognized as capable of being protected by means of restrictive covenants, (i) customer connection, (ii) business intelligence and trade secrets and (iii) the existence of a stable workforce.

(a) Customer Connection

Customers and clients are a valuable business asset. If an employee has a close working relationship with customers or clients, there is a substantial risk that they may "follow" the employee should he move to a competitor or set up independently. The courts recognize that it is legitimate for the employer to try to prevent this. Cases in which a customer connection have been accepted to exist by the Irish courts include *"Oates —v — Romano"*[1] (a case involving a hairdresser) and *"Mulligan —v- Corr"*[2] *(a* case involving a solicitor).

An employer may attempt to protect its customer connection through either non-compete or non-solicitation covenants. In order to justify *a* restrictive covenant on the basis of customer connection, the employer must satisfy the Court that it seeks to protect a customer base, that the employee in question has direct exposure to its customers and is in a position to generate a tie with those customers and that the customers are in a position to divert business to the employee should he move elsewhere.

(b) Business Intelligence and Trade Secrets

Although the common law provides employers with a certain protection against the disclosure of confidential information or trade secrets by former employees, many employers rely on express non-compete covenants to strengthen this protection. The employer must establish that the information, by its nature, qualifies for protection by means of a restrictive covenant. The Courts will not allow an employer to prevent an employee from using the skill he ordinarily employs in his trade.

UK cases such as *"FSS Travel and Leisure Systems Ltd v. Johnson"*[3] are of note. In this case, the UK Court of Appeal held that the employee had not acquired all of the information contained in the computer programmes or the details of those programmes. He had merely increased his skill in working on such programmes. This was not an interest qualifying for protection as a trade secret.

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[1] (1950) 84 ILTR 161
[2] (1925) IR 169
[3] [1998] IRLR 382

(c) Existence of a stable work force

The goodwill between a business and its employees may also constitute an interest capable of protection by restrictive covenant. However, there is conflicting UK case law on this point.

In *"Hanover Insurance Brokers Ltd —v- Shapiro"*[4] the UK Court of Appeal rejected the proposition that employee stability was an interest capable of protection on the ground that it interferes with the right of those employees to work for whom they wish.

However, in *"TSC Europe --v- Massey"*[5] the UK Chancery Division accepted that the protection of an employer's employee base was a legitimate interest. However, the restrictive covenant in that case was held to be unenforceable because it applied to all employees of the company, even those who could not cause damage to the employer's commercial interests and to those who were employed by the employer following termination of the employee's employment and over whom the employee who have had no influence.

An employer may attempt to protect its workforce through non- solicitation covenants. These covenants must be confined to employees over whom the former employee has a hold or connection and to employees who are likely to pose a threat to the employer's commercial interests.

2. The Reasonableness Test

The restrictive covenant will not be enforceable unless it is reasonable in terms of (i) duration, (ii) geographical location and (iii) scope of the activities which may not be undertaken by the employee.

(a) Duration

In general, the Courts will not uphold non-compete or non-solicitation covenants which are for more than twelve months duration except in exceptional cases.

[4] [1994] IRLR 82
[5] [1999] IRLR 22

Covenants which seek to prohibit solicitation of employees of the former employer must be limited to employees who were employed at the date of termination of employment and who were employed during the 6 months prior to termination of employment (although 12 months may be reasonable for senior executives or employees with a large degree of influence over employees or customers).

Covenants which seek to prohibit solicitation of customers of the former employer must be limited to customers who were customers at the date of termination of the employment and who were customers during the 6 months prior to termination of employment (although 12 months may be reasonable for customers over whom the former employee had a large degree of influence).

In assessing whether the duration of a restrictive covenant is reasonable in a particular case, the Courts look at the time necessary for the employer to confirm its business connections with its existing customers before facing competition from its former employee.

In *Apex Fire Protection Ltd/Murtagh*[6] the Competition Authority (rather than the Courts) held that a two year restriction on soliciting former customers was unreasonable. The service in question was normally required by customers once a year. Therefore, a one year period of protection would have provided the company with ample opportunity to confirm its business connections with its existing customers.

(b) Geographical Location

The restrictive covenant should be confined to the geographical market where the employer operates. Anything more than this would be considered excessive. The geographical limits of the covenant will very much depend on the nature of the work in question and the structure of the business.

In *"John Orr Ltd and Vescom B.V. v. John Orr"*[7] the High Court held that a blanket world wide restraint was excessive and said that it should be confined to the countries in which the employer had customers, although if there were definite

[6] CA/1130/92
[7] [1987] ILRM 702

proposals for expanding into new markets this might warrant including these markets in the restriction.

However, a world wide covenants may be upheld in cases where the employer is a global entity. In the U.K. case of *LTE Scientific Limited v. David Thomas and Barbara Thomas*[8] the court noted that LTE was an international company and accepted that it was necessary to protect confidential information being disclosed in connection with all of the restricted activities worldwide.

Conversely, in *Mulligan v. Carr*[9] the Supreme Court refused to enforce a restraint of trade clause preventing a solicitor from practicing within a twenty mile radius of a small provincial town.

(c) Scope of activities

A non-compete covenant should only prevent an employee from working in the same capacity and/or in the same business as the employer.

In *John Orr Ltd and Vescom B.V. v. John Orr*[10] the employer manufactured and sold upholstery and garment fabrics. The High Court held that the clause in question was excessive because it prevented the employee from manufacturing or trading in wall coverings, which were the goods manufactured by its parent company. The employer itself did not trade in wall coverings.

in *Murgitroyd & Company limited v. Purdy*[11] the High Court held that while a 12 month non-compete restriction in the Irish market was reasonable, the restrictive covenant was unenforceable as the prohibition on dealing with potential, as opposed to actual, customers of the plaintiff company was too wide.

Non-solicitation clauses only prevent an employee from soliciting customers or employees of the employer for the purpose of competing with the employer's business. In addition, they should be limited so as to prohibit solicitation of employees or customers of the former employer over

[8] [2005] EWHC 7
[9] [1925] 1 I.R. 169
[10] [1987] ILRM 702
[11] Unreported, Clarke J., 1 June 2005

whom the employee would have had direct control or influence in the course of his or her employment.

B. The Severance Rule

If a restrictive covenant is adjudged by and Irish court to be excessive, the court may, in appropriate cases, sever the unenforceable part of the clause. What is known as a "blue pencil" test may sometimes be applied to sever the unreasonably wide element of the clause. The court will only do this where the clause is capable of standing alone without the offending provision. The court will not amend or modify the clause so as to make it enforceable.

C. Remedies

Where an employee breaches a *restrictive* covenant the employer may seek an Injunction, damages or an account of profits.

The right to an injunction is predicated on the employer demonstrating that it has a prima facie case, that the balance of convenience favors granting the injunction and that damages will not be an adequate remedy. In *European Paint Importers v O'Callaghan*[12] an interlocutory injunction was granted restraining a former employee from doing business with any person, firm or company who had been a customer of the plaintiff in the previous year.

Damages might also be available where the employer can show loss of profit resulting from the prohibited conduct. It may however, be difficult to identify any direct financial loss.

In such circumstances, it may be more appropriate to seek an account of profits made by the employee as a result of engaging in the prohibited conduct.

However, an employer who repudiates a contract or is involved in a fundamental breach of a contract will generally not be able to rely on restrictive covenants in that contract. Such breaches could include matters such as a failure to pay salaries or payments due to employees under their contract of employment, dismissal without notice and constructive dismissal.

[12] Unreported, Peart, J., 10 August 2005

III. COMPETITION ACT 2002

Restrictive covenants are not expressly dealt with in the Competition Act 2002 nor in the Competition Acts 1991-1996 (which were repealed by the Competition Act 2002).

However, under the Competition Acts 1991-1996, the Competition Authority issued a non- legally binding Notice on Employment Agreements, In this Notice the Competition Authority set out its view that section 4(1) of the Competition Act 1991 which provides that all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition or trade in any goods or services in the State or in any part of the State are prohibited and void, applied in circumstances where an employer attempted to enforce a covenant against a former employee who had begun to trade on his own account. The Authority's reasoning was that the ex-employee then constitutes an "undertaking" for the purposes of the Act.

On 2 January 2007 the Competition Authority clarified its position through a news release by revoking its 1992 Notice on Employment Agreements. A statement in the 1992 Notice that a contract of employment may become an agreement between undertakings in certain circumstances was deemed erroneous by the Competition Authority. The consensus now appears to be that even if the employee sets up business on his or her own behalf the contract restriction does not infringe section 4 (1) of the Competition Act, 2002 (previously section 4(1) of the Competition Act, 1991).

ITALY

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ITALY

I. SUMMARY OF THE LAW

According to Section 41 of the Italian Constitution, entrepreneurial activity is to be carried out within a free market. Consequently competition among businesses under Italian law cannot, in principle, be limited. Considering that such general principle is aimed at creating beneficial conditions for consumers (namely, lower prices) and that entrepreneurs would willingly enter into agreements in order to limit the "damage" which can originate from the business competition, legislation has been enacted to set forth the limits within which such agreements are valid.

The above mentioned legislation has two aims:

A. guaranteeing, as far as possible, free competition and, therefore, defining the antitrust regulations (Article 85 and following of the "EU Treaty" and Law 10 October 1990, no. 287);

B. setting forth limits to covenants not to compete in general (Article 2596 of the Italian Civil Code, hereinafter "Code") or in specific relationships (Article 2557 of the Code with respect to sale of businesses or lines of businesses, Article 2125 of the Code with respect to employment and Article *1751-Ms* with respect to agencies).

II. LIMITS TO COVENANTS NOT TO COMPETE — PARAMETERS OF THE REASONABLENESS TEST

In general, Article 2596 of the Code requires that any covenant not to compete must be made in a written form and is enforceable if it is limited to a geographical area or a business activity (paragraph 1). Moreover, the term of the non-competition obligation must not exceed five years. Agreements for a longer period are automatically limited to five years (paragraph 2).

Article 2557 of the Code states that, in case of a transfer of a business or a line of business, the transferor may not initiate a new business within a term of five years after completion of the deal, that "for its object, location or other circumstances" would be fit to divert customers from the transferee (essentially, the clause protects the goodwill of the transferred business). The obligation may be derogated or broadened by the parties, with the sole limit that it cannot prohibit any professional activity of the transferor and must be limited to five years. Also in this case, agreements for a longer period are automatically limited to five years.

During the course of an employment relationship, the employee has the duty not to compete with the employer. Article 2125 of the Code provides that upon termination of the employment, a covenant not to compete may be entered into

between the employer and employee. Such agreement must be made in writing, provide a consideration in favour of the employee and limit its purpose to object, location and term. The term cannot exceed three years for employees and five years for managers (paragraph 2).

Also agents may undertake not to compete with the principal following the termination of the relationship (Article 1751 *-bis* of the Code). The agreement must

be in writing, the term must not exceed two years and it must concern the same area, customers, goods and services that were the object of the agency agreement. A consideration for the agent must also be provided for, based on parameters mentioned in the abovementioned Article.

III. GENERAL COMMENTS

- The provision of Article 2596 of the Code does not exclude the possibility to renew the covenant not to compete upon expiration of the relevant term.

- The prevailing opinion is that Article 2596 applies only to "horizontal" relationships, i.e. among competitors. Limitations inserted in "vertical" relationships (e.g. manufacturers and resellers) are not within the purpose of the provision as they would concern exclusivity obligations and not non-competition undertakings (Supreme Court, decision no. 5094 of 1994).

- As a general principle, applicable to entrepreneurs, employees and agents, covenants not to compete shall not be so strict to prohibit any possible source of income (Supreme Court, decision no. 16026 of 2001, no. 7835 of 2006.

- A violation of a non-competition obligation may be ascertained independent from the existence of effective damages. The mere existence of the breach and of potential damages is sufficient to obtain a favourable judgment with consequent remedies, such as interim measures (injunction to prohibit the unlawful behaviour) and publication of the order in newspapers or magazines (Supreme Court, decision no. 1311 of 1996).

- As regard to non-competition obligations in transfers of business, it is common practice to extend non-competition obligations also to the shareholders of the transferor company (and sometimes to their family members) and to its employees (in case of transfer of a line of business) to avoid indirect competition. In addition, to strengthen the enforceability of such undertakings, it also common practice to set forth penalties determining the amount of damages that any breach could cause.

- According to the latest case law, the provisions of Article 2557 of the Code are applicable also in case of transfers of shares (Supreme Court, decision no. 9682 of 2000). In such case it was also stated that the undertaking of a

covenant not to compete by the seller of the shares cannot include working as an employee of a competitor (Supreme Court, decision no.16026 of 2001).

- According to Section 41 of the Italian Constitution, entrepreneurial activity is to be carried on within a free market. Consequently competition among businesses under Italian law cannot in principle be limited. Considering that such general principle is aimed at creating beneficial conditions for consumers (namely, lower prices), and that entrepreneurs would willingly enter into agreements in order to limit the "damage" which can originate from the business competition, legislation has been enacted to set forth the limits within which such agreements are valid.

The above mentioned legislation has two aims:

(a) guaranteeing, as much as possible, free competition, and therefore defining the antitrust regulations (Article 85 and following. of the "EU Treaty" and Law 10 October 1990, no. 287);

(b) setting forth limits to covenants not to compete in general (Article 2596 of the Italian Civil Code, hereinafter "Code") or in specific relationships (Article 2557 of the Code with respect to sale of businesses or lines of businesses, Article 2125 of the Code with respect to employment and Article 1751-*bis* with respect to agencies).

IV. LIMITS TO COVENANTS NOT TO COMPETE – PARAMETERS OF THE REASONABLENESS TEST

In general, Article 2596 of the Code requires that any covenant not to compete must be in written form and is enforceable if it is limited to a geographical area or a business activity (paragraph 1). Moreover, the term of the non-compete obligation must not exceed five years. Agreements for a longer period are automatically limited to five years (paragraph 2).

