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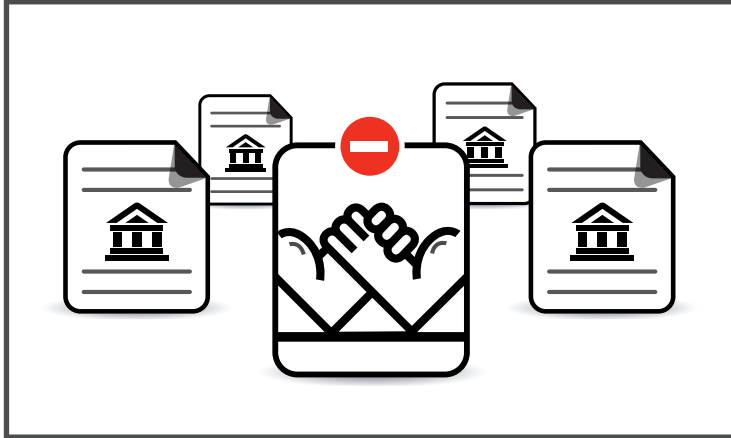
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Non-compete agreements and confidentiality

At a glance



Laws and Regulations



Validity



ARGENTINA

Act 20.744 includes a series of principles (both general and specific) to guide employee and employer behavior during the course of a labor contract, including:

- i) Generic obligation of solidarity and collaboration (Section 62)
- ii) Employees must be faithful and keep confidentiality of all information accessed that might be critical for the employer, (Section 85)
- iii) An employee must abstain from entering into negotiations on his own behalf or for another party that might affect the employer's interests (Section 88).

BRAZIL

The duty not to compete during the employment is provided for in the Labor Code, Article 482. An employer may confirm or supplement it, but post-employment duty depends on private agreements, which must observe some general principles and limitations such as freedom of profession, protection of the employee as the weak party in an employment relationship, equity and fairness.

COLOMBIA

Given that non-compete agreements seek to restrict a particular person from participating in a given market, or limiting the production of goods or services, they are expressly prohibited by Article 1 of Law 155 (1959) and Article 47 of Decree 2153 (1992).

MEXICO

As a general rule, the Mexican Constitution prohibits agreements where a person temporarily or permanently waives his right to a determined profession, industry or business activity and grants every individual the right and freedom to engage in any lawful activity. It further provides that employees' rights and protections cannot be waived in any manner whatsoever, and any agreement to contrary will be deemed null and void.

However, the Mexican Supreme Court of Justice has ruled that non-compete agreements may be admissible if certain requirements for validity are observed.

On the other hand, confidentiality and protection of IP provisions are fully enforceable under Mexican Intellectual Property Law. Any related breach could even be considered as a criminal offense.

PANAMA

The Panama Labor Code (Article 126) prohibits an employee's disclosure to third parties of any technical, commercial or manufacturing of goods' secrets known due to his labor as well as any administrative matters.

Furthermore, employees are prohibited from working for another employer during vacation, medical disability leave or remunerated licenses periods (Labor Code, Article 126).

PERU

Civil Code (Book VI: Obligations and Book VII: Sources of Obligations) and the Political Constitution of Peru.

UNITED STATES

Whether a non-compete agreement is legally enforceable will be determined by state law. Generally, the law of the state where the employee is located will apply. The majority of U.S. states recognize and enforce various forms of non-compete agreements. A few states, such as California and Colorado, totally ban or prohibit such agreements except in limited circumstances.

VENEZUELA

Under Venezuelan Labor Law an employer's business information cannot be disclosed by employees, and the disclosure of the manufacturing processes or trade secrets is considered as a valid cause for dismissal.

In addition, during employment and up to 6 months after termination employees cannot engage in negotiations that may negatively affect the employer or that may involve any conflicts of interest.

Moreover, under Venezuelan Labor Law, confidentiality is considered implicit in employment contracts.

ARGENTINA

Once a labor contract is finalized the employer cannot prohibit an employee to work with a competitor. To impose a non-compete agreement after the labor contract has ended would collide with a constitutional right that grants the liberty of work. Therefore, a non-compete agreement can only be enforceable if it is:

- i) limited in time, and
- ii) includes compensation for the employee's loss of opportunity.

BRAZIL

There is no statutory requirement, but court precedents indicate that the following are necessary for a valid non-compete agreement:

- (i) compensation
- (ii) term of no more than 12 months, and
- (iii) the individual must be allowed to take on another job in a noncompeting company.

COLOMBIA

Non-compete agreements are prohibited in Colombian legislation in all circumstances.

MEXICO

The Mexican Supreme Court of Justice has ruled that non-compete agreements may be admissible provided:

- (i) they are limited in time and geographical scope, and
- (ii) monetary consideration is paid in exchange.

