

NON COMPETITION COVENANTS



Non-Competition Covenants (NCC), also often referred to as Covenant Not To Compete (CNC), are a basic staple of many standard employment agreements. Their aim is to prevent employees from leaving and going to work for competitors (or starting up a competing business) where they may reveal, steal, or exploit confidential trade secrets and know-how in addition to luring away clients and other important professionals for the business in the process.

However, despite a signed and quite straight forward black and white agreement – (former) employees continue to challenge their (former) employers on this front. The blame though is not always with the employee ... there are also companies which try to lure valuable employees away in order to gain a competitive advantage. In such instances they will work to find ways to wriggle their new hires out of any restrictions put on them by their former employers. Moreover, employees are frequently transferred abroad in the globalized market and the NCC may not be enforceable in the destination country, making the protection of the employer's legitimate business interests more complex and difficult.

How can a company truly protect its legitimate business interests
if the rules are flouted by both employees and competitors ?

Find out more on the following pages...



Sonia Cortés



IN OUR LANGUAGE:

cláusula de no competencia
cláusula de no competencia postcontractual.

NON-COMPETE CLAUSES ARE REGULATED BY:

Governed by article 21.1 of the Workers Statute. See also Case Law.

TIME RESTRICTIONS?

The law provides a maximum of two-years for qualified workers and a six-months non-qualified workers.

GEOGRAPHICAL RESTRICTIONS?

There are no geographical restrictions. However the case law shows that clauses should have geographical restrictions to be reasonable and proportional to the scope of the company and the job position. The geographical scope should be limited to the areas where the business operates since the company has no business interest in restricting competition in areas where it does not operate, unless it is preparing the launching of sales.

MUST THE NCC BE PAID AND IF SO IS THERE ANY RULE FIXING THE CONSIDERATION?

The validity of the NCC is subject to an adequate consideration. However, the law gives no indication of what “adequate” is. In general terms, 30-50% of the employee’s annual base salary should be acceptable. The consideration may be paid during the employment relationship, when the contract has come to an end or during the restricted term. The consideration may be paid as a lump-sum or on instalments.

DIFFERENT REGULATIONS FOR DIFFERENT PROFESSIONS?

No, time restrictions may vary depending on the job position but not on the profession. The maximum term for qualified workers is two years; the maximum term for non-qualified workers is six-month.

DO EMPLOYERS HAVE TO PROVIDE EVIDENCE TO INCLUDE AN NCC IN AN EMPLOYMENT CONTRACT?

The law prescribes two requirements that must be fulfilled by the employer: (i) an effective business interest and (ii) the payment of an adequate amount for consideration.

These requirements will be revised by the Courts in the event that the NCC is challenged and the lack of any of these requirements is argued, as is often the case.

OTHER IMPORTANT FACTS ABOUT NON-COMPETITION AGREEMENTS IN OUR COUNTRY

It should be noted that in the event of breach of contract by the employee, the Spanish legal system does not provide for strict enforcement through an injunction preventing the employee from competing, but rather the former employer can only expect to receive compensation for damages.

Another difficulty is evidencing the employee’s breach. Indeed, the employee may find ways to go around the prohibition by competing through companies set up by relatives or friends.

Therefore, in order to discourage executives from breaching this obligation and given the difficulties to enforce these provisions, it is common practice to provide a penalty clause. The penalty should not be unreasonably high, given that courts have the authority to moderate the clause or even declare the agreement null and void for being abusive (e.g. 50% of the consideration paid for NCC).

The agreement should be provided in writing and the employee should clearly accept such clause.

Finally, it is important to highlight that Courts usually apply a very strict interpretation as to whether the employee has infringed the restriction bearing in mind individuals’ constitutional right to work.



Jessica Corsi



UK

IN OUR LANGUAGE:

Restrictive covenants & Post-termination restrictions

These can be subdivided into non-compete, non-solicitation (of customers and employees) and non-dealing provisions.

Alternatives: Garden leave – enabling an employer to suspend an employee from their duties during employment, generally during their notice period, in order to keep them out of the market, away from confidential information, contacts and competitors

NON-COMPETE CLAUSES ARE REGULATED BY:

There is no legislation governing NCCs. The common law determines whether they are enforceable. There can never be certainty as to enforceability. The employer will need to obtain a court order, which is granted at the discretion of the court by reference to what it regards as reasonable in the circumstances.

TIME RESTRICTIONS?

No, but the restriction must last no longer than is reasonably necessary to protect a legitimate interest of the employer, such as its trade secrets or trade connections. This involves considering how long it will be before competitive activities by the individual represent less than a material threat to the employer's legitimate interest.

In addition, where the employer has both a garden leave clause and NCCs, it is wise for time spent on garden leave (i.e. time spent at home, on pay, while the contractual notice period is used up) to be set off against the duration of the NCCs.

GEOGRAPHICAL RESTRICTIONS?

No, but again the restriction must be no wider than is reasonably necessary to protect a legitimate interest of the employer, such as its trade secrets or trade connections. Of relevance here is whether there is an actual relationship between the interest to be protected and any specific geographical area, and the area of the employees' activities.