Article 2557 of the Code states that, in case of a transfer of a business or a line of business, the transferor may not initiate a new business, for five years after completion of the deal, that "for its object, location or other circumstances" would be fit to divert customers from the transferee (essentially, the clause protects the goodwill of the transferred business). The obligation may be derogated or broadened by the parties, with the sole limit that it cannot prohibit any professional activity of the transferor and must be limited to five years. Also in this case, agreements for a longer period are automatically limited to five years.

In the course of an employment relationship, the employee has the duty to not compete with the employer. Article 2125 of the Code provides that at the end of the employment, a covenant not to compete may be entered into by employer and employee. Such agreement must be in writing, provide a consideration in favour of the employee and limit its scope as to object, location and term. The

term cannot exceed three years for employees and five years for managers (paragraph 2).

Also agents may undertake not to compete with the principal following the termination of the relationship (Article 1751-*bis* of the Code). The agreement must be in writing, the term must not exceed two years and it must concern the same area, customers, goods and services object of the agency agreement. A consideration for the agent must also be provided for, based on parameters mentioned in the above-indicated Article.

A. General Comments

- The provision of Article 2596 of the Code does not exclude the possibility to renew the covenant not to compete at the expiration of the relevant term..

- The prevailing opinion is that Article 2596 applies only to "horizontal" relationships, i.e. among competitors. Limitations inserted in "vertical" relationships (e.g. manufacturers and resellers) are not within the scope of the provision as they would concern exclusivity obligations and not non-compete undertakings (Supreme Court, decision no. 5094 of 1994).

- A violation of a non-compete obligation may be ascertained independent from the existence of effective damages, the mere existence of the violation and of potential damages is sufficient to obtain a favourable judgment.

- As regards non-compete obligations in transfers of business, it is common practice to extend non-compete obligations also to the shareholders of the transferor company (and sometimes their family members) and to its employees (in case of transfer of a line of business) to avoid indirect competition. In addition, to strengthen the enforceability of such undertakings, it also common practice to set forth penalties predetermining the amount of damages that any violation could cause.

- According to the latest case law, the provisions of Article 2557 of the Code are applicable also in case of transfers of shares (Supreme Court, decision no. 9682 of 2000).

THE NETHERLANDS

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THE NETHERLANDS

I. STATUTORY BASE

Articles 7:653 and 7:443 of the Dutch Civil Code (DCC) address non-competition covenants in the context of employment and agency agreements, respectively.

A. Employment/non-compete agreements

1. According to article 7:653 DCC an employee can be restricted by his employer in his activities after the termination of his employment agreement. Causes which limit the activities of an employee during the employment are not within the scope of this article. Article 7:653 DCC requires that a non-competition covenant is in writing; normally a non-competition covenant is therefore incorporated in a written and signed employment agreement.

2. According to article 7:653 DCC the employee can be restricted in accepting employment with competitors of the employer or in performing certain activities which are similar to or in competition with the activities of the employer.

3. An employee may request the cantonal judge to annul or limit the scope of the non-competition covenant if in proportion to the interests that the employer has by enforcing the non-competition covenant, the employee's position is unreasonably affected.

4. Circumstances which may support enforcement of the non-competition covenant:

   (a) The fact that the employee knows a lot about the business secrets, like price policy, clients, production, etc., in which cases the competitor of the employer would take unjustified advantage from this information by hiring the employee (Ktr. Amsterdam, 11 May 1995, JAR 1995/119, Rb. Amsterdam, 16 August 1995, JAR 1995/208, Ktg. Amsterdam 3 August 2001, JAR 2001/202).

   (b) The fact that the employee may or will attract clients of his previous employer in favor of his new employer or in favor of the employee himself (Rb. Leeuwarden, sector kanton, 27 June 2002, JAR 2002/181, Ktg Lelystad, 4 October 2000, JAR 2000/256).

   (c) The fact that the employer has put great efforts (time and money) in the employee's training, and it would be unfair for the competitor to benefit from these efforts (Arr.Rb. Zwolle,

21 May 1980, NJ 1981, 282, Pres.Rb. Arnhem 2 October 1992, JAR 1993/135).

(d) The fact that the employment agreement was terminated at the request of the employee, or the employee's behaviour gave rise to termination by the employer (Ktg Tilburg, 17 July 2000, JAR 2000/186, Ktr. Enschede 8 October 1992, JAR 1992/107).

5. Circumstances which may give rise to limitation or annulment of the non-competition covenant:

(a) The fact that the employee is only qualified and able to perform the activities which are forbidden and therefore will not be able to find a job when he is not allowed to use these special skills and experience (HR 25 October 2002, JAR 2002/277, Pres.Rb. Roermond, 24 December 1991, KG 1992/54).

(b) The fact that the job which has been offered to the employee means a significant increase of salary or a significant promotion whereas such increase of salary or such promotion is not possible in the service of the old employer (Ktg. Utrecht 28 February 1996, JAR 1996/86, Rb. Amsterdam 29 September 1993, JAR 1993/230).

6. It is advisable to limit the effects of the covenant to a limited geographical area (for example '20 kilometres around Amsterdam' or 'in the Netherlands') and to a limited number of years (normally two years). By doing so, the possibility that the judge will limit the scope or annul the non-competition covenant is minimized. The non-competition covenant can contain a penalty for non-compliance. .

7. In accordance with article 7:653, paragraph 4 DCC in some cases the judge decided that the employer, although he was allowed to enforce the non-competition covenant, by doing so he is bound to pay the employee compensation for the fact that due to the non-competition covenant, the employee is not able to find a suitable job.

8. If an employee, who is bound to a non-competition covenant, is offered a new job by his employer which substantially differs from his old job, as a result of which the non-competition covenant becomes of more weight, then it is advisable to enter into a new non-competition covenant, since the older one may be held invalid.

9. In the event of a transfer of business, the employees who were employed in the business transfer to the purchaser of the business by matter of law (art. 7:662 etc. DCC); all rights and obligations regarding these employees will therefore transfer over to the new employer, including the rights and obligations which are part of the non-competition covenants. This will not be the case if as a result of the transfer of business, the non-competition covenant would become of substantially more weight.

B. Agency agreements

1. According to article 7:443 DCC a non-competition covenant with the agent is valid only if:

   (a) it is entered into in writing;

   (b) it relates to the type of products or services, for which the agent was hired and;

   (c) it is limited to the area, or to the customers and the area, which were entrusted to the agent.

   A non-competition covenant in agency agreements is valid only for a maximum period of two years after the termination of the agency agreement.

2. The principal cannot enforce the non-competition covenant with the agent if the agency agreement is terminated:

   (a) by the principal without approval of the agent or without taking into account the statutory or agreed notice period;

   (b) by the agent for reasons due to the principal;

   (c) by a judicial decision, based on circumstances due to the principal.

3. At the request of the agent, the judge may limit or annul a non-competition covenant in an agency agreement if in proportion to the interests the principal has by enforcing the non-competition covenant, the agent's position is unreasonably affected.

II. SALE OF BUSINESS

A. Dutch civil law does not contain any specific provisions which relate to non-competition covenants in agreements whereby a business is sold or transferred. Reference is made to the section dealing with non-competition covenants in the European Community.

SPAIN

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SPAIN

I. SUMMARY OF THE LAW

Spanish legal regulation governing covenants not to compete distinguishes between those covenants while the employment relationship is in force, and those referring to a post-contractual obligation.

The non-competition obligation of the employee during the period in which the employment relationship is in force is compulsory.

In the case of Top executive employees, this obligation does not only refer to a competitor company, but to any contract, that is, Top Executive employees cannot enter into any other employment contract with third Companies, unless otherwise agreed with their prior employer (vid. art. 8.1 RD 1382/1985).

Concerning the post-contractual non-competition agreement, Spanish law establishes some requirements which must be fulfilled for the covenant to be enforceable. Among these covenants, the law establishes mainly limits of duration, the fact that the Company must have an effective industrial or commercial interest in the non-competition obligation and that an adequate compensation for this non-competition covenant is paid to the employee.

II. PARAMETERS OF THE "REASONABLENESS" TEST

A. Ancillary to an employment contract

1. The enforceability of the post-contractual non competition agreement is subject to the Company having an industrial or commercial interest in maintaining it (art. 21.2.a) of the Workers' Statute for ordinary employees and art. 8.3.a) R.D. 1382/1985, for Top Executive employees).

2. The post-contractual non competition agreement also requires the payment of an "adequate compensation" (art. 21.2. b) of the Workers' Statute and art. 8.3.b) R.D. 1382/1985, for Top Executive employees). Spanish employment law does not give any indication as to when a compensation is reasonable, or adequate, but an amount around 50% of the annual fixed salary of the employee should be in general circumstances considered as "adequate" for these purposes. On the other hand, Spanish Law does not establish the moment in which this compensation must be paid and theoretically it can be paid during the life of the contract or after its termination, and can be paid as a lump sum, or in monthly installments. We suggest that the payment of this compensation is made after the termination of the contract, that

is, during the period in which the covenant not to compete is in force.

3. The maximum duration of the non-competition clause is fixed by law at 2 years for Top Executives (ex art. 8.3 R.D. 1382/1985) and technicians and six months for other employees (ex art. 21.2 Workers' Statute). The recommended extension depends on the interests of the Company and in any event, on the agreement reached by the Company and the employee.

4. In the case of Top Executive employees, certain High Courts have declared the possibility of the Company reserving the right of deciding whether to enforce the post-contractual non competition clause or not. However, this point has now been clarified by the Supreme Court, who has stated that the Company can not unilaterally waive the non-competition agreement. The covenant not to compete, once it has been agreed by both parties, can only be waived by mutual agreement between them.

5. The infringement of the obligation not to compete while the employment contract is in force would entitle the Company to terminate the employment relationship under a disciplinary dismissal procedure, that is, without being obliged to pay a dismissal compensation, provided that the dismissal is declared fair by the competent Courts. It would also be possible to claim damages from the employee (in any case, the damages compensation should be solidly proven).

B. Incidental to the sale of business

1. Under Spanish Law when a Company or a business is sold, the employees of said Company or those rendering services in the scope of said business are transferred from one Company to another, keeping their specific rights and obligations (art. 44 Workers' Statute). As a result of this, the covenant not to compete will be valid, as agreed with the previous employer and provided that the abovementioned conditions are met.

2. In the case of a Top Executive employee, the change of owner or control of the Company would allow the employee to terminate the employment contract with the compensations agreed (or those established for the termination in case of waiving of the contract by the Company). However, even in the case of termination by the employee, the covenant not to compete will remain enforceable.

III. GENERAL COMMENTS

It is important to highlight that covenants not to compete after the termination of the employment contract would not prevent the employee from rendering his services for a competitor, and the Employment Court will not enjoin the employee to leave the competing Company on the grounds of a covenant not to compete. In this sense, the covenant not to compete will only entitle the Company to claim damages against the employee in order to obtain compensation for the non-fulfillment of the covenant. This action is without prejudice to the possible civil actions that the Company could have against the competing company in case of unfair competition, if applicable.

On the other hand, the terms of the non competition, and what should be understood as competition can be agreed by the parties and established in the agreement signed to that effect. In this sense, the non-competition clause agreed between the parties would be valid even when the termination of employment is not justified, unless otherwise established in the contract. Therefore, if nothing specific has been foreseen in the contract in this respect, the non-competition clause would apply whatever the reason for termination may be (fair dismissal, unfair dismissal, voluntary resignation, retirement...). If the parties want to exclude from the scope of the non-competition clause any of these termination causes, they should be clearly specified in the contract.

Finally, covenants not to compete must be distinguished from exclusivity agreements. By means of the first one the employee is obliged to not render services for any competing company. By means of the second agreement, the employee commits himself not to render services for a third company while the employment contract is in force, irrespective of its economic scope.

SWITZERLAND

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SWITZERLAND

I. STATUTORY BASE

Covenants not to compete are included in many contractual relationships **during their existence**. Such covenants derive from the general duty of loyalty in many long-term agreements such as employment contracts (Section 321a Swiss Code of Obligations, "CO"), agency (Section 418d CO), partnership ("Einfache Gesellschaft", Section 536 CO), partnership ("Kollektivgesellschaft", Section 561 CO) and Limited Liability Company (Section 818 CO). Noncompetition agreements can also frequently be found in pooling agreements among shareholders and license agreements.

Covenants not to compete with **effect after termination of such an agreement** are only specifically regulated in the employment context. Sections 340 et seq. CO provide for the typical covenant not to compete after termination of the employment agreement. The pertinent Section 340(1) CO reads as follows:

An employee may bind himself to the employer to refrain from engaging in any competitive activity after termination of the employment relationship, in particular neither to operate a business for his own account which competes with the employer's business, nor to work for nor participate in such a business.

Generally speaking, a competitive activity is given if two suppliers offer goods or services of the same kind, satisfy the same needs and target the same buyers (*Streiff/von Kaenel, Arbeitsvertrag, 1992, N 7 ad Section 340 CO*).

II. PARAMETERS OF THE "REASONABLENESS" TEST

A. Ancillary to an Employment Contract:

A covenant not to compete is valid only if

1. the employee has full legal capacity (Section 340(1) CO);

2. the covenant is in writing (Section 340(1) CO): A covenant in standard business terms is not considered to be sufficient at least as long as there is no explicit reference in the employment contract (*Streiff/von Kaenel, op. cit., N 5 ad Section 340 CO*);

3. the employment relationship gives the employee access to customers or to manufacturing or business secrets (Section 340(2) CO);

4. the use of such knowledge could significantly harm the employer (Section 340(2) CO);

5. the covenant is reasonably limited in terms of place, time and subject in order to preclude an unreasonable impairment of the employee's economic prospects (Section 340a(1) CO);

6. the covenant does not exceed three years unless there are special circumstances (Section 340a(1) CO). Special circumstances are, however, very rarely given.

