

Employment Agreements in Brazil: Non-compete Clauses

Largely used worldwide, non-compete clauses in employment agreements are still rarely used in employment agreements governed by Brazilian Law. Although such clauses are relatively uncommon from an overall perspective, they tend to become standard practice for high-level employees and those with access to key information. However, certain characteristics of Brazilian labor statutes and case law need to be considered carefully.

Differently from many other jurisdictions, it is common in Brazil for non-compete clauses to focus only on restrictions to competition after the termination of the employment relationship. This is so due to the fact that the Brazilian Labor Law itself prevents competition while the employment relationship is in force.

However, under Brazilian Labor Law, either during employment or after its termination, an employee is not automatically obliged to refrain from working or rendering services to another company, competitor or not, unless such obligation is expressly introduced by agreement. A non-compete clause can for instance create an obligation for the employee or former employee to indemnify the employer in case any losses, such as client or revenue loss, are caused. In such cases, the employee would be subject to summary dismissal without pay in lieu of notice and/or could be sued for damages before the Civil Courts.

In light of the above, if the employee is to be exposed to sensitive information, such as exclusive know-how, industrial secrets or commercial strategies, it is advisable to include non-compete, confidentiality and exclusivity clauses in all employment contracts governed by Brazilian Law. In this situation, one clause might help the enforcement of the others.

According to current Brazilian case law, non-compete clauses applicable while the employment relationship is in force do not demand any specific requirements to be met, except for the general test of reasonability. On the other hand, the non-compete clauses applicable after the termination of the employment relationship must meet a few requirements imposed by Brazilian Labor Courts.

One of the requirements to be met is that the clause provides clear time limitation. Several court precedents state that two years are sufficient to protect the employer, although longer periods could be imposed under special conditions.

The second requirement for validity of the non-compete clause is that it provide territorial limitation. Depending on the company's market, competitors and former employee's activities, this territorial limitation could be a neighborhood, city, state or specified region.

It is also possible to list the specific competitors with whom the former employee will not be able to work. Again, the employer must be reasonable when listing such competitors.

Since the former employee will suffer market restriction due to the fact that he/she will not be allowed to offer his/her services to certain employers for a certain period of time, a third common requirement is the payment of special compensation to the former employee. The amount of the payment must be established considering, alongside with the living standards the former employee had while the employment relationship was in force, the territorial and the time limits imposed.

Finally, generic provisions and broad limitations should be avoided, since they could completely nullify the clause, rendering it unenforceable.

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