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Noncompetition and Nonsolicitation Clauses in Employment Law

A recently published decision of the Swiss Federal Supreme Court (4C.276/2003 of 20 February 2004) extensively addressed noncompetition clauses in employment agreements. The decision also comprehensively addressed the relationship between noncompetition clauses and nonsolicitation provisions. The Federal Supreme Court ruled for the first time on the requirements for a contractually agreed nonsolicitation clause.

Theory and Purpose of Noncompetition Provisions

During his or her employment, the employee may have an opportunity to acquire extensive know-how of his or her employer. The employer has a justifiable interest in restricting the exploitation of this know-how by the employee after the employment relationship ends. In addition to the statutory confidentiality obligation in Article 321a paragraph 4 of the Code of Obligations ("CO"), which also applies after the employment ends, and the protections of the Federal Law Against Unfair Competition *(Bundesgesetz gegen den unlauteren Wettbewerb, "UWG")*, the employer can make use of a written noncompetition agreement (Article 340 et seq. CO).

by Natalie Boller
+41 1 265 75 93
nboller@wwp.ch

Appropriateness and Enforceability of Noncompetition Agreements

A noncompetition provision can have drastic consequences for the employee and significantly restrict his or her employment or business prospects. The law therefore requires that a noncompetition clause is only valid to the extent that (a) the employee actually had access to customer information or manufacturing and other business secrets and (b) the employee could cause material harm to the employer by the use of this knowledge. Further, a noncompetition provision must be reasonably limited in terms of its scope, the geographic area in which it is applied and its duration (Article 340a paragraph 1 CO). The noncompetition provision can nevertheless lapse if the employer no longer has a substantial interest in its enforcement (Article 340c paragraph 1 CO). It also can expire if the employer has given notice to the employee terminating the employment although the employee had done nothing to justify such termination, or if the employee terminates the employment relationship for good cause based on adverse circumstances within the control of the employer (Article 340c paragraph 1 CO). These mandatory provisions protect the employee and state, essentially, that the economic prospects of the employee may only be affected when the interests of the employer justify it. This requires the case-by-case analysis of the interests of the employer and the employee. In balancing these interests, the constitutionally guaranteed principle of economic freedom (Article 27 of the Federal Constitution) is to be taken into account. Economic freedom includes the right to choose an occupation, the right to pursue gainful activity and to engage in one's occupation. These freedoms exist not only in relation to the state, but also in the realm of private relationships. The scope of competition restrictions is therefore to be reviewed in each case.

Markets Affected by Competition Restrictions

The rules regulating restrictions on competition (Article 340 et seq. CO) apply only to competition among suppliers of goods or services. Competition for the acquisition of the same goods and services, the consumer market, is not regulated and a former employee cannot be prohibited from competing with his or her former employer for the acquisition of the same goods or services. This is true even if suppliers' addresses, for example, are otherwise business secrets protected under Article 340 paragraph 2 CO.

Restriction on Solicitation of Former Employer's Customers

The Federal Supreme Court made clear that a contractually agreed restriction on the solicitation of a former

employer's customers is covered by the comprehensive restriction on competition in Article 340 CO which prohibits the employee from engaging in an activity competing with the former employer. This includes, of course, interfering in the customer relationships of the former employer as well as the active solicitation of the former employer's customers.

Restriction on Solicitation of Former Employer's Employees

A noncompetition provision can not, however, protect the employer against the possibility that a former employee recruits employees of the employer. The duty of loyalty of the employee under Article 321a paragraph 1 CO protects the employer against the recruiting of its employees only during the term of the employee's employment. The post-employment duty of confidentiality under Article 321a paragraph 4 CO also does not operate to protect against such recruiting. If the employer wants to hinder this, then a specific restriction not to solicit employees has to be agreed with the employee.

For the first time, the Federal Supreme Court has ruled on the requirements for a nonsolicitation clause. It held that a competition restriction and an independent nonsolicitation clause can both present significant limitations on the economic development potential of the employee. It further stated that it is not possible to regulate by statute all of the potential post-employment restrictions on the employee and concluded that all such restrictions must meet the requirements for a noncompetition provision as set forth in Article 340 et seq. CO by analogy.

Nonsolicitation Provisions in the Job Placement Business

In the specific case reviewed by the Federal Supreme Court, the employment contract imposed three restrictions on the post-employment conduct of the employee: a noncompetition clause, a customer solicitation restriction and a restriction on the solicitation of employees. The former employer relied principally on the argument that the solicitation restrictions operated independently from the noncompetition provision and that therefore the restrictions provided by Article 340 CO would not apply to it. In the case, the restriction on the solicitation of employees had a special context because the employer was engaged in the business of personnel recruiting and temporary job placement. In this industry, the supplier and consumer markets can not be separated because the customers of the recruiting firm are not only employers seeking employees, but also employees who seek jobs. A personnel recruiting firm thus offers services in both markets. When a restriction on the solicitation of employees is imposed on an employee in such a business, it is tantamount to a prohibition on the solicitation of clients. In this special case, the restriction on the solicitation of employees had – as in the case of the customer solicitation restriction – no significance independent from the noncompetition clause and therefore had to fulfil the requirements of Article 340 et seq. CO.

Result

The decision of the Federal Supreme Court brought considerable clarity regarding nonsolicitation clauses. The solicitation of the former employer's customers is included in a noncompetition restriction. In contrast, restrictions on the solicitation of employees are not included and can, in principle, exist independently from a noncompetition clause and can be agreed by contract. However, the same rules and requirements applicable to a noncompetition clause, i.e. Articles 340 et seq. CO, must be observed when agreeing on any post-employment restrictions – including on the solicitation of employees – which have an effect similar to a noncompetition clause.

ww&p **Walder Wyss & Partners**
Attorneys at Law

Münstergasse 2
P.O. Box 2990
CH-8022 Zurich
Phone +41 1 265 75 11
Fax +41 1 265 75 50
reception@wwp.ch
www.wwp.ch

London Representative Office
9 Gray's Inn Square
London WC1R 5JQ
Phone +44 20 7405 2043
Fax +44 20 7405 0605