   The employer loses the benefit of a covenant not to compete if he terminates the employment relationship without a valid reason or if the employee terminates the employment relationship for a valid reason for which the employer is responsible (art. 340c Para 2 CO). The covenant also lapses if the employer no longer has a significant interest in its maintenance (art. 340c Para 1 CO).

B. Incidental to the Sale of a Business:

Swiss civil law does not specifically regulate covenants not to compete in agreements related to the sale or transfer of a business. The Swiss Federal Supreme Court denied in its criticized decision *BGE (=Federal Reporter) 124 III 495 ff.* the applicability of the Swiss Cartel Act on noncompetition agreements incidental to the sale of a business. The Supreme Court only applied the general personality right protection rule of Section 27(2) Civil Code ("CC") to such noncompetition agreements. The critics of this decision point out that the applicability of Section 27(2) CC does not provide specific guidelines as to the permissible duration of noncompetition agreements, and that this decision runs afoul of the very basic notion of what constitutes an agreement under contemporary antitrust law. Therefore, some authors have proposed to apply the rules set forth by the European commission with respect to the application of the competition laws to covenants not to compete (cf. *Etter, Noncompetition Agreements in connection with acquisitions of enterprises and competition law, sic! 2001, 488*).

The Swiss Competition Commission follows the predominant doctrine in this field and now holds that even a unilateral covenant not to compete principally constitutes an agreement in restraint of competition. If concluded within the framework of the sale of a business, however, the Commission does *not* qualify such a covenant as an agreement in restraint of competition provided the covenant is truly ancillary to the sale of the business. This is the case if the covenant is *directly related* to the sale of business and if it is *necessary* (that is, indispensable) in regard to its factual and geographical scope as well as its duration to make possible that the goals of the transactions can be realized. This must be assessed on a case by case basis; *see*, e.g., RPW ("Law and Politics of Competition", the Swiss Competition Commission official reporter) 2006/4 p. 687-690, in particular p. 689-690). To the extent that the covenant meets these criteria and is thus ancillary to the sale of the specific business, it is assessed under merger law only, and not antitrust law.

It can be concluded that the Swiss Commission follows the respective practice of the European Commission set forth in its "Notice on restrictions directly related and necessary to concentrations (OJ C56 of March 5, 2005, p. 24) by analogy.

III. GENERAL COMMENTS

A. Noncompetition Agreements Ancillary to an Employment Contract:

With respect to their enforceability, it should be noted that noncompetition agreements will generally be enforced if they meet the requirements set forth in the pertinent statutory provisions (Sections 340 et seq. CO). However, an overbroad noncompetition provision not meeting the standard set forth in Sections 340 et seq. CO will be modified by the judge to a reasonably restrictive covenant; thus, it will not be invalidated. That means that covenants not to compete are not fully effective if they are not drafted carefully enough. It can be said that the courts tend to be rather critical towards the enforceability of noncompetition agreements in the employment context.

If the noncompetition agreement is combined with a penalty to ensure compliance by the employee, he can free himself from the covenant by paying the penalty (Sections 340b(1) and (2) CO). However, if specifically agreed in writing, the employer may, in addition to the penalty for breach and the compensation for further damage, request the elimination of this situation contrary to the contract, insofar as this is justified by the violated or threatened interests of the employer and by the behavior of the employee (Section 340b(3) CO).

B. Other Noncompetition Agreements:

Section 27(2) CC (protection of personality) applies to covenants restricting someone in its freedom in general. Hence, this provision applies not only to covenants not to compete incidental to the sale of a business but also to other noncompetition agreements. For instance, the Swiss Federal Supreme Court examined in a recent decision a noncompetition covenant in a pooling agreement among shareholders with respect to its compliance with Section 27(2) CC (*BGer, 4C.5/2003*). Furthermore, if, for instance, there is a similar close relationship between the parties involved as in an employment relationship, the courts might also apply the rules for covenants not to compete in an employment context (Sections 340 et seq. CO) by analogy to other noncompetition agreements (cf. *Chappuis, noncompetition covenants in pooling agreements among shareholders, SJ 2003 II 317; BGer, 4C.5/2003*).

UNITED KINGDOM

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UNITED KINGDOM

I. SUMMARY OF THE LAW

The starting point for non-compete covenants between an employer and an employee is that they are void, being contrary to public policy. However, such a covenant may be upheld if the employer can show:

- He has legitimate business interests which merit protection by a restrictive covenant; and

- The restriction extends no further than is reasonably necessary to protect the legitimate business interests.

(*Masons v Provident Clothing & Supply Co Ltd* [1913]; *Herbert Morris Ltd v Saxelby* [1916]; *Stenhouse Australia Ltd v Phillips* [1974]; *TFS Derivatives Ltd v Morgan* [2005]).

The ex-employer cannot protect himself against competition per se (as this is not a 'legitimate business interest') but only against unfair exploitation of his trade secrets or trade connections (*Herbert Morris Ltd v Saxelby*; *Stenhouse v Phillips* (see above)). The reasonableness of the covenant will be judged at the date the contract is made, i.e. it has to be reasonable at its inception (*Rex Stewart Jeffries Parker Ginsburg Ltd v Parker* [1988]).

A restraint must not be contrary to the public interest. However, a covenant which is reasonably necessary to protect a legitimate interest of the employer will not generally be found to be against the public interest.

The courts are more likely to strike down non-compete covenants in employment contracts than in business sale contracts due to the greater likelihood of equality of bargaining power in the latter (*Herbert Morris Ltd v Saxelby* (see above)), although non-compete covenants in business sale agreements may be subject to EC and UK competition law.

In addition to non-compete restrictions, employers should also give consideration to other types of protection available, including non-solicitation, non-dealing and non-poaching restrictive covenants, so as to ensure they have the right provisions (or combination of provisions) in place to protect their legitimate interests.

Non-compete and other restrictive covenants need to be carefully drafted and incorporated into contractual documentation. Where possible, restrictive covenants should be tailored to particular employees, or types of employees, and should be reviewed regularly to ensure they are up to date.

II. LEGITIMATE INTERESTS

An employer's legitimate interest must be of a proprietary nature. Therefore, some advantage or asset inherent in the business which can properly be regarded as property should be identified. This is the case whether or not the employee contributed to the interest's creation (Stenhouse v Phillips).

In general terms, an employer may seek to protect through the medium of a non-compete covenant:

- his trade secrets/confidential information; and/or
- more rarely, his trade connections/goodwill

A. Trade secrets/confidential information

Trade secrets and confidential information may be protected by a simple non-disclosure covenant. However, in some cases a non-complete clause may be justified (*Littlewoods Organisation Ltd v Harris* [1977])

It is important to consider what information can be properly protected. The key question is whether the trade secret can be regarded as the employer's property or whether it is itself the employee's skill, experience, know-how and general knowledge (which can be regarded as property of the employee) (*FSS Travel and Leisure Systems Ltd v Johnson and another* [1989]). Considerations such as the nature of the employment, the character of the information, the restrictions imposed on its dissemination, the extent of its use in the public domain and the damage likely to be caused by its use and disclosure to those in competition with the employer will be relevant.

In *Lansing Linde Ltd v Kerr* [1991], a trade secret was defined to cover information that if disclosed to a competitor would be liable to cause real or significant damage to the owner of the secret.

B. Trade connections/goodwill

Non-compete clauses are used infrequently for the protection of trade connections. This is because a non-compete clause to protect trade connections is likely to run the risk of being held to go further than is necessary to protect a legitimate business interest (see below), on the basis that trade connections can normally be adequately protected by non-solicitation, non-dealing and/or non-poaching covenants. However, where a non-solicitation and/or non-dealing covenant would be difficult to police (perhaps because the identity of the customers or other connection is not documented or is unknown), a non-compete covenant may be justified to protect customer (or other) connections (*Turner v*

Commonwealth & British Materials Ltd [2000]; *TFS Derivatives Ltd v Morgan*).

An employer seeking to establish a trade connection must show:

- the existence of a connection that is special to it; and
- that the former employee is or will be in a position to take advantage of the trade connection (*Barry Allsuch & Co v Harris* [2001]).

It is important that there is a recurrence of clients and strong client relationships in order for the trade connection to be a legitimate interest.

1. **Reasonable protection of legitimate interests**

In order for a covenant to be reasonable it must "afford no more than adequate protection to the party in whose favour it is imposed" (*Herbert Morris Ltd v Saxelby* [1916]). The covenant must therefore be no wider than necessary to protect the legitimate interest.

A non-competition covenant is the most onerous type of covenant, because it prevents an individual from earning a living from his trade, and is therefore the most likely type of covenant to be struck down by the courts. It should therefore be focussed in order to limit:

- the type of business affected
- the geographical area of the restriction
- the duration of the restriction

(a) Type of business affected

The non-compete covenant must precisely define the type of business in which the employee is prevented from being engaged during the period of the restraint. That type of business should be focussed on the particular field of activity in which the employee was engaged whilst employed (*Attwood v Lamont* [1920]).

The covenant must also be limited to involvement with competing businesses (*Scully UK Ltd v Lee*).

(b) Duration

The duration should be no longer than necessary to protect the legitimate proprietary interests of the employer.

If the legitimate interest is the employer's trade connections this will normally be the time it would take a replacement employee to establish a relationship with customers such that the influence of the former employee will have been removed (*Barry Allsuch*).

In relation to confidential information, it should be considered how long the information which the employee may have gained will remain of use to a competitor.

The Courts will also have regard to the interplay between a non-compete covenant and notice/garden leave provisions. The duration of a non-compete covenant should normally be set-off against any period spent by the employee on garden leave during the notice period.

(c) Geographical limits

The geographical area should be no wider than necessary to protect the employer's legitimate business interests. The limitation should therefore bear some relation to the geographical extent of the employer's business. What area is necessary is a question of fact (*Skully*) and will depend on the nature of the business to be protected and the manner in which it is carried on. However, in many cases limiting the geographical area will not be of any practical use because the location from which business is transacted is of little relevance. In some cases a continental or worldwide restraint will be justifiable because of the international nature of the business (*Skully*); *Poly Lina Ltd v Finch* [1995]; *Polymasc v Charles* [1999]).

2. **General comments**

- Where there is a wrongful dismissal or the employer has otherwise breached the terms of the contract of employment containing the restrictive covenants, the employee will be freed from any covenants in restraint of trade (*General Bill Posting Company Ltd v Atkinson* [1909])

- A court will not rewrite covenants in order to make them enforceable (*Mason v Provident Clothing and Supply Ltd* [1913]). A court will only amend a restrictive covenant by

deleting certain words if necessary (the "blue pencil" test). Therefore, if a covenant is too wide or unreasonable at its inception, it will generally be unenforceable.

- Although there must be consideration for covenants, it is not necessary to make payments to support covenants. Indeed, a covenant which is too wide will not be saved by making a payment (*TSC Europe (UK) Limited v Massey* [1999]).

GUAM

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GUAM

I. STATUTORY STATEMENT OF THE LAW

Pursuant to statute, and with certain limited exceptions, Guam prohibits post-employment noncompetition agreements:

Every contract, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided in the next two sections, is to that extent void.

18 Guam Code § 88105.

One statutory exception allows a noncompetition agreement incident to the sale of a business:

One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified district, city, or a part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein.

18 Guam Code § 88106.

The second exception allows a noncompetition agreement in the dissolution of a partnership:

Partners may, upon or in anticipation of a dissolution of a partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof.

18 Guam Code § 88107.

II. JUDICIAL INTERPRETATION AND APPLICATION OF STATUTE

A. Lawful restriction incidental to the sale of a business:

Shelton v. Guam Service Games, 239 F.2d 902 (9th Cir. 1956) (court enforced a noncompetition provision in a contract for sale of a coin-operated machine business restricting the seller from competing with the buyer for five years where the seller sold the good will of the business. However, the court held the provision was invalid to the extent it purported to cover all of Guam and directed the trial court to define a narrower more reasonable geographic area to which the restraint could validly operate).

III. GENERAL COMMENTS

A. Protectable interests: Although post-employment noncompetition agreements are generally prohibited by statute, a restriction on

competition will be enforced incident to the sale of the good will of a business or the dissolution of a partnership. 18 Guam Code §§ 88105 – 88107.

B. **Duration of the restriction:** Courts have approved a five-year noncompetition agreement incident to the sale of a business. *Shelton v. Guam Service Games*, 239 F.2d 902 (9th Cir. 1956); *Guam Service Games v. Shelton*, 126 F. Supp. 335 (D.C. Guam 1954)

C. **Geographic scope:** A noncompetition agreement purporting to cover all of Guam was held overbroad. *Shelton v. Guam Service Games*, 239 F.2d 902 (9th Cir. 1956). The statute permitting a noncompetition agreement incident to the sale of a business allows the restraint only for "a specified district, city, or a part thereof." 18 Guam Code § 88106.

D. **Blue pencil/modification:** The courts may blue pencil, i.e., modify, the overbroad restriction and enforce a narrower restraint on competition. *Shelton v. Guam Service Games*, 239 F.2d 902 (9th Cir. 1956) (lower court instructed to craft a more narrow restraint to cover the municipality of Agana and its surrounding area; overbreadth did not render the clause unenforceable in its entirety).

E. **Source of Guam laws:** In 1933, Guam adopted the codes of California in place of the previous Spanish Civil Law. Courts construe the Guam statutes in light of California decisions. *Guam Service Games v. Shelton*, 126 F. Supp. 335 (D.C. Guam 1954).