MUST THE NCC BE PAID AND IF SO IS THERE ANY RULE FIXING THE CONSIDERATION?

It is not necessary for an employee to be paid for entering into a NCC. Although valuable consideration is necessary for the agreement to be binding, where the NCC is contained in the employment contract, such consideration will generally be provided by the employer paying the employee's salary and benefits.

It is not necessary for the employee to be paid during the period of the restraint (and it would be unusual if this were the case). The exception to this is during garden leave. Here the employment contract continues whilst the employee is on garden leave and the employee must be paid their full salary and benefits as though they were working.

DIFFERENT REGULATIONS FOR DIFFERENT PROFESSIONS?

The rules are the same for all professions.

DO EMPLOYERS HAVE TO PROVIDE EVIDENCE TO INCLUDE AN NCC IN AN EMPLOYMENT CONTRACT?

Employers will only be able to enforce NCCs if they have a legitimate business interest which they are seeking to protect and the restriction is no wider than reasonably necessary to protect that interest.

OTHER IMPORTANT FACTS ABOUT NON-COMPETITION AGREEMENTS IN OUR COUNTRY

Courts will not rewrite restrictions which are too broad but they may delete words which render a provision too wide if this then leaves behind a valid and enforceable provision remaining.

Employers cannot enforce NCCs if they have breached the employment contract. They therefore need to be careful to ensure that dismissals are carried out in accordance with the terms of the employment contract.

The reasonableness of NCCs is assessed at the time they are entered into by reference to the employee's job at that time. If an NCC is unreasonable at the time it is entered into, it cannot be saved simply because a subsequent change of circumstances, such as a promotion, means that it would have been reasonable at that later date. Employers therefore need to update restrictive covenants on promotion and to review NCCs regularly to ensure they continue to be likely to be enforceable in case of need.



Anja Mengel



GERMANY

IN OUR LANGUAGE:

(Nachvertragliches) Wettbewerbsverbot

NON-COMPETE CLAUSES ARE REGULATED BY:

These clauses are governed under German Law in the German Commercial Code (Handelsgesetzbuch - HGB), but are also regulated by Case Law.

Post-Contractual Covenant Not to Compete: Sections 74 to 75a of the German Commercial Code (HGB)

TIME RESTRICTIONS?

The NCC must not exceed a period of two years (section 74a para (1) of the German Commercial Code) following the end of the employment relationship.

GEOGRAPHICAL RESTRICTIONS?

The law provides for no geographical restrictions. It varies on a case by case basis whether a wide geographical scope will be upheld by the courts. It depends on the justified commercial interests of the employer and whether it may unreasonably prevent the employee in his or her professional advancement.

MUST THE NCC BE PAID AND IF SO IS THERE ANY RULE FIXING THE CONSIDERATION ?

The NCC is only enforceable if the employer commits to pay compensation for the duration of the NCC in the amount of at least one-half of all contractual benefits the employee last received (section 74 para (2) of the German Commercial Code.

DIFFERENT REGULATIONS FOR DIFFERENT PROFESSIONS?

No.

However, there are slightly different rules for employees and managers (managing directors / board members of companies).

DO EMPLOYERS HAVE TO PROVIDE EVIDENCE TO INCLUDE AN NCC IN AN EMPLOYMENT CONTRACT?

Yes, the NCC must be necessary to safeguard a justified commercial interest of the employer. However, it is not necessary to declare the interests of the employer in writing.

OTHER IMPORTANT FACTS ABOUT NON-COMPETITION AGREEMENTS IN OUR COUNTRY

The NCC is only valid if it is concluded in writing. In the event of litigation, the employer is obliged to prove that the employee received the document with the NCC in one (whole) document and with the original signature of the CEO/managing director of the employers company.



Sébastien Le Coeur



FRANCE

IN OUR LANGUAGE:

Clause de non-concurrence

NON-COMPETE CLAUSES ARE REGULATED BY:

Case law

In some sectors, the collective agreement

TIME RESTRICTIONS?:

The time restriction must be proportionate to the protection of the company's interests

Usually, two years is considered a maximum

1 year is the average

GEOGRAPHICAL RESTRICTIONS?

In practice, it depends on the employee's role:

National role = national restriction

International role = international restriction

MUST THE NCC BE PAID AND IF SO IS THERE ANY RULE FIXING THE CONSIDERATION ?

Yes, it must be paid

If not provided for under the collective agreement, the compensation must be reasonable (eg 30 % of base salary) and, in any case, proportionate to the restriction upon the employee's freedom to work.

DIFFERENT REGULATIONS FOR DIFFERENT PROFESSIONS?

No

DO EMPLOYERS HAVE TO PROVIDE EVIDENCE TO INCLUDE AN NCC IN AN EMPLOYMENT CONTRACT?

Yes, the employer must have a legitimate interest to protect its business. Except for low-level jobs, NCC are generally considered legitimate.

OTHER IMPORTANT FACTS ABOUT NON