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Non-compete clauses in employment relationships

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Loyalty and competition

Employees have a general duty of loyalty towards the employer throughout the duration of the employment relationship. Among other things, the duty of loyalty requires the employee not to conduct any business in competition with the employer. However, the employee's duty of loyalty ceases once the employment relationship is terminated. In order to limit the possibility for previous employees to conduct competing business directly after the employment ends, the employer can include a non-compete clause in the employment agreement.

With the development of the information society, employees' know-how and access to information has made the use of non-compete clauses common practice. As a rule, non-compete clauses in employment relationships are accepted in Swedish law and are thus generally binding on the employee. However, the applicability of the clauses in individual cases is limited to what may be considered reasonable according to law, case law and agreements between parties. The statutory regulation purports to find a suitable balance between the principle of freedom of contract and the employer's interest in protecting trade secrets.

Statutory regulation

Section 38 of the Contracts Act (1915:218) contains a special provision regarding non-compete clauses. It states that a party that commits not to conduct competing business is not bound by the undertaking if the commitment is more far reaching than may be considered reasonable. Further, the reasonability of non-compete clauses in certain areas of the labour market is regulated in greater detail by the 1969 Collective Bargaining Agreement on Non-competition Clauses, signed by the central organisations on the private labour market. The agreement has been adopted by numerous employer associations within the Confederation of Swedish Enterprise and applies to companies which are members of associations with employees who belong to contracting labour organisations. According to Section 27 of the Employment (Co-determination in the Workplace) Act (SFS 1976:580), employers and employees that are bound by the agreement may not enter into binding contracts in conflict with the collective agreement. Through a statement in the preparatory work (prop 1975/76:81, p 148) which refers to a collective agreement in the field, the agreement has come to have great importance in case law.

The Labour Court has stated (AD 2015 nr 8) that a comparison with the agreement shall be made even in cases where it is not formally applicable between the parties. According to Section 38 of the Contracts Act, the agreement thus has a general normative effect when determining reasonability.

Reasonability assessment

The reasonability assessment of non-compete clauses is achieved through an overall assessment of all circumstances in an individual case. Key factors considered in the assessment are as follows:

- the extent to which the employer has a legitimate purpose to restrict competition (eg, to protect technical or trade-specific know-how in the shape of product development or commercial business secrets);
- the extent to which the clause limits the employee's possibilities to conduct business (eg, the scope of the clause, possible penalties and length of the commitment period);
- whether the employee receives any compensation during the commitment period or whether salary and other conditions have been determined based on the restrictions;
- whether the clause has been the subject of negotiations between the parties;
- the employee's position and duration of employment; and

- the public interest in maintaining competition in the market in which the employer operates.

Previously, employers were able to modify an overly restrictive non-compete clause. However, the Labour Court (AD 2013 nr 24) has since stated that an employer which tries to bind an employee with an overly restrictive clause risks having it thrown out in its entirety. The employer should consider carefully the form of a non-compete clause in an employment agreement before conclusion.

Legal uncertainty

In 2002 the government proposed legislation regarding non-compete clauses (Ds 2002:56). However, the proposal did not lead to the adoption of any legislation. In 2014 the 1969 agreement was terminated and it ceased to exist on May 31 2015. Since the agreement was accepted by the legislature through statements in preparatory works and was also applied by the Labour Court outside its proper scope of application, it has more or less gained the status of a source of law concerning the applicability of non-compete clauses. In the absence of clarification from either the legislature or the court, the legal situation is uncertain and it remains unclear whether this will affect the assessment of the reasonability of non-compete clauses in future employment relationships.

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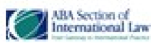

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