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NORTHERN MARIANA ISLANDS

I. JUDICIAL STATEMENT OF THE LAW

Although there is no governing statute, and no case has addressed the legality of a post-employment noncompetition agreement, a court in considering a provision prohibiting the solicitation of customers refused to issue an injunction where the plaintiff offered no proof of active solicitation. *Pacific American Title Insurance and Escrow v. Anderson*, 1999 WL 33992416 (N. Mariana Islands) 6 N.M.I. 15 (1999) (Plaintiff Pacific Title sought an injunction against former employee Anderson. Anderson had signed an employment agreement that included a provision prohibiting her from soliciting Pacific Title's customers for a period of two years after termination of employment. Post-termination, Anderson started a competing title insurance company. Pacific Title urged that the provision prohibited Anderson from accepting any business from its customers, i.e., net effect, a noncompetition agreement. Rejecting that interpretation, the court held that the provision only prohibited Anderson from actively soliciting Pacific Title's customers and that she was free to compete so long as she did not solicit. Further, Pacific Title had failed to offer any proof of solicitation.)

JAPAN

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JAPAN

I. SUMMARY OF THE LAW

Under Japanese law, covenants not to compete are deemed to be an ancillary obligation to an employment agreement during the period of employment. No prior consent by the employee or written agreement is required.

On the other hand, for a covenant not to compete to be legally valid after termination of employment, it must be reasonable, and clearly expressed in a prior written agreement of the parties or the written employment work rules because it would restrict the freedom of choosing one's own occupation, a right of the employee guaranteed under the Constitution of Japan.

II. VALIDITY OF COVENANTS NOT TO COMPETE AFTER TERMINATION OF EMPLOYMENT

A. Prior written consent to a covenant not to compete

In principle, a covenant not to compete after termination of employment must be clearly expressed in a prior written agreement of the parties or the written employment work rules of the employer.

There are a few cases in Japan that have upheld the application of covenants not to compete to employees after termination of employment in limited situations without prior written consent of the employee to the non-competition covenant.

In the *Chescom Secretarial Center* case (Tokyo District Court, January 28, 1993), the court ruled that a former employee had violated his obligations to his previous employer when the court found that he solicited existing clients of his previous employer, taking advantage of the knowledge and information of the clients acquired before the termination of employment contract.

In regards to the *Chescom* case, however, emphasis was placed on the characteristics of the act as a serious breach of faith rather than any explicit covenant not to compete. In *Chescom,* the former employee competed by offering competitive prices to his previous employer's existing clients knowing that previous employer has invested quite an amount in marketing.

B. Reasonableness of a covenant

Further, a covenant not to compete after the termination of employment must be demonstrated to be reasonable. Whether the covenant is reasonable involves a consideration of the following factors: (I) whether

restraint is necessary for the protection of a legitimate business interest of the employer, (2) the position of the employee during the term of employment, (3) the extent of the occupation, duration and geographic area to which restraint applies, and (4) the compensation given to the employee in return for restraint.

1. Leading Case

In the *Foseco Japan Limited* case (Nara District Court, October 23, 1970), a leading case addressing this issue, the court held a covenant not to compete in a non-competition agreement to be legal and valid. In *Foseco,* an employee who was able to access certain technical information of a former employer became a director of a competitor of the former employer after the termination of his employment. There was a non-competition agreement between the parties prohibiting the former employee from working for any competitors during two (2) year period after the termination of his employment.

In *Foseco*, the court held that it is legal and valid to impose non-competition obligations after the termination of the employment of an employee who is able to access to an employer's proprietary (business and technical) information such as customer data, material or process for production, etc. while an employer cannot restrict an employee from using the general information or technique which the employee may have obtained if he or she had worked for another employer. Further, the court also held that the reasonableness of the duration, geographic area and occupation to which the restraint applies, and the compensation given to the employee in return for the imposition of the restraint should be carefully considered by balancing the employer's interests (protection of its proprietary information), the harp to the employee (career opportunity) and the public interest (monopoly, interest of general consumer).

2. Cases Upheld the Restriction

In the *Shin Osaka Boeki* case (Osaka District Court, October 15, 1991), the court allowed a non-competition restriction to run for three years after termination of the employment. In this case, a sales manager maliciously deprived customer information from his previous employer so that the information could not be used by the previous employer after termination of his employment. Taking into account the facts of the case, the court held that the restriction was not unreasonable.

In the *Gakushu Kyoryokukai* case (Tokyo District Court, April 17,

1990), the court upheld a covenant and awarded damages where a teacher recruited colleagues and solicited pupils from his previous employer to his own private school, which he established during the three-year period in which the covenant not to compete was still in effect.

In the *Kepner Tregoe* case ("Tokyo District Court, September 29, 1994), an obligation to pay damages was enforced by accepting the validity of the noncompetition restriction. In this case, the prohibition against competition was agreed only with respect to the duration (12 months) and sphere of business activity (limit to own clients acquired during the contractual period). "1'he court held that considering the duration and business activities to which the restriction applied, the restriction did not infringe public policy.

3. Case Denied the Restriction

On the other hand, in the *Tokyo Kamotsusha* case (Tokyo District Court, January 27, 1997), the court held that a non-competition restriction was invalid for infringement of public policy and good moral. In this case, an employee agreed with his employer that he would not work for any competitors of the employer or compete with the employer himself, as an individual or as a corporate entity, for three (3) years after the termination of his employment. The court held that a non-competition restriction is allowed only when reasonable grounds for such a restriction exist (only to the extent of necessary for such reasonable ground), appropriate procedures arc taken and the compensation for such restriction is paid.

As described above, the Japanese courts have decided on the reasonableness and validity of the non-competition restriction based on some or all of four factors described in the lust paragraph of this section and carefully looking into the specific facts for individual case.

III. VALIDITY OF PROVISION FOR REDUCTION OR NON-PAYMENT OF A RETIREMENT ALLOWANCE

While including an explicit restriction on competition in a company's employment work rules is a direct way to restrict competition of employees after termination of employment, Japanese companies sometimes establish a provision for the reduction or non-payment of a retirement allowance in the retirement rules as an indirect way of imposing a restriction on competition. Such a provision is valid only if clearly mentioned in the termination rules. The reasonableness of the provision is measured by considering of the duration of non-competition period and the reduction rate of the retirement allowance.

The Supreme Court (August 9, 1977) held that it is reasonable to apply the provision of the work rules in which the retirement allowance is reduced in half when an employee works for a competitor after the termination of employment. "The Supreme Court stated that the above decision is upheld considering the characteristics of the retirement allowance which is not only deferred payment of salary but also premium or compensation for overall services rendered by the employee during his or her employment period.

However, some other court cases have held that unless an obvious breach of faith is found, the provision in which the retirement allowance is partially or entirely reduced should not be valid due to its severe characteristics, which may greatly interfere with the employee's career after termination. (The *Chubu Nihon Kokokusha* case (Nagoya High Court, August 31, 1990) and the *Venice* case (Tokyo District Court, September 29, 1995))

PEOPLE'S REPUBLIC OF CHINA

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PEOPLE'S REPUBLIC OF CHINA

I. STATUTORY LANGUAGE OF THE LAW

Article 23 of the People's Republic of China Employment Contract Law states:

> An Employer may specify in an employment contract or a confidentiality agreement with an employee who bears an obligation of confidentiality and non-competition and specify the monthly compensation for the non-competition period after the termination or ending of the employment contract. If the employee breaches the non-competition covenant, he/she shall pay the Employer liquidated compensation as agreed.

Article 24 of the People's Republic of China Employment Contract Law states:

> Persons subject to a non-competition covenant shall be limited to the employer's senior management personnel, senior technical personnel and other persons with an obligation of confidentiality. The scope, geographic coverage and duration of a non-competition covenant shall be agreed upon by the employer and the employee, and the provisions on such a restriction may not violate laws or regulations. Once an employment contract is terminated or ends, the term of the non-competition covenant mentioned in the preceding paragraph that prohibits a person from serving with a competitor that produces or deals in the same type of product or engages in the same type of business as the employer, or prohibits him/her from opening his/her own business to produce or deal in the same type of product or engage in the same type of business may not exceed two years.

II. CONSEQUENCES OF BREACH

Article 90 of the People's Republic of China Employment Contract Law states:

> If an employee violates this Law in terminating his/her employment contract, or breaches his/her confidentiality obligation or the non-competition covenant in his/her employment contract, and thereby causing the employer to incur a loss, he/she shall be liable for compensation.

In practice, the arbitrators or judges may award damages based on (a) the employer's actual loss or (b) the employer's loss of anticipated profits.

III. ENFORCEABILITY

Under the Chinese civil law system, the principles of fairness and a person's right to work will have significant impact on shaping the final decision regarding the enforceability of a non-compete covenant. Usually, a covenant not to compete is enforceable under Chinese law only if the following conditions are met:

1. the employee has the legal capacity to enter into a contract;

2. the employee was granted access to the employer's business and trade secrets as a result of the employment relationship;

3. the covenant is reasonable in scope, duration, and geographic coverage;

4. the non-competition period does not exceed two (2) years after the termination of the employment relationship; and

5. the employee receives "adequate" compensation (in addition to his/her regular wages and other employment-related benefits) during the time period that the covenant is being enforced (see below for comments on the timing of payment).

IV. GENERAL COMMENTS

The People's Republic of China Employment Contract Law, which became effective on January 1, 2008, codified the rules that were previously promulgated in an administrative notice issued on October 31,1996 by the Ministry of Labor (In March 2008, the Ministry of Labor changed its name to the Ministry of Human Resources and Social Security). Under the old law as promulgated in the administrative notice, the maximum time period to enforce a non-competition covenant was three years. Essentially, the new law shortened the maximum time period for enforcing non-competition by one year.

This new Employment Contract Law, however, left two issues open to interpretation. The first issue is that the law does not specify who are considered to be senior management and senior technical personnel as mentioned in Article 24. However, this issue should not be an obstacle in practice. If there is any question whether a person should be considered a senior manager or senior technical person, the employer could rely on the catch-all phrase in Article 24 that would allow an employer to bind "other persons with an obligation of confidentiality" with a non-competition covenant.

The second issue is the question regarding what constitutes "adequate" compensation in order to enforce the covenant. What amount of compensation would be deemed "adequate" (which greatly increases the likelihood that the covenant is enforceable) varies from jurisdiction to jurisdiction. In some cases,

the amount may even vary within the same local jurisdiction from time to time. The best practice in navigating safely through this unsettled area of law is to contact the relevant local authority at or near the time when entering into an employment agreement that contains a non-competition covenant.

Regarding the timing of payments during the post-termination, non-competition period, the general rule under Article 23 is that monthly payments shall be made to the employee. But in practice, so long as the employer and the employee agree to other arrangements, such as bi-monthly or semi-yearly payments, the law does not prohibit such arrangements.

V. PRACTICE TIPS

When contemplating the use of a covenant not to compete under Chinese law, one should follow this checklist:

A. Prepare a written agreement and have the employee sign the agreement;

B. Clearly define "competition" (or the specific competitors), geographic coverage and the scope of "competitive activities";

C. If possible, specify a formula for calculating damages;

D. Define and separately identify the compensation for the time period during which employee's non-compete covenant is being enforced after the termination of employment and obtain the employee's written acknowledgement of both the receipt and adequacy of such compensation; and

E. With the assistance of counsel, understand and comply with any additional local employment regulations where the employee performs his/her work duties.

HONG KONG

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HONG KONG

I. SUMMARY OF HONG KONG LAW

As a general rule, non-compete covenants between an employer and employee are unenforceable in Hong Kong as restraints on trade unless the covenant is reasonable taking into consideration the interests of the parties and that of the public. *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co Ltd.,* [1894] AC 535.

For a non-compete covenant to be enforceable, it must be designed to protect a legitimate interest of the employer and be no broader than adequately required to protect that interest.

II. REASONABLENESS CONSIDERATIONS

A. Protection of a Legitimate Interest

Consideration of whether a non-compete covenant against a former employee is reasonable largely depends on whether the employer has any legitimate interest that requires protection. *BCS Building Materials Supply Co Ltd v. Cheung Chi Hung Michael* [1998] 2 HKC 425 *citing Stenhouse Australia Ltd v. Phillips* [1974] AC 391.

1. What is a legitimate interest?

   An employer's legitimate interest capable of being protected by a non-compete covenant must be of a proprietary nature. *Stenhouse Australia Ltd v. Phillips* [1974] AC 391. Proprietary interests identified by courts in Hong Kong have included confidential information such as trade secrets and customer lists.

2. What is not a legitimate interest?

   Although an employer may protect its proprietary interests through non-compete covenants under Hong Kong law, the law does not allow an employer to use restrictive covenants solely to protect itself against competition by a former employee. *Ng Mary (t/a Doggie House) v. Luk Siu Fun Michelle* [1987] 1 HKC 427. Where not protecting a proprietary interest, an employer cannot prevent an employee from using the knowledge and skill gained in the workplace.

B. Protection No Broader Than Required

Where there is a legitimate business interest to be protected, the protection must be no broader than is required to adequately protect that interest. *Herbert Morris Ltd v Saxelby* [1916] AC. The reasonableness of a non-compete covenant's effect on scope, duration and geographical application will be considered. Courts have refused to enforce a non-compete covenant where one of these aspects was viewed as unreasonable. *See Natuzzi Spa v. De Coro Ltd.*, [2007] 3 HKC 74.

1. Scope of the restriction

   Hong Kong courts will consider the scope of application, such as restrictions on the employee's future employment, activities and employers, when determining the reasonableness of non-compete covenants. *See Susan Buchanan v. Janesville Ltd* [1981] HKLR 700.

2. Geographical limitations and duration of the restriction

   Geographical restraints in non-compete covenants must be reasonable with regards to the interest that the employer is protecting. *Candia Shipping (HK) Ltd v. Wong Chiu-wai & Anor*, High Court, Civil Action No. 629/86. Additionally, Hong Kong courts may give consideration to the former employees' ability to earn a living when determining the reasonableness of a restraint. *See Caudron, Kleber Emile Marceau v. Lorenz Kao* [1964] HKLR 594.

