

Germany's post-contractual non-compete covenants in a nutshell

By Kai Bodenstedt and Henriette Norda

Post-contractual non-compete clauses are often contractually agreed upon to prevent the employee from working for an competitors after their employment relationship has terminated. During the employment relationship, employees are forbidden from working for competitors or founding a competing company according to statutory law. However, after the end of the employment relationship, such restrictions only apply if the parties have concluded a valid post-contractual non-compete covenant.

Post-contractual non-compete clauses are only enforceable in Germany if the following is observed:

1. Compensation

A post-contractual non-compete will only be enforceable if the employer agrees to pay at least 50 percent of the remuneration the employee received during the employment relationship (such as base salary, bonus payments or car allowances) during the term of the non-compete. The question of how the compensation during the term of the non-compete clause is calculated in detail (eg, are stock options considered in the calculation of the previous remuneration?) can be quite complicated and is mostly stipulated by case law. Under certain conditions, it is possible to set off the salary the former employee earns elsewhere against the non-compete compensation.

2. Maximum term

The maximum term of a post-contractual non-compete allowed under German law is two years after the end of the employment relationship. However, a shorter period (up to two years) is also possible.

3. Written form required

The post-contractual non-compete will only be enforceable if:

- the agreement is originally signed (in physical form with a wet-ink signature) by both parties (copies are not enough, and on behalf of the company a duly authorized officer should sign the document) and
- each party is provided with a version that includes both original signatures. The pages of the agreement should be stapled and each page of the contract should be initialled.

4. Waiver of post-contractual non-compete

The waiver of the post-contractual non-compete is subject to mandatory statutory law, which may not be waived or altered by an agreement between employer and employee. The employer may at any time during the employment relationship waive the post-contractual non-compete clause in writing. In such case, the employer's obligation to pay compensation would cease

to exist after 12 months have elapsed (starting on the day the employer waives the non-compete clause towards the employee). The employee, on the other hand, is free to compete against the employer immediately after the end of the notice period (assuming the employment relationship is still active at the time the employer has waived the non-compete clause).

If, for example, the employer gives notice to waive the non-compete 12 months prior to the end of the employment relationship, the employer will not be required to provide the employee with any additional compensation once the employment has ended.

If, on the other hand, the employer waits to give written notice until a month before the end of the employment contract, the employer then will be required to compensate the employee for 11 months after the employment relationship has ended (ie, 12 months from the date when the employer notified the employee of the waiver of the non-compete clause), and the employee will be able to compete immediately after the employment relationship has ended.

Therefore if waiving a non-compete clause is an option considered by the employer, the timing should be carefully determined.

Due to the special requirements of German law for post-contractual non-compete clauses it is advisable to seek legal advice on this matter.

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