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**AUSTRIA**

**Non-competition clauses in labour contracts**

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Preliminary remarks

In this questionnaire, “plaintiff” refers to the employer with whom the employee signs the labour contract. “Defendant” refers to the employee who signed the labour contract. Sometimes the new employer can also be a defendant.

The law governing covenants not to compete in labour contracts relates to many areas of the law (such as freedom of occupation, freedom of contracts, etc.) and may be taken into consideration when replying to the questionnaire. This subject also relates to theories of economics and freedom of trade and competition, which can also be taken into account.

In Austria there must be distinguished two different problems.

- a. During the employment relationship salaried employees (white color ) are obliged by a statute. They are not allowed to run an independent commercial business or conclude transactions for their own account in the employers line of business.
  - b. After the termination of the employment relationship they are only prohibited from competition against their former employer, if they have a contract with a non competition clause. There are some statutory provision which restrict these clauses. For instance are these clauses only binding for one year after the termination of the employment relationship. They are only possible if the employee earns more than 2125 Euro per month (2006)
1. What clauses, if any, are in your country’s constitution relating to covenants not to compete in labour contracts? Are there clauses relating to the freedom of occupation; protection of property (if so, does this include intellectual property and trade secrets); freedom of contract, etc. If there are such clauses, how are they applied relating to covenants not to compete? Which, if any, of the EU Directives relating to this subject are applied in your country?

In the Austrian Constitution the freedom of occupation has some impact on contracts and covenants not to compete. This constitutional right usually is not applied directly but it is considered by interpreting statutory provisions.

2. Is there a statute in your country that governs the enforceability of covenants not to compete? Or, is the law governed solely by case law?

There are some statutory provisions that governs the enforceability of covenants not to compete.

If there is a statute, does the statute relate to specific professions or industries?

The statutory provisions are applied generally

3. In general, are covenants not to compete in labour contracts enforceable in your country? Following are some possible answers:

- (a) In my country covenants not to compete are not enforceable under any circumstances.

No. If they are not enforceable, explain the legal and economic basis for this rule.

- (b) In my country covenants not to compete are enforceable under certain conditions and to a certain extent.

Yes.

(If the answer is yes, there are further questions about the condition required for the covenant to be enforceable.)

4. What are the employer's protected interests and how are they defined?

The employer has an economic interest

What is the public's interest in enforcing covenants not to compete? Is this a reason for statutes and case law?

During employment relationship it is to enforce the duty to act in good faith for the employer.

5. If covenants not to compete are enforceable in your country: what must the plaintiff show to prove the existence of an enforceable covenant not to compete?

- (a) Is a written contract required?

No.

- (b) Is a trade secret required to prove the employer's case? If so, how is a trade secret defined? Does it include customer lists, price lists, systems of work?

No.

- (c) Does the employer need to give the employee consideration (in addition to a regular salary) as a condition for the covenant not to compete to be enforceable?

No, only in some cases of non competition clauses – if the employer himself terminates the employment relationship without a reason caused by the employee, the employer has to pay remunerations if he wants to enforce the non competition clause.

- (d) Will geographical factors, time factors and the special characteristics of an industry be considered when deciding whether to enforce a covenant not to compete?

Yes.

- (e) Must the covenant not to compete meet a "reasonable test"? If so, who has the burden of proof? How, if at all, does your case law balance between such rights as freedom of contract, property rights and freedom of occupation?

There is some "reasonable test". The non competition clause is void if it hinders the employees possibilities for gaining an occupation to an extend which is not reasonable considering the employers interests.

- (f) May the new employer be sued for employing an employee who is violating the covenant not to compete in his labour contract with the former employer? If so, in which court? Is this hearing held jointly with the suit against the employee? Note: the new employer has no contract with the former employer and there is no employee-employer relation between them.

The new employer cannot be sued only based on the fact of employing an employee who is violating the covenant not to compete in his labor contract with the former employer.

- (g) If the employer terminates the labour contract, is the covenant not to compete enforceable? Does it matter what the reason for the dismissal is?

See answer to ©

7. If a covenant not to compete is held by a court in your country to be overly broad, will the court modify the covenant? What other flexibility do courts have relating to relief they can grant?

The court will restrict the clause.

8. Do the courts issue preliminary (temporary) injunctions for violation of covenants not to compete in labour contracts?

Yes in some cases.

9. What are the remedies which courts can and do grant when an employee has violated his/her covenant not to compete?

There is the possibility of an injunctions for violation of covenants not to compete or damages.

10. Which court(s) in your country have jurisdiction over legal matters relating to covenants not to compete in labour contracts? (Labour Courts; Civil or Commercial Courts; Administrative Law Courts; Constitutional Court, etc.).

Against employees – Labor Courts.