C. Additional Considerations

1. Remuneration

   Remuneration paid to the employee by the employer during the term of a non-compete covenant may be considered by a court when it looks to determine the reasonableness of the covenant, but the existence of remuneration will not make an otherwise unreasonable covenant reasonable. *See Natuzzi Spa v. De Coro* [2007] 3 HKC 74 *citing TSC Europe (UK) v. Massey* [1999] 1 AC 688.

2. Acknowledgement of reasonableness

   An acknowledgement of the reasonableness of a non-compete covenant by the employer and employee may be persuasive as to the reasonableness of the covenant in the case of sophisticated parties. *See BCG Capital Mkts. (Hong Kong) Ltd. v. James Priest*, [2006] HKEC 1837] but will not make an otherwise unreasonable covenant reasonable.

MEXICO

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MEXICO

I. CONDITIONAL AUTHORITY

Under Mexico's Constitution (Article 5), nobody can be impeded from dedicating to the profession, industry, business activity or type of work that she/he so elects. The individual is free to decide the occupation to which he/she will devote his/her time and activities as long as such activities are not considered illicit.

Under Mexican Federal Labor law, which is highly protective in favor of the employee when an employment relationship exists (contractually or otherwise) each employee shall enjoy certain minimum inalienable rights. Employers may grant employees additional rights and benefits, but any attempt to cause an employee to waive a minimum right will be deemed unenforceable as a matter of law. Thus, in the context of a labor agreement, all provisions can only deviate from the labor law principles if such deviation is more favorable to the employee and the employee's Constitutional guarantees are not violated.

II. SUMMARY OF LAW

A. Covenants Not To Compete In General

General contracts law (Article 2028 of the Civil Code) regulates obligations no to perform an act (e.g., an obligation not to compete) and establishes that in the event of non-compliance of the breaching party shall pay money damages (*daños y perjuicios*) to the other party. An employer may not specifically enforce a covenant not to compete, but any breach of such covenant may give rise to an action of money damages.

Mexican courts (*Amparo directo 6764/58. Juan Bringas Zamora. 14 de octubre de 1959. 5 votos. Ponente: Mariano Ramírez Vázquez*) have recognized that when a party to a non-compete failed to comply with the principal obligation of not competing with the plaintiff in the sale of milk-related products for a certain term, the value of the principal obligation is represented by the damages caused to the plaintiff, including lost benefits and revenue or income lost due to the disloyal competition. Such value, shall serve as the base for the contractual agreed damages. The courts recognized that in some instances the obligation not to perform an act is the principal factor that motivated the parties to enter into a certain agreement.

B. Economic Competition

The Competition law defines two types of "monopolistic practices" (*prácticas monopólicas*) - both "absolute" (*absolutas*) and "relative" (*relativas*). In addition, the law sets forth the criteria for judging the anticompetitive effect of a relative monopolistic practice. The practice is a

relative ___ practice courts ____ at (1) the "relevant market" (*mercado relevante*) and (2) "substantial power" (*poder substancial*). Absolute monopolistic practices are illegal per se and admit no examination of either purpose or market affected, whereas relative monopolistic practices are subject to economic analysis similar to the "rule of reason" applied in other jurisdictions. Covenants not to compete which are primarily designed to harm, interfere or limit competition and are deemed to constitute a monopolistic practice will generally not be enforceable.

Even though a party may enter into a contract that would impair that individual from performing an act, a covenant not to compete may be held unenforceable as a monopolistic practice.

C. Intellectual property

Under the Industrial Property Law, any person who, because of its employment or other business relationship, has access to industrial secrets (Defined in the Industrial Property Law as any information of industrial application than an individual or legal entity keeps as confidential, that may be useful for obtaining or maintaining a competitive or economic advantage over third parties in the performance of economic activities.) of another may not disclose those without justified cause or consent from the owner or licensee. In addition, individuals or legal entities may be liable for damages (*daños y perjuicios*) for taking into employment or contracting for services from third parties with the purpose of obtaining industrial secrets. Therefore, it would be valid to agree as a non compete commitment, to keep all knowledge obtained while performing an activity secret. If the non-compete clause became unenforceable, there would still be an argued violation of the confidentiality protection granted under the Industrial Property Law.

D. Covenants incidental to a sale of a business

In the context of a sale of a business, it is common to include in the purchase agreement or separately, a covenant not to compete. A binding non-competition clause should narrow down, as much as possible, the acts which are forbidden to the seller and should limit the restrictions to a period of five years. This time frame is arbitrary and intends to reflect a period of time which, while allowing the target company to develop, does not seem to create monopolistic conditions or an absolute restraint on the freedom of seller to engage in business.

CANADA

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CANADA

I. JUDICIAL STATEMENT OF THE LAW

A. A covenant in restraint of trade is enforceable only if it is reasonable between the parties and with reference to the public interest. As in many of the cases which come before the courts, competing demands must be weighed. There is an important public interest in discouraging restraints on trade, and maintaining free and open competition unencumbered by the fetters of restrictive covenants. On the other hand, the courts have been disinclined to restrict the right to contract, particularly when that right has been exercised by knowledgeable persons of equal bargaining power. In assessing the opposing interests the word one finds repeated throughout the cases is the word "reasonable." The test of reasonableness can be applied, however, only in the peculiar circumstances of the particular case.

B. The distinction made in the cases between a restrictive covenant contained in an agreement for the sale of a business and one contained in a contract of employment is well-conceived and responsive to practical considerations. A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to assure the purchaser that he, the vendor, would not later enter into competition. Difficulty lies in definition of the time during which, and the area within which, the non-competitive covenant is to operate, but if these are reasonable, the courts will normally give effect to the covenant.

C. A different situation, at least in theory, obtains in the negotiation of a contract of employment where an imbalance of bargaining power may lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and in his own interest, knowledge and skills obtained during employment. Again, a distinction is made. The general rule is that non-competition clauses will be upheld only in exceptional cases and that it is preferable to bind employees to non-solicitation covenants where by virtue of the employee's duties and responsibilities, those covenants would adequately protect the corporate interests. *Lyons v. Multari,* [2000] O.J. No. 3462 (C.A.), online: QL [*Lyons*]. Although blanket restraints on freedom to compete are generally held unenforceable, the courts have recognized and afforded reasonable protection to trade secrets, confidential information, and trade connections of the employer. *J.G. Collins Insurance Agencies Ltd. v. Elsley Estate*, [1978] 2 S.C.R. 916 at 923-924 [*Elsley*]; see also *Doerner v. Bliss and Laughlin Industries Inc.*, [1980] 2 S.C.R. 865 at 872-873 [*Doerner*].

II. PARAMETERS OF THE REASONABLENESS TEST

A. Ancillary to an employment contract.

1. *Cameron v. Canadian Factors Corp.*, [1971] S.C.R. 148 (agreement not to solicit clients, or operate factoring business in Canada, for five years; duration unreasonable, and geographic scope unreasonable because employer had no business interest outside province of Quebec); *Lyons*, *supra* (three-year/five mile non-competition agreement unreasonable; non-solicitation agreement would have adequately protected oral surgeon's proprietary interest in clients and referring dentists); *Reed Shaw Osler v. Wilson*, [1981] A.J. No. 693 (C.A.), online: QL (agreement not to compete or solicit in the "business of insurance" for five years; term "business of insurance" so vague as to be uncertain, and non-solicitation clause unreasonably broad because it prevented any type of employment with firms that solicited employer's customers); *Gordon v. Ferguson* (1961), 30 D.L.R. (2d) 420 (N.S. S.C. (A.D.)) (five-year/twenty-mile non-competition agreement unreasonable; duration and geographic area both greater than necessary to protect physician's proprietary interest in existing customers, particularly in a growing population); *Investors Syndicate Ltd. v. Versatile Investments Inc. et al.* (1983),149 D.L.R. (3d) 46 (O.C.A.), rev'g on other grounds 126 D.L.R. (3d) 451 (H.C.J.) [*Investors Syndicate*] (non-competition agreement unlimited in time and space unreasonable);

2. *Elsley*, *supra* (agreement not to open insurance agency in three adjoining municipalities was reasonable because employee had personal relationship with policyholders who would naturally follow him if he set up his own business; an exceptional case where a non-solicitation clause would not suffice.) *Friesen v. McKague* (1992), 96 D.L.R. (4th) 341 (Man. C.A.) (agreement prohibiting involvement in veterinary medicine within 25 miles of rural community for three years was reasonable given employee's personal relationship with employer's customers); *Jostens Canada Ltd. v. Gendron*, [1993] O.J. No. 2791 (C.J., Gen. Div.), online: QL (one-year non-solicitation agreement was reasonable to protect customer base of school photography business); *Island Glass Limited v. O'Connor* (1980), 79 A.P.R. 377 (P.E.I. S.C.) (three-year agreement not to solicit employer's workers and customers, or open competing business within three miles, was reasonable to protect proprietary interests); *S.J. Kernaghan Adjusters Ltd. v. Kemshaw* (1978), 8 B.C.L.R. 3 (S.C.) (two-year/25-mile covenant not to carry on business as independent insurance adjuster was reasonable to protect employer's trade connections to agents requiring independent adjusters; employee could still be employed

in-house); *M.E.P. Environmental Products Ltd.* v. *Hi Performance Coatings Co.* (2006), 204 Man. R. (2d) 40 (Q.B.), (confidentiality agreement preventing former employees from actively soliciting the Manitoba employer's customers and suppliers in Manitoba, Saskatchewan and north-western Ontario for a period of five years was reasonable as it did not prevent competition in environmental products and services market, of which the employer had developed its market share over 25 years).

B. Incidental to the sale of a business

1. *Doerner*, *supra* (five-year agreement prohibiting vendor from involvement in similar manufacturing anywhere in Canada or the U.S.; reasonable because purchasers had paid for goodwill, and vendors were virtual monopolists with a personal relationship to their customers); *Dale & Co. v. Land* (1987), 56 Alta. L.R. (2d) 107 (C.A.) (agreement by vendor not to act as insurance agent or broker within Alberta for five years after termination of employment; duration, area, and proscribed activities all reasonable, particularly given equal bargaining power of parties);

2. *Beton Brunwick Ltee v. Martin* (1996), 66 C.P.R. (3d) 320 (N.B. C.A.) (agreement prohibiting competition in ready-mix concrete business within 50 miles of purchaser's plants for five years was reasonable to protect purchaser's client base; vendor free to produce other types of concrete); *Burgess v. Industrial Frictions & Supply Co.*, [1987] B.C.J. No. 273 (B.C. C.A.), online: QL (agreement not to compete in provinces of B.C. and Alberta for five years was reasonable because vendor dealt closely with suppliers, customers and staff, and was familiar with lists of speciality products); *Ryder v. Lightfoot and Burns* (1965), 51 D.L.R. (2d) 83 (N.S. S.C.) (agreement not to compete in hearing aid business within province of Nova Scotia for three years was reasonable because number of potential customers was limited and purchaser would not have bought the business without the agreement).

3. *Cochrane Air Services Ltd. et al. v. Veverka* (1973), 13 C.P.R. (3d) 158 (O.S.C.) (agreement not to compete as tourist outfitter in Ontario for three years; geographic scope unreasonable because purchaser carried on business exclusively in Northern Ontario); *Huberman v. Hadath* (1973), 13 C.P.R. (2d) 253 (B.C. S.C.) (agreement not to compete anywhere in British Columbia except Vancouver Island unreasonable because purchaser only operated salons in lower mainland); *McAllister et al. v. Cardinal*, [1965] 1 O.R. 221 (H.C.J.) (agreement prohibiting competition across significant portions of Ontario and Quebec for 10 years; geographic scope unreasonable because purchaser's propane distribution

business restricted to a smaller area); *Sherwood Dash Inc. v. Woodview Products Inc.* (2005), 144 A.C.W.S. (3d), (non-competition clause where no geographic limitation was specified was unreasonable because it essentially disqualified employees from working in a field in which they have acquired skills and knowledge); *Trapeze Software Inc. v. Bryans* (2007), 154 A.C.W.S. (3d) 944 (Ont. S.C.J.), (clause preventing former employees from working anywhere in the world where employer marketed its products or services for one year was unreasonable).

III. GENERAL COMMENTS

A. Canadian courts will consider three factors when examining a restrictive covenant in an employment contract:

1. whether the employer has a proprietary interest entitled to protection;

2. whether the temporal or spatial features of the clause are too broad; and

3. whether the covenant is unenforceable as being against competition generally, and not limited to proscribing solicitations of clients of the former employee.

Lyons, *supra* at para. 23.

With respect to the second factor, the court in *Community Credit Union Ltd. v. Ast* (2007), 156 A.C.W.S. (3d) 113 (Alta. Q.B.) found that an employment contract with a ladder-type covenant providing many optional outcomes was not unreasonably broad or vague.

With respect to the third factor, the court in *Lyons* emphasized that general covenants against competition will only be upheld in exceptional cases. In *Aon Consulting Inc. v. Watson Wyatt & Co.* (2005), 141 A.C.W.S. (3d) 836 (Ont. S.C.J.), the court found no breach where employee contacted employer's clients to inform them he was terminated by employer but did not solicit them.

B. Protectable interests: Canadian courts have extended protection to: goodwill; confidential information such as customer lists and trade secrets; existing stock of customers, suppliers and employees. In addition to cases cited above, see *American Building Maintenance Co. Ltd. v. Shandley* (1966), 58 D.L.R. (2d) 525 (B.C. C.A.); *Maguire v. Northland Drug Co.*, [1935] S.C.R. 412 [*Maguire*].

