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## Considerations on how to draft a non-compete restriction

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During the employment, both the employer and the employee are bound by a mutual duty of loyalty, which is a basic principle on the labor market and forms part of the employment relationship. The duty of loyalty on the employee's behalf implies a non-compete obligation towards the employer. However, since the duty of loyalty does not apply post employment, the employer must have included an explicit contractual obligation for the employee not to compete with the employer after the employment has ceased; should the employer consider this to be important.

Nevertheless, a non-competition restriction must always be regarded as "reasonable" in order to be enforceable. In determining the "reasonableness" of such restrictions, the employer's interest in protecting trade secrets and confidential information is balanced against the employee's interest in using his or her skills on the labor market. Another factor that is taken into consideration is e.g. the duration of the restriction in comparison with the estimated life span of the employer's know-how with special need of protection. The employee's position in the organization is also assessed, which means that generally only key employees can be restricted by a non-competition undertaking.

A recent case law (AD 2013:24) shows the importance in carefully thinking through the drafting of a non-competition restriction. An employee was bound by a non-competition restriction which prevented him from conducting business or accepting employment with a business in competition with his employer (the "Company"), for a period of twelve months following the termination of the employment. At the time the employee resigned and accepted employment with a competitor, the Company filed a claim arguing that the former employee violated the non-competition clause. The claim was however filed without success. The Labor Court concluded that the non-competition restriction was too far-reaching, i.e. unreasonable, and that the former employee therefore was not bound by the undertaking. The court found that the restriction prevented the former employee during a relatively long time-period from working in a business where he had been active for the previous six years. During the restricted period, the Company had not undertaken to compensate the former employee in any way. The court ruled that even though the Company

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might have had a legitimate interest in protecting existing customer relations, the non-competition clause had a far wider area of application. According to the court, the restriction was aiming to prevent market competition rather than protecting the Company's existing customers. Therefore, the restriction was regarded as unreasonable and accordingly unenforceable.

An interesting angle in this case was that during the court proceedings, the Company tried to limit the scope of the restriction by amending it to only prevent the former employee from contacting customers who he knew was customers to the Company. By this amendment, the Company argued, the non-competition restriction should be regarded as reasonable. The court, however, concluded that the reasonability assessment must be based on the meaning of the non-competition restriction at the time when the employment ceased, without consideration to any amendments regarding its scope made by the employer thereafter.

Given the outcome of this case, we do stress that the drafting of a non-compete restriction must be made in a legal acceptable way already from the start since any amendments later on are likely to be disregarded in court proceedings.



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