Confidentiality, intellectual property and assignment of inventions agreements are fully enforceable without having to comply with any specific requirements for validity.

PANAMA

Non-compete and confidentiality clauses must be included in a labor contract to ensure validity.

PERU

For a non-compete agreement to be recognized the agreement:

- i) must be essential for the protection of the legitimate interests of the company
- ii) be limited in time (usually no more than two years) and geographic scope, and
- iii) include a reasonable economic compensation (to be paid after completion or termination of the employment contract).

UNITED STATES

To be legally valid, a non-compete agreement must:

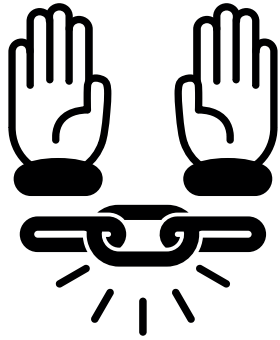
- i) be supported by consideration
- ii) protect the employer's legitimate business interests or trade secrets, and
- iii) be reasonable in time and geographic scope.

VENEZUELA

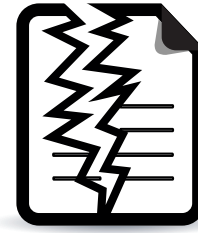
According to the Labor Law Regulation, in order for restrictive covenants to be enforceable:

- (i) they should be intended to protect a legitimate employer interest, taking into account employee's responsibilities, relationships with customers, and knowledge of trade or industrial secrets
- (ii) they should be included as a specific clause in the employment contract or in a separate written agreement at the commencement of employment
- (iii) they should provide for an additional compensation in favor of the employee, during the length of time that the non-compete clause is in effect (post-termination).

Enforceability



How employees can escape the agreement



ARGENTINA

Non-compete provisions may be enforceable in all sectors as long as the requirements for validity are met. If an employee agrees to enter into a non-compete arrangement, then the agreement would be fully enforceable as a matter of law.

BRAZIL

Enforcement is under the jurisdiction of labor courts, as it is considered an employee-friendly environment. To date, there have been some restraining orders, but not many. The typical remedy is compensation (forfeiture of compensation plus fines, if preset).

COLOMBIA

Exclusivity can only be enforced during the employment relationship.

MEXICO

Non-compete provisions may be enforceable in all sectors as long as the requirements for validity are met. If an employee agrees to enter into a non-compete arrangement, then the agreement would be fully enforceable as a matter of law.

PANAMA

Non-compete clauses could be enforceable before the civil and criminal jurisdictions. However, the success of such kind of proceedings will depend on the evidence filed.

PERU

Non-compete agreements can be recognized in all sectors and questions of enforceability will be brought before Peru's Civil Court.

UNITED STATES

Non-competes are more likely to be upheld if the geographic scope is smaller, the duration is two years or less, and the type of limited activity is narrower (e.g., sales position only, versus working for a competitor in any capacity).

They are also more likely to be upheld if the employee is only prohibited from soliciting the employer's established customers.

VENEZUELA

Restrictive covenants are enforceable in all sectors.

ARGENTINA

Confidential information is protected even in absence of a non-compete agreement. An employer's Intellectual property, including trade and other secrets, are protected by law and should not be disclosed by current or former employees.

For an employee to avoid complying with a non-compete agreement he must receive an authorization from the employer.

BRAZIL

It depends on the practical circumstances, but it is possible for an employee to escape the agreement:

- i) by arguing invalid consent due to moral/ economic constraint
- ii) by rejecting or returning the compensation and sometimes paying-off the fine, or
- (iii) by arguing the covenant is so restrictive that the employee would either have to begin in a new profession or refrain from working at all.

COLOMBIA

It is not possible to stop an employee from working for a competitor after termination of the employment relationship via a restrictive covenant. Thus, any document purporting to do this, including those not governed by Colombian labor law, but purporting to be effective in Colombia, will be ineffective.

Such restrictions may be considered to infringe, or at least to threaten infringement, of the legal and constitutional rights of individuals, enshrined in Colombia's Political Constitution.

MEXICO

Any given employee may choose not to accept the non-compete arrangement (consideration in exchange for not competing) and would therefore not be obliged to comply given the Constitutional provision of freedom of labor.

Also, if an employee enters into a non-compete arrangement and no consideration is paid in exchange, then the arrangement would not be enforceable and the employee will be completely off the hook.

PANAMA

If the non-compete agreement is in a written labor contract there are no circumstances for the employee to escape it.

PERU

Non-compete agreements are not enforceable, after the termination of the employment relationship, unless the employer pays the employee consideration.

UNITED STATES

Employers should make sure all non-compete agreements are carefully drafted to ensure they comply with all legal requirements.