C. Canadian courts will sever the reasonable portions of a restrictive covenant in order to enforce them, as long as parties' legitimate intentions are respected. See *Investors Syndicate*, *supra; Dominion Art Co. v. Murphy* (1923), 54 O.L.R. 332 (C.A.); *KRG Insurance Brokers (Western) Inc. v. Shafron* (2007), 390 W.A.C. 116 (B.C.C.A.). Canadian courts will not, however, rewrite the agreement, or sever portions if doing so would emasculate the meaning of the agreement or if doing so would be tantamount to rewriting the parties' contract. *T.S. Taylor Machinery Co. Ltd. v. Biggar* (1968), 2 D.L.R. (3d) 281 (Man. C.A.); *Canadian American Financial Corporation v. King*, [1989] B.C.J. No. 701 (B.C. C.A.), online: QL; *Gautreau v. Arvelo* (2004), 137 A.C.W.S. (3d) 560 (Ont. S.C.J.). Notional severance for restrictive covenants in employment agreements is not permitted, and the "blue pencil rule" of deleting offending words from a contractual term to make it enforceable should only be used when the section being deleted is "clearly severable, trivial and not part of the main purport of the restrictive covenant." *Shafron v. KRG Insurance Brokers (Western) Inc.,* 2009 SCC 6.

D. The old view was that continuing employment was sufficient consideration for a non-competition agreement. *Maguire, supra*; *Skeans v. Hampton*, [1914] O.J. No. 43 (S.C. (A.D.)), online: QL. More recent decisions make it clear that this is true only where the employer also expresses a clear prior intention to terminate if the agreement is not signed. *Watson v. Moore Corporation Ltd.,* [1996] B.C.J. No. 525 (C.A.), online: QL; *Kohler Canada Co. v. Porter*, [2002] O.J. No. 2418 (Sup. Ct.), online: QL.

E. Canadian case law is divided on the treatment of a non-competition agreement which provides for the forfeiture of benefits. One line of authority regards such agreements as restraints on trade and requires them to be reasonable. *City Dray Co. Ltd. v. Scott et al.*, [1950] 4 D.L.R. 657 (Man K.B.); *Furlong v. Burns & Co. Ltd.* (1964), 43 D.L.R. (2d) 689 (Ont. H.C.J.); *Taylor v. McQuilkin et al.* (1968), 2 D.L.R. (3d) 463 (Man. Q.B.); *Henriksen v. Tree Island Steel Co.,* [1983] B.C.J. No. 1777 (B.C. S.C.). Another line of cases states that there is no restraint on trade where only economic benefit (as opposed to legal right) is affected. *Inglis v. Great West Life Assurance Co.*, [1942] 1 D.L.R. 99 (Ont. C.A); *Webster v. Excelsior Life Insurance Co.* (1984), 50 B.C.L.R. 381 (S.C.); *Roy v. Assumption Mutual Life Insurance Co.*, [2000] N.B.J. No. 1 (N.B. Q.B.), online: QL. In *Mezaros v. Barnes* (1977), 73 D.L.R. (3d) 407 (Man. Q.B.), the court endorsed the latter analysis in *obiter,* but then applied a reasonableness test.

F. Where a contract contains no express choice of governing law, Canadian courts will employ the "proper law doctrine", which holds that the choice is to be inferred from all the circumstances surrounding the transaction, e.g. residence of the parties, place of contracting, place of performance, and location of subject matter. *Montreal Trust Co. et al v. Stanrock Uranium*

Mines Ltd. (1965), 53 D.L.R. (2d) 594 (Ont. H.C.); *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443; *Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente* (1999), 178 D.L.R. (4th) 409 (Ont. C.A.).

G. The leading Canadian judicial definition of "trade secret" is found in *R.I. Crain Limited. v. Ashton et al.*, [1949] O.R. 303, where the court accepted the following American definitions:

1st. "A trade secret ... is a property right, and differs from a patent in that as soon as the secret is discovered, either by an examination of the product or any other honest way, the discoverer has the full right of using it. *Progress Laundry Co. v. Hamilton*, 270 S.W. 834, 835, 208 Ky. 348."

2nd. "A trade secret is a plan or process, tool mechanism or compound known only to its owner and those of his employees to whom it is necessary to confide it. *Cameron Mach. Co. v. Samuel M. Longdon Co.*, N.J. 115 A. 212, 214; *Victor Chemical Works v. Iliff*, 132 N.E. 806, 811, 299 Ill. 532."

3rd. "The term 'trade secret', as usually understood, means a secret formula or process not patented, but known only to certain individuals using it in compounding some article of trade having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on. *Glucol Mfg. Co. v. Shulist*, 214 N.W. 152, 153, 239 Mich. 70."

4th. "A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. A trade secret is a process or device for continuous use in the operation of the business. The subject matter of a trade secret must be secret. Restatement, Torts, 757."

H. A good introduction to these issues is provided by K.G. Fairburn & J.A. Thorburn, *Law of Confidential Business Information*, looseleaf (Aurora, Ont.: Canada Law Book, 2007).

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ISRAEL

I. The laws of the State of Israel do not specifically deal with employees not competing with their former employers. However, the employer's right to restrict a former employee's dealings, despite the restriction in the Basic Law: Freedom of Occupation, may be deduced, *inter alia*, from the Commercial Torts Law, 5759-1999 and the Contracts (General Part) Law, 5733-1973.

II. We shall first set out the employee's freedom of occupation which the employer seeks to restrict (and in fact, harm).

III. The Basic Law: Freedom of Occupation grounds the principle of freedom of occupation and provides that every citizen or resident of Israel is entitled to deal in any business, profession or occupation and that this freedom of occupation may only be harmed by a statute that is in compliance with the values of the State of Israel (see HCJ 1683/93 *Yavin Plast Ltd. v. National Labor Court at Jerusalem)*.

IV. Under Israeli common law, the principle of freedom of occupation will find expression in the field of private law and will also impact on contractual arrangements in the field of labor relations regarding to restriction of the freedom of occupation following termination of the employer-employee relationship.

V. The courts in Israel have held that as a rule, an order restricting the freedom of occupation of an employee will not be given without striking a balance between the employer's right to defend his property and his trade secrets, and the interest of the employee and the public in employment mobility. In balancing these interests, the employee's interest prevails for the following reasons:

A. The Basic Law: Freedom of Occupation grants the employee the right to work in any occupation.

B. Since there is a presumption of basic inequality between the employee's power and that of the employer, certain conditions which a reasonable employee would presumably not agree to of his own free will, will not be enforced.

C. A person's place of work is a place of satisfaction and self-accomplishment. Restricting an employee's mobility will harm his right to self-fulfillment.

D. Restricting an employee's right to move from one place of work to another also harms free competition.

E. Society has an interest in the rapid and free transfer of information in the

market.

1. However, despite the fact that the courts in Israel have recognized freedom of occupation as a supreme protected right of employees by virtue of the Basic Law: Freedom of Occupation, in each and every case, like any right, it must face other legitimate interests which seek to derogate from it, including the interests set out in employment agreements.

2. The leading case with respect to stipulations in a labor contract requiring the preservation of trade secrets and prohibiting an employee from competing against his former employer due to the legitimate interests of the employer is Dan Frommer, Check Point Software Technologies Ltd – Redguard Ltd., *(Labor Appeal 164/99)* (hereinafter: "*Check Point*"). Since publication of this decision on June 4, 1999, the Court has reiterated this rule in its later decisions, including the judgment in *AES System Inc. & Ors. v. Saar & Ors.* (Civil Appeal 6601/96). It was emphasized in that case that an employee's undertaking not to compete with his former employer following the end of his term of employment, where such does not reflect the employer's legitimate interest in prohibiting such competition, goes against the public good.

3. According to *Check Point*, in order to examine whether the restriction of competition contained in an employment contract is "reasonable", it is necessary to look at a number of criteria which, following such examination, might mean that the stipulation in the employment contract should not be enforced.

4. As a rule, a condition in a personal employment contract restricting later employment should not, in and of itself, be given too much weight. It should only be given significance if it is reasonable and in fact protects the interests of both parties, including the prior employer, and, more importantly, the prior employer's trade secrets. In the absence of the appropriate circumstances (which shall be set out below), and mainly in the absence of "trade secrets", the principle of freedom of occupation will prevail over the principle of freedom of contracting.

5. According to *Check Point*, the circumstances that permit restricting an employee's freedom of occupation are:

F. Trade secret – the court will restrict an employee's freedom of occupation in order to prevent him from unlawfully using a trade secret belonging to his former employer. In the high-tech industry, the intellectual property of a company is one of its most important assets and high-tech companies invest large funds in such property. The court will only award an injunction

restricting the freedom of occupation of an employee if the employee's job with his new employer threatens the very existence of the previous employer. Thus, the previous employer must prove that the use that the employee is making of his trade secret will indeed harm the business that he owns.

The Commercial Torts Law, 5759-1999 deals, inter alia, with the prohibition against theft of trade secrets. Section 5 of the Law defines a trade secret as "business information of any kind that is not in the public domain and that cannot easily be lawfully disclosed by others, the confidentiality of which affords the owner of it a business advantage over his competitors, provided that the owner has taken reasonable steps to keep it confidential."

However, it has been held that the term "trade secret" is not a "magic word". An employer claiming the existence of a "trade secret" must prove its existence, i.e., he must describe and detail what the secret is. The court interprets the term "trade secret" in light of the public good, the right to freedom of information and the question of whether exposure of the "secret" to the public will be of any significance. In *Check Point*, the court held that at times, these considerations will prevail over the protection that an employer's "trade secret" should be given.

As stated above, an employer claiming the existence of a "trade secret" must prove the existence of it. The court in Israel will not make do with a general description or a general claim as to the existence of a "secret" but rather, will ask the previous employer to indicate a sample, software, formula, or particular example, a particular client list, particular process, etc. In proving the trade secret, the previous employer must also prove the scope of the "secret", and the duration of the period in which it must remain secret. The previous employer will also be required to prove that he took reasonable steps to ensure preservation of the trade secret, such as: Disclosure of it only to those employees who need it for the purpose of their employment, and non-disclosure of it to other employees, or keeping the material in a well-protected place.

In order to restrict the employee's subsequent employment, the previous employer must prove that there is evidence or that there are circumstances that point to a reasonable possibility that the employee will use the trade secrets in his possession in the course of his work with the new employer, thus breaching his duty of trust.

There are cases where knowledge in the field of hi-tech, including knowledge of certain software, will be considered a trade secret. One of the indications of knowledge being a trade secret is that the software bears a classification of "confidential", and the number of available copies of it is restricted. Products that are being designed and developed are

considered to be trade secrets where the information in question is not in the public domain, cannot be easily reconstructed and grants the employer a commercial advantage over his competitors.

In Labor Appeal 86/08 Shachal Telemedicine v. Roni Tuval, the Court reiterated the above tests and applied them with respect to the company's customer list. The customer list was recognized by the Court as a protectable trade secret if financial resources and effort, which could be spread over a number of years, are expended in creating it. However, notwithstanding recognition of the importance that customer lists have to an employer, we should not generalize and say that wherever an employer presents a customer list, the list will be protected. This kind of list has only been recognized as a "secret" where the list requires some special effort to compile and in those cases where it is proven that there is some added value in obtaining the list ready-made. The same is true for cases where the list is of customers with whom the former employer has commercial relations, provided that they are real customers in respect of whom the company has relevant commercial information.

It should be noted that as a rule, a person's knowledge, experience and qualifications will not fall within the ambit of a trade secret. The knowledge and experience acquired by an employee during the course of his employment become part of his qualifications and he may make use of them as he wishes. Where an employee moves to a new place of work, he does not have to "erase" all of the information and experience that he accrued in his previous job. But that is so long as the employee does not otherwise make use of a trade secret belonging to his former employer.

G. Special training – in the event that the employer invests special and expensive resources in training the employee, as a result of which the employee undertakes to work with the employer for a particular period, the employee's employment may be restricted for a particular period in consideration for the employer's investment in such training. Clearly, if the employee acquires the training during the ordinary course of his employment or at his own expense and during his own free time, the previous employer is not entitled to limit his use of such training.

H. Special consideration for restriction of occupation – it is necessary to examine whether the employee received special remuneration for his undertaking not to compete in the future with his current employer, upon termination of the employer-employee relationship. Payment for a period of transition/force unemployment after termination of employment relations can be deemed to be special consideration for restriction of an employee's occupation, with respect to a 1:2 arrangement (payment of one month's salary in return for 2 months of restriction of subsequent employment).

I. Duty of good faith and fiduciary duty – weight must be given to the good faith of the employee and/or the new employer. A relationship of trust exists between an employee and their employer. The fiduciary duty owed by an employee to his employer imposes stricter norms of conduct upon the employee than are imposed by the duty to act in good faith. An example of breach of the fiduciary duty is engagement by the employee, during the course of his employment, in contracts with other persons for the purpose of copying his employer's production process. In this context, it should be noted that the fiduciary duties imposed on senior officers are broader than those imposed on more junior employees. Many duties can be derived from the fiduciary duty imposed upon an employee, most of which relate to the period of time during which labor relations are in existence. However, the fiduciary duty also exists at the end of labor relations and is usually related to the question of the employee competing with his previous employer.

Pursuant to *Check Point*, the National Labor Court handed down a ruling which recognized legitimate restriction by the employer on the basis of the employee's duty of good faith (Lab. App. 189/03 Girit Ltd. – Mordechai Aviv). In that case, it was held that the non-competition restriction imposed on employees served to protect a legitimate interest of the employer and therefore the contractual restriction on occupation imposed upon the employees was upheld on the basis of the public good which seeks to prevent situations in which employees can become Trojan Horses on the employer's premises, taking away huge chunks of information with them when they leave.

VI. Note that the circumstances described above are not a closed list and the Court must consider each case on its merits, on the basis of all of the circumstances, the guiding rule being that restrictions on future employment will not be enforced unless one of the circumstances appearing above is in existence. Note also that the existence of one of the above circumstances is not sufficient to require the Court to enforce a stipulation restricting later employment and the ruling will be based on all of the principles and interests relevant to the matter, and on the specific circumstances of the case.

VII. Therefore, a broad non-competition clause that aims, prima facie, to broadly protect the employer against future competition by his employee could be completely overruled by the Court, leaving the employer without protection.

