

Restrictive Covenants under Norwegian Law

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1. INTRODUCTION

In the following, we will present the current provisions concerning agreements restricting competition in employment relationships according to Norwegian law. The provisions are principally found in the Working Environment Act (**WEA**) chapter 14 A, supplemented by general legal principles.

2. NON-COMPETITION DURING THE EMPLOYMENT

During the time of employment, the employee has a duty of loyalty towards the employer. The duty of loyalty does not correspond to statutory provisions, but can be derived from the general legal principle of loyalty in contractual relationships.

In accordance with this duty, the employee may not participate in any activity that constitutes a disloyal competition to the employer. Engagement as well as preparations in competing activities is prohibited.

3. NON-COMPETITION AFTER THE EMPLOYMENT

3.1. Non-compete clauses

A non-compete clause is an agreement limiting the employee's freedom to undertake actions in competitive activities following the termination of the employment agreement. Non-compete clauses are governed by WEA Section 14 A-1 to Section 14-3.

Relevant actions that may be prohibited include:

- Employment in a competing business
- Assistance or participation in a competing business, for instance by spreading information or holding shares in such a company.
- Starting up a competing business

3.1.1. Scope of the clause

The non-compete clause may only be invoked as far as it is considered necessary with regard to the protection of the employer's interests. Restrictions that are wider than necessary will not be enforced. To which extent the restrictions can be said to constitute necessary means is a question that must be answered individually, based on the clause in question. Typical interests that are worthy of being protected are trade secrets and know-how within the company.

The interests worthy of protection must further be connected to the particular employee. If the employee has no knowledge of the information worthy of protection, the clause cannot be considered necessary. However, having knowledge of important information is not in itself sufficient. The employer must be able to demonstrate why the clause should be enforced.

As a general rule; the more advanced position of the employee and the more sensitive information, the wider scope of restriction is allowed.

The geographical scope of the clause must be determined with regard to the clause in question, dependent on the employer's geographical range.

The duration of the non-compete clause should not be longer than what is required to protect the information. The duration may in no event exceed a period of one year from the termination date.

3.1.2. Notification to the employee

An employee may at any time demand a written statement regarding whether and to what extent a non-compete clause will be invoked with regard to the employee's employment agreement. This follows from WEA Section 14 A-2, and the statement must be given within four weeks. The statement must further explain in which way the employee may cause a threat to the employer's interests.

If not already given, such a statement must be provided by the employer in connection with the termination of an employment agreement. The statement shall be given to the employee within a certain time limit, depending on the reason for termination:

- If the employee is dismissed the statement shall be provided at the same time as the dismissal.
- If the employee is dismissed summarily the statement shall be provided within one week of the summary dismissal
- If the employee resigns the resignation will be regarded as an enquiry for a written statement, and the employer must subsequently provide the statement within four weeks.

3.1.3. Formal requirements

In order for the clause to be valid, it must be entered into in writing.

3.1.4. Exceptions

The non-competition clause cannot be invoked if the termination of the employment results from:

- Dismissal by the employer due to reductions in workforce or other reasons connected with the company's activity.
- Resignation by the employee due to the employer's breach of the employment agreement.

The provisions limiting non-compete clauses shall not apply to the undertaking's chief executive if he or she renounces such rights before resigning in return for severance pay, see WEA Section 14 A -5.

3.1.5. Compensation

If the non-competition clause is enforced, the employee is according to WEA Section 14 A -3 entitled to compensation. The compensation is calculated on the basis of the employee's salary from the last 12 months up until the date of dismissal. Deductions corresponding to a maximum of half the compensation can be made if the employee acquires any income from somewhere else.

The compensation may in any case be limited to twelve times the Norwegian National Insurance basis amount.

3.2. Non-solicitation of customers clause

A non-solicitation of customers clause is an agreement limiting the employee's freedom to contact the employer's customers following termination of the employment. Non-solicitation of customer clauses are governed by WEA Section 14 A-4.

Relevant actions that may be prohibited include:

- Directly contacting the customers for recruitment purposes
- Indirectly contacting the customers for recruitment purposes

However, the employee is not obliged to reject a customer that act on its own initiative.

The employer must to the same extent and within the same time limits as for the non-compete clauses provide a statement regarding whether and to what extent the non-solicitation of customers clause will be invoked with regard to the employee's employment agreement. The statement must further specify by name which customers that are subject to the restriction.

A non-solicitation clause may only apply to customers with whom the employee has had contact or for whom he has been responsible during the year immediately prior to the statement. Whether or not the relevant contact constitutes a sufficient connection between the employee and the customer must be determined individually. Sporadic contact may fall without the scope of the restriction.

In conformity with what applies to non-compete clauses, the provisions limiting non-solicitation of customers clauses shall not apply to the undertaking's chief executive if he or she renounces such rights before resigning in return for severance pay, see WEA Section 14 A -5.

Enforcement of a non-solicitation clause does not give the employee any entitlement to compensation.

3.3. Non solicitation of employees clause

A non-solicitation of employees clause is an agreement between the employer and other undertakings preventing or limiting the employee's possibility of taking up an appointment in another undertaking. Non-solicitation of employees clauses are governed by WEA Section 14 A-6.

As a main rule, the employer is prohibited from entering into such agreements. The exception relates to negotiations and completion of transfer of undertakings, where the employee can enter into such agreements for a maximum period of six months.

3.4. Exceptions regarding the undertaking's chief executive

The provisions concerning non-compete and non-solicitation of customers clauses shall not apply to the undertaking's chief executive if he or she renounces such rights before resigning in return for severance pay.