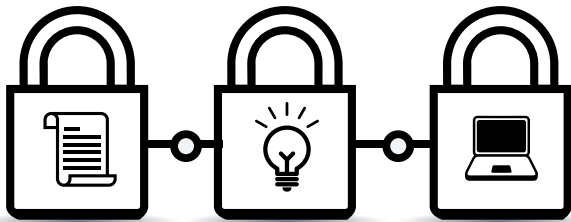
Employers should also ensure they do not breach the agreement. If the non-compete is part of the employment agreement rather than a separate agreement, the contract and the non-compete clause may be void if any part of the employment agreement is breached, such as compensation, work hours or benefit promises.

VENEZUELA

An employee can only escape a non-compete agreement/clause where the employer does not comply with the validity requirements set by law.

Other methods for protecting property

(In jurisdictions where non-competes are invalid)



Top tips for employers



COLOMBIA

Regarding trade secrets and confidential information, the non-disclosure of confidential information is a legal obligation provided by Colombian law. It applies to all employees, regardless of their level or seniority. Thus, every employee must observe and strictly maintain the confidentiality of any information provided during the employment relationship, in particular, information that has been classified by the organization as a trade secret.

Employers often include an express term in the employment contract specifying the type of information that it will treat as confidential and that the employer owns all confidential information. The aim of this is to protect information obtained by employees during and after the employment relationship has been terminated.

Furthermore, the employer can incorporate into the employment contract a clause stating that, upon termination of the employment agreement, the employee will not retain or release to third parties any documents or other matters that are confidential to the employer, but will return them to the employer. The clause can either be operable for a specific period after termination, or it may last indefinitely. The obligation may be formalized in a non-disclosure agreement containing penalties and indemnities for breach of its terms.

As noted above, all labor obligations apply to all employees regardless of rank. However it should be noted that managers have a special duty of confidentiality and loyalty and must not disclose privileged information.

Moreover, another form by which companies may protect their property is through an exclusivity clause, whereby the employee agrees not to take part in any other working activity during the employment without the express, written consent of the employer. This kind of restriction applies, for example, to working in business activities that compete with those of the company, or acting as a consultant to any business engaged in the same line of business as the company.

UNITED STATES

Even in California, where non-compete agreements are invalidated by statute except in very limited circumstances, employers can use nonsolicitation agreements and nondisclosure agreements to protect their trade secrets, client lists and employees when an employee leaves.

ARGENTINA

Employers should have:

i) non-compete and confidentiality information policies in place. Employees should sign any agreements jointly with the labor contract.

ii) if a mutual agreement is signed after the employee leaves the company, it is a good idea to introduce two sections: one reaffirming the confidentiality obligations and another one with a non-compete restriction.

BRAZIL

First, if at all possible try to put the non-compete covenant in the job offer, rather than in the employment agreement, because it makes it more difficult if not impossible for the employee to argue moral/economic constraint.

Second, don't be greedy: balanced and moderate covenants are more likely to be upheld in court, while too rigid and restrictive covenants are likely to be overruled.

COLOMBIA

Recommendations for employers when defining an employment agreement may be the following:

i) establish non-disclosure of confidential information clauses, and

ii) establish exclusivity clauses during the employment; agree with the employee on a paid leave to avoid competition for a specified period.

MEXICO

Pay special attention when drafting non-compete agreements in order to avoid undesired enforceability concerns.

Document the arrangement by executing an agreement of a civil, rather than a labor nature, at the end of the employment relationship, whereby the employer and employee agree that the employee may not render his/her services during a determined period of time, in a certain jurisdiction and payment is provided in exchange.

PANAMA

Include a non-compete clause in the labor contract depending on the importance and activity performed by the employee. Include the requirement of indemnification in case of violation of a non-compete or confidentiality agreements.

PERU

Employers should reiterate an ex-employee's non-compete obligations shortly after the labor relationship ends; a simple letter to remind the ex-employee of their obligations and compensation will suffice.

Non-compete agreements should be written in clear language that all employees of the company can understand.

Remember that to enforce obligations they must be reasonable, legal and physically possible.

UNITED STATES

Have custom-made agreements tailored to each state's law, and to the particular employee who will be asked to sign the agreement.

Narrowly tailor the agreement and avoid overly broad or unreasonable restrictions.

Determine which positions require non-compete agreements.

Remind employees of their non-compete agreements annually during their performance review.

Conduct an exit interview when employee leaves the company, collect all confidential and proprietary information, remind the employee of the restrictions contained in their non-compete agreement and provide them a copy.

If you discover that a former employee is breaching a non-compete agreement, act quickly. Investigate and gather evidence. Send a "cease and desist" letter.

VENEZUELA

Include non-compete clauses when initially negotiating employment contracts with employees.



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