VIII. It should also be noted that confidentiality and non-solicitation clauses in employment agreements are also based on the fiduciary duty, the duty of good faith and the duty of fairness owed by the employee to the employer. Breach of these duties amounts to real harm to the public interest and the public good which will not be permitted.

IX. In summary, the Courts in Israel have considerably limited the ability of employers to restrict the freedom of occupation of their employees. Therefore, nowadays, employers will be hard-pressed to prevent situations in which their former employees choose to work for competing businesses, except in cases that involve trade secrets, use of customer lists and certain circumstances such as professional training at high cost provided to employees by their employers.

X. With respect to an employee's freedom of occupation contemporaneous with his present employment (as distinct from after termination of employment), the balance of rights changes and the ruling might be different. The weight of the consideration of freedom of the employee's occupation in terms of his basic subsistence and the initial and only source of his livelihood diminishes on the scales of the employee's rights since the employee already has a basic source of livelihood which enables him to feed his family at the end of the day, and the additional job in question is merely a supplement to the existing job. While the weight of what was a serious consideration diminishes on the scales of the employee's rights, a consideration taken from the field of freedom of occupation increases in the employer's favor, in terms of the "freedom to employ or not to employ". Since at this stage an employment relationship still exists between the parties, the employer will be entitled, in certain cases, to make the employee's continued employment with him subject to his not doing other work at the same time with a competitor or with a person who might cause damage to the employer. Therefore, the employer's interest in protecting himself (which has become part of the procedure of private work permits) is sufficient to prevent an employee from doing other work at the same time as his own work (*see Miscellaneous Civil Applications (Jerusalem) 2501/00 Shimon Parnas v. Broadcasting Authority*).

XI. As for the new employer's responsibility in maintaining a trade secret or in non-competition, it should be noted that in HCJ 1683/93 Yavin Plast v. National Labor Court, the Court held that a third party who knowingly and without justification enters into a contract with the employee and receives the trade secret from him commits the tort of inducing breach of contract. A third party which causes a breach of an employee's duty of confidentiality towards his former employer might be required to pay compensation (in the case of a tort such as inducing breach of contract) or restitution (in the case of unjust enrichment). Likewise, the Court may order the third party to cease inducing the breach of contract. In this context, the Court has jurisdiction to order the new employer not to employ the employee fully or partially as the case may be, to the extent that such may be necessary in order to prevent disclosure of the trade secret.

Note that the existence of the tort of inducing breach of contract is conditional upon the intervening party's causing the contracting party to breach the contract between him and another party to the contract, inter alia, by soliciting him not to perform the contract, by entering into a contradictory transaction, by preventing performance of the contract, etc.

Statistics of U.S. Businesses Glossary

The glossary below defines terms included in the Statistics of U.S. Businesses (SUSB) [/programs-surveys/susb.html] program.

Abbreviations and Symbols

D	Withheld to avoid disclosing data for individual companies; data are included in higher level totals
G	Low noise; cell value was changed by less than 2 percent by the application of noise
H	Moderate noise; cell value was changed by 2 percent or more but less than 5 percent by the application of noise
J	High noise; cell value was changed by 5 percent or more by the application of noise
S	Withheld because estimate did not meet publication standards
N	Not available or not comparable
r	Revised
a	0 to 19 employees
b	20 to 99 employees
c	100 to 249 employees
e	250 to 499 employees
f	500 to 999 employees
g	1,000 to 2,499 employees
h	2,500 to 4,999 employees
i	5,000 to 9,999 employees
j	10,000 to 24,999 employees
k	25,000 to 49,999 employees
l	50,000 to 99,999 employees
m	100,000 employees or more

At-Large District

At-large is a designation for members of a governing body who are elected, and one at-large representative is elected from the entire state. States with at-large congressional districts are: Alaska, Delaware, North Dakota, South Dakota, Vermont, and Wyoming.

Business Information Tracking Series (BITS)

A file which links establishments in the annual County Business Patterns data from year to year. We use a series of matches to link establishments across years. The primary match links establishments having the same census identification number in both the initial and

Related Information

About this Program [/programs-surveys/susb/about.html]

Data [/programs-surveys/susb/data.html]

subsequent years. These are establishments which have undergone no ownership or organizational changes.

The remainder of the matches uses establishment identification numbers such as the employer identification number, as well as establishment attributes like business name and address, ZIP code, and industry code to create links for establishments that have remained in existence but have undergone ownership or organizational changes which lead to changes in the census identification numbers across years.

Using this file, we are able to create longitudinal tabulations. A longitudinal tabulation is a tabulation that provides a study of business entities across a span of years. A longitudinal tabulation measures the change in business entities, such as establishment births, deaths, expansions, and contractions for an industry and/or enterprise size. In contrast, non-longitudinal tabulations show aggregate totals for an industry and/or enterprise size. Comparison of non-longitudinal tabulations of two-year time periods do not provide explanations for changes in business entities.

Congressional District

A congressional district is an electoral constituency that elects a single member of a congress. A congressional district is based on population, which, in the United States, is taken using a census every ten years. There are 435 congressional districts in the United States House of Representatives.

Employment

Paid employment consists of full- and part-time employees, including salaried officers and executives of corporations, who are on the payroll in the pay period including March 12. Included are employees on paid sick leave, holidays, and vacations; not included are sole proprietors and partners of unincorporated businesses.

Enterprise

An enterprise (or "company") is a business organization consisting of one or more domestic establishments that were specified under common

ownership or control. The enterprise and the establishment are the same for single-establishment firms. Each multi-establishment company forms one enterprise - the enterprise employment and annual payroll are summed from the associated establishments.

Enterprise Classification

An enterprise may have establishments in many different industries. For the purpose of classifying an entire enterprise into a single industry, the classification methodology starts by excluding nonoperating establishments - establishments classified as manufacturers' sales branches and offices, establishments engaged in management of companies and enterprises (NAICS 55), and auxiliary establishments. The enterprise is then classified into the 2-digit NAICS sector in which it paid the largest share of its payroll. Then, within this 2-digit NAICS sector, the enterprise is classified into the 3-digit NAICS sub-sector in which the enterprise paid the largest share of payroll. Finally, within the assigned 3-digit NAICS sub-sector, the enterprise is classified into the 4-digit NAICS industry group with the largest share of payroll.

SUSB currently has tabulations by enterprise industry for the 2012-2015 reference years.

Enterprise Size

Enterprise size designations are determined by the summed employment of all associated establishments. Employer enterprises with zero employees are enterprises for which no associated establishments reported paid employees in the mid-March pay period but paid employees at some time during the year.

Establishment

An establishment is a single physical location at which business is conducted or services or industrial operations are performed. It is not necessarily identical with a company or enterprise, which may consist of one or more establishments. When two or more activities are carried on at a single location under a single ownership, all activities generally are grouped together as a

single establishment. The entire establishment is classified on the basis of its major activity and all data are included in that classification.

Establishment counts represent the number of locations with paid employees any time during the year. This series excludes government establishments except for government sponsored Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers (NAICS 4248); Beer, Wine, and Liquor Stores (NAICS 44531); Tobacco Stores (NAICS 453991); Book Publishers (511130); Monetary Authorities – Central Bank (NAICS 521110); Savings Institutions (NAICS 522120); Credit Unions (NAICS 522130); Hospitals (NAICS 622); Gambling Industries (NAICS 7132); and Casino Hotels (NAICS 721120).

Establishment Births

Births are establishments that have zero employment in the first quarter of the initial year and positive employment in the first quarter of the subsequent year.

Establishment Contractions

Contractions are establishments that have positive first quarter employment in both the initial and subsequent years and decrease employment during the time period between the first quarter of the initial year and the first quarter of the subsequent year.

Establishment Deaths

Deaths are establishments that have positive employment in the first quarter of the initial year and zero employment in the first quarter of the subsequent year.

Establishment Expansions

Expansions are establishments that have positive first quarter employment in both the initial and subsequent years and increase employment during the time period between the first quarter of the initial year and the first quarter of the subsequent year.

Firm

A firm is a business organization consisting of one or more domestic establishments in the same geographic area and industry that were specified under common ownership or control. The firm and the establishment are the same for single-establishment firms. For each multi-establishment firm, establishments in the same industry within a geographic area will be counted as one firm; the firm employment and annual payroll are summed from the associated establishments.

Legal Form of Organization (LFO)

LFO is assigned at the establishment level and is derived from administrative records data sources. The following LFOs are included in the SUSB program.

C-Corporation and other corporate legal forms of organization - An incorporated business that is granted a charter recognizing it as a separate legal entity having its own privileges, and liabilities distinct from those of its members.

S-Corporation - A form of corporation where the entity does not pay any federal income taxes. The corporation's income or losses are divided among and passed to its shareholders. The shareholders must then report the income or loss on their own individual income tax returns.

Sole Proprietorships - An unincorporated business with a sole owner.

Partnership - An unincorporated business where two or more persons join to carry on a trade or business with each having a shared financial interest in the business.

Non-profit - An organization that does not distribute surplus funds to its owners or shareholders, but instead uses surplus funds to help pursue its goals. Most non-profit organizations are exempt from income taxes.

Government - A business that taxpayers primarily fund. Most government businesses are out of scope to this data series.

Metropolitan/Micropolitan Statistical Area (MSA)

MSA is a core area containing a substantial population nucleus, together with adjacent communities having a high degree of economic

and social integration with that core.

Each metropolitan statistical area must have at least one urbanized area of 50,000 or more inhabitants. Each micropolitan statistical area must have at least one urban cluster of at least 10,000 but less than 50,000 population. Metropolitan and micropolitan statistical areas can be collectively referred to as "Core Based Statistical Areas" (CBSAs); however, SUSB uses the term MSA.

Noise Infusion

Noise infusion is a method of disclosure avoidance in which a random noise multiplier is applied to certain data values for each business prior to table creation. Disclosure protection is accomplished in a manner that results in a relatively small change in the majority of tabulated values.

Nonemployer

A nonemployer business is one that has no paid employees, has annual business receipts of $1,000 or more ($1 or more in the Construction industry), and is subject to federal income taxes.

SUSB does not include data for nonemployer businesses. For these data, refer to the Nonemployer Statistics [/programs-surveys/nonemployer-statistics.html] .

North American Industry Classification System (NAICS)

NAICS [https://www.census.gov/naics/] is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. This system is used by the United States, Canada and Mexico.

Payroll

Payroll includes all forms of compensation, such as salaries, wages, commissions, dismissal pay, bonuses, vacation allowances, sick-leave pay, and employee contributions to qualified pension plans paid during the year to all employees. For corporations, payroll includes amounts paid to officers and executives; for unincorporated businesses, it does not include profit or other

compensation of proprietors or partners. Payroll is reported before deductions for social security, income tax, insurance, union dues, etc. This definition of payroll is the same as that used by the Internal Revenue Service (IRS) on Form 941 as taxable Medicare Wages and Tips (even if not subject to income or FICA tax). First-quarter payroll consists of payroll during the January-to-March quarter.

Receipts

Receipts (net of taxes collected from customers or clients) are defined as operating revenue for goods produced or distributed, or for services provided. Receipts excludes local, state, and federal sales and other taxes collected from customers or clients and paid directly to a tax agency. Receipts are acquired from economic census data for establishments in industries that are in-scope to the economic census; receipts are acquired from IRS tax data for single-establishment businesses in industries that are out-of-scope to the economic census; and payroll-to-receipts ratios are used to estimate receipts for multi-establishment businesses in industries that are out-of-scope to the economic census. SUSB tabulations provide summed establishment receipts which creates some duplication of receipts for large multi-establishment enterprises. Receipts data are available for years ending in 2 and 7 only.

Reference Year

The reference year is the year for which the data are published. SUSB data are available approximately 24 months after the conclusion of the reference year.

Statewide

A county-equivalent geography assigned to employers without a fixed location within a state (or of unknown county location). Employers who report data for multiple locations under one common location are also given a statewide classification. This incomplete detail causes only slight understatement of county employment.

PATIENTS' BILL OF RIGHTS

What is the Patients' Bill of Rights?

In March of 1997, President Clinton appointed the Advisory Commission on Consumer Protection and Quality in the Health Care Industry (Commission) to advise him on changes occurring in the health care system. He asked the Commission to recommend measures necessary to promote and assure health care quality and value, and protect consumers and workers in the health care system.

The Commission was comprised of 34 members, selected from the private sector. Members included representatives of consumers, institutional health care providers, health care professionals, other health care workers, health care insurers, health care purchasers, State and local government representatives, and experts in health care quality, financing, and administration.

The President asked the Commission to develop a "Consumer Bill of Rights" in health care and to provide him with recommendations to enforce those rights at the Federal, State, and local level. The Commission gave the President a report entitled the Consumer Bill of Rights (Patients' Bill of Rights) in November of 1997.

The President then asked the Office of Personnel Management (OPM), the Department of Labor, the Department of Health and Human Services, the Department of Veterans Affairs, and the Department of Defense to assess the level to which their health care programs were in compliance with the Patients' Bill of Rights (PBR). After this compliance assessment, the President directed these agencies by Executive Memorandum to adopt any measures necessary to come into full compliance with the PBR. This Executive Memorandum required the FEHB Program to be in full contractual compliance with the PBR by the end of 1999. OPM worked with health carriers throughout 1998 and 1999 to fully implement the PBR. The FEHB Program is now in full compliance with the President's Patients' Bill of Rights.

Objectives of the Patients' Bill of Rights and Responsibilities

The Patients' Bill of Rights and Responsibilities has three major objectives:

First, to strengthen consumer confidence by assuring the health care system is fair and responsive to consumers' needs, provides consumers with credible and effective mechanisms to address their concerns, and encourages consumers to take an active role in improving and assuring their health.

Second, to reaffirm the importance of a strong relationship between patients and their health care professionals.

Third, to reaffirm the critical role consumers play in safeguarding their own health by establishing both rights and responsibilities for all participants in improving health status.

Eight Principle Areas of Rights and Responsibilities

I. Information Disclosure

Patients have the right to receive accurate, easily understood information to help them make informed decisions about their health plans, professionals and facilities. The FEHB Program provides extensive information about benefits, customer satisfaction, delivery systems, health plan operating procedures and review rights through enrollment guides, plan brochures, and on the OPM website. Your FEHB plans make even more information available to you through their websites, provider directories, telephone numbers, or information sheets. Your plan may also refer you to plan providers or facilities for some information. However, if you are unable to get the information, the plan will assist you.

So that you can make informed health care decisions, your plan will make available to you, or aid you in obtaining, the following information:

About the Plan and Care Management:

- Accreditation status
- Compliance with State or Federal licensing, certification, or fiscal solvency requirements, if applicable, including the date the requirements were met.
- Disenrollment rate (FEHB Open Season losses / Dec 31 enrollment = %)
- Years in existence (corporate)
- Corporate form (profit/non-profit, private/public)
- Compliance with standards (State, Federal, and private accreditation) that assure confidentiality of medical records and orderly transfer to caregivers
- Methods of compensation, ownership or interest in health care facilities.
- Disclosure of the credentials of the person, or persons, involved in reviewing the patient's appeal.
- Experimental/investigational determination process
- Customer satisfaction measures
- Preauthorization and utilization review procedures used to approve care
- Clinical protocols, practice guidelines and utilization review standards being used to direct a patient's care
- Mandatory or voluntary disease management programs or programs for persons with disabilities and significant benefit differentials if any
- Formulary drug inclusion and exception process
- Whether a patient's medication is included in the plan's formulary, and if not, how the patient can request a waiver to allow coverage for the particular medication at preferred cost-sharing levels

About Networks and Providers:

- Number of primary care and specialty providers

- Name, education, board certification status and geographic location of all contracting primary and specialty care providers; whether they are accepting new patients; language(s) spoken and availability of interpreters (for non-English speaking and those with communication disabilities); and whether their facilities are accessible to the disabled
- Provider compensation, including base payment method (e.g., capitation, salary, fee schedule) and additional financial incentives (e.g., bonus, withhold, etc.)

About All Professional Providers:

- Corporate form of provider practice
- Names of hospitals where physicians have admitting privileges
- Years in practice as a physician and as a specialist if so identified
- Accreditation status
- Cancellation, suspension, or exclusion from participation in Federal programs or sanctions from Federal agencies; any suspension or revocation of medical licensure, Federal controlled substance license, or hospital privileges
- Experience with performing certain medical or surgical procedures (e.g., volume of care/services delivered), adjusted for case mix and severity
- Consumer satisfaction, clinical quality and service performance measures

About Facilities:

- Names, accreditation status, and geographic location of hospitals, home health agencies, rehabilitation and long-term care facilities; whether they are accepting new patients; language(s) spoken, and availability of interpreters (for non-English speaking and those with communication disabilities), and whether they are accessible to the disabled
- Corporate form
- Consumer satisfaction, clinical quality and service performance measures
- Whether facility specialty programs meet guidelines established by specialty societies or other bodies
- Complaint procedures
- Whether facility has been excluded from any Federal health programs
- Volume of certain procedures performed
- Numbers and credentials of providers of direct patient care
- Whether the facility's affiliation with a provider network would make it more likely that a consumer would be referred to health professionals or other organizations in that network.

II. Choice of Providers and Plans

Consumers have the right to a choice of health care providers that is sufficient to ensure access to appropriate high-quality health care.

With almost 300 plans with delivery systems that include managed fee-for-service, preferred provider organizations, health maintenance organizations and point-of-service products, FEHB enrollees can choose among a broad range of health plans and providers. In implementing the Bill of Rights, we have assured that all participating carriers have the appropriate procedures in place to ensure access to high-quality health care.

For example, all plans in the FEHB Program provide:

- Direct access to women's health care providers for routine and preventative health care services.
- Direct access to a qualified specialist within your network of providers if you have complex or serious medical conditions that need frequent specialty care. Authorizations, when required by a plan, will be for an adequate number of direct access visits under an approved treatment plan.
- *Transitional care*. If you have a chronic or disabling condition and your health plan terminates your provider's contract (unless the termination is for cause), you may be able to continue seeing your provider for up to 90 days after the notice of termination. If you are in the second or third trimester of pregnancy, you may continue seeing your OB/GYN until the end of your postpartum care.

If you have a chronic or disabling condition or are in your second or third trimester of pregnancy and your health plan drops out of the FEHB Program, you may be able to continue seeing your provider if you enroll in a new FEHB plan. You may continue to see your current specialist after your old enrollment ends, even if he or she is not associated with your new plan, for up to 90 days after you receive the termination notice or through the end of postpartum care, and pay no greater cost than if your old enrollment had not ended.

III. Access to Emergency Services

Consumers have the right to access emergency health care services when and where the need arises. Health plans use a "prudent layperson" standard in determining eligibility for coverage of emergency services. Coverage of emergency department services are available without authorization if you have reason to believe your life is in danger or you would be seriously injured or disabled without immediate care.

IV. Participation in Treatment Decisions

Consumers have the right and responsibility to fully participate in all decisions related to their health care. Consumers who are unable to fully participate in treatment decisions have the right to be represented by parents, guardians, family members, or other conservators.

V. Respect and Nondiscrimination

Consumers have the right to considerate, respectful care from all members of the health care system at all times and under all circumstances. An environment of mutual respect is essential to maintain a quality health care system.

Consumers must not be discriminated against in the delivery of health care services consistent with the benefits covered in their policy or as required by law.

Consumers who are eligible for coverage under the terms and conditions of a health plan or program or as required by law must not be discriminated against in marketing and enrollment practices based on race, ethnicity, national origin, religion, sex, age, mental or physical disability, sexual orientation, genetic information, or source of payment.

FEHB statute and regulations prohibit discriminatory practices in the FEHB Program.

VI. Confidentiality of Health Information

Consumers have the right to communicate with health care providers in confidence and to have the confidentiality of their individually identifiable health care information protected. Consumers also have the right to review and copy their own medical records and request amendments to their records.

The privacy provisions already in place ensure that patient confidentiality is protected under the FEHB Program. We have ensured that carriers arrange with all their contracting providers so that you can review, copy, and request amendment to your medical records.

VII. Complaints and Appeals

All consumers have the right to a fair and efficient process for resolving differences with their health plans, health care providers, and the institutions that serve them, including a rigorous system of internal review and an independent system of external review.

The FEHB Program has had an external review process in place for the last 20 years. Our disputed claims process ensures an independent review of disputes between participating carriers and our enrollees.

VIII. Consumer Responsibilities

In a health care system that protects consumers' rights, it is reasonable to expect and encourage consumers to assume reasonable responsibilities. Greater individual involvement by consumers in their care increases the likelihood of achieving the best outcomes and helps support a quality improvement, cost-conscious environment.

You as a consumer can make a significant contribution in these key areas:

- Maximize healthy habits e.g., exercising, not smoking, and eating healthy diet.
- Become involved in care decisions.
- Work collaboratively with providers in developing and carrying out agreed-upon treatment plans.
- Disclose relevant information and clearly communicate wants and needs.
- Use the FEHB Program disputed claims process when there is a disagreement between you and your health plan. The process is described in your plan brochure.
- Become knowledgeable about coverage and health plan options, including covered benefits, limitations, and exclusions, rules regarding use of network providers, coverage and referral rules, appropriate processes to secure additional information, and process to appeal coverage decisions. This information is in your plan brochure.
- Show respect for other patients and health workers.
- Make a good-faith effort to meet financial obligations.
- Report wrongdoing and fraud to appropriate resources or legal authorities. The OPM Fraud Hot Line number is 877-499-7295.

FEHB enrollees should educate themselves with respect to specifics of benefit coverage and to learn how to access health care and services by using the information provided in FEHB enrollment information, plan brochures, and on the OPM website.

On This Page

Handing in your notice

1. Your employment contract

If you want to leave your job, check your employment contract (/employment-contracts-and-conditions) to find out your employer's policy on handing in notice.

There are rules about:

- giving notice (/handing-in-your-notice/giving-notice)
- how much you'll be paid during your notice period (/handing-in-your-notice/payment-during-your-notice-period)
- what will happen if you leave to work for a competitor (/handing-in-your-notice/restrictive-covenants)

2. Giving notice

You must give at least a week's notice if you've been in your job for more than a month.

Your contract will tell you whether you need to give notice in writing - otherwise you can do it verbally.

Give written notice if you think you'll need to refer to it later, for example at an employment tribunal.

> **You may be in breach of your contract if you don't give enough notice, or give notice verbally when it should be given in**

writing. Your employer could take you to court.

Your notice period usually runs from the start of the day after you handed your notice in.

If you change your mind

If you resign in the 'heat of the moment' (eg during an argument) and you change your mind, you should tell your employer immediately. They can choose to accept your resignation or not.

Get free advice from Acas

Call the Acas helpline (/pay-and-work-rights) to get advice about handing in your notice and pay rights.

3. Payment during your notice period

You're entitled to your normal pay rate during your notice period, including when you're:

- off sick
- on holiday
- temporarily laid off
- on maternity, paternity or adoption leave
- available to work, even if your employer has nothing for you to do

'Payment in lieu' of notice period

Your employer can ask you to leave immediately after handing in your notice.

If they do, they'll probably offer you a one-off payment instead of allowing you to work out your notice period - called 'payment in lieu'.

You can only get payment in lieu if it's in your contract, or if you agree to it. If you don't agree to it, you can work out your notice period.

Disputes over notice pay

If you can't resolve a dispute about notice pay with your employer informally, you can follow your company's grievance procedures (/solve-workplace-dispute).

If this doesn't work, you may be able to make a complaint to an employment tribunal (/employment-tribunals) for breach of contract.

4. Gardening leave

Your employer may ask you not to come into work, or to work at home or another location during your notice period. This is called 'gardening leave'.

You'll get the same pay and contractual benefits.

5. Restrictive covenants

There may be terms in your contract that says you can't work for a competitor or have contact with customers for a period of time after you leave the company.

These are called 'restrictive covenants'.

> **Your company could take you to court if you breach the restrictive covenants in your contract.**

Rule 5.6: Restrictions on Right to Practice

Share:

Law Firms And Associations

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

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Comment on Rule 5.6

Share:

Law Firms And Associations

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

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Noncompete Clause Rule

Staff Presentation for Open Commission Meeting

April 23, 2024

Federal Trade Commission

FTC Proposed Rule and Extraordinary Public Response

- The evidence of harm to competition from noncompetes has increased substantially
- January 2023 – FTC proposed a comprehensive ban on noncompetes
- Over 26,000 comments, with overwhelming support for comprehensive ban (over 25k)
- Compelling picture of the economic and human toll from the perspective of individuals and families

Support Spanned Wage Levels and Sectors

"I currently work in sales for an asphalt company in Michigan. The company had me sign a two year non-compete agreement. . . . I have been disheartened at how poorly customers are being treated and how often product quality is sub-par. I would love to start my own business because I see this as an opportunity to provide a better service at a lower cost. However, the non-compete agreement stands in the way . . ." (#2215)

"In October 2020, I started working as a bartender. . . . I was sexually harassed and emotionally abused. . . . I was eventually offered a bartending job at a family-owned bar with better wages, conditions, and opportunities. Upon resigning, I was threatened with a non-compete I didn't know existed. Still, I couldn't take it anymore, so believing it was an unenforceable scare tactic, I took the new job. . . . In December 2021, I was sued for $30,000 . . . for violating the non-compete." (#8852)

"I am a physician in a rural underserved area of Appalachia. . . . Non-competes have become ubiquitous in the healthcare industry. With hospital systems merging, providers with aggressive non-competes must abandon the community that they serve if they chose to leave their employer. . . . Healthcare providers feel trapped in their current employment situation, leading to significant burnout that can shorten their carer longevity. Many are forced to retire early or take a prolonged pause in their career when they have no other recourse to combat their employer." (#15947)

"[I] signed a non-compete clause for power-washing out of duress. My boss said that if I didn't sign before the end of the week, not to come in the next week. . . . I'd like to start my own business but I would have to find another job and wait 5 years. . . . In the land of the free, we should be free to start a business not limited by greedy business owners." (#12689)

Staff Recommendation for Final Rule Toplines

- New noncompetes banned for all workers as of the effective date
- Existing noncompetes (change from proposal)
  - May remain in effect for senior executives
  - Unenforceable for all other workers after the effective date (but formal rescission not required)
    - Employers must provide notice; model language provided
- 120-day effective date

Non-Senior Executives: Evidentiary Record and Findings

- Labor markets
  - Noncompetes inhibit efficient matching between workers and employers through the competitive process
  - Final rule would increase earnings by $400b-$488b over 10 years, or an average of $524 per worker per year
- Product & service markets
  - Noncompetes suppress new business formation and innovation
  - Final rule would lead to over 8,500 new businesses/year and average increase of 17,000-29,000 patents/year over next decade
- Exploitation and coercion

Senior Executives: Evidentiary Record and Findings

- Product & service markets
  - Noncompetes with senior executives suppress competition in product and service markets at least as much as, and likely to a greater extent than, noncompetes with other workers
  - This is due to key role of senior executives in establishing new firms, serving on new firms' executive teams, and setting strategic direction of firms with respect to innovation
- Labor markets
  - Decreased labor mobility and earnings
- Less likely to be coerced and exploited

Justifications for Noncompetes

- Final rule considers the claimed business justifications for noncompetes, but they do not alter the finding that noncompetes are an unfair method of competition
  - Firms have less restrictive alternatives for protecting trade secrets and other confidential info (including trade secret law, IP law, NDAs) and human capital investments (including fixed-duration contracts, pay/benefits)
  - The benefits from these claimed justifications do not justify the harms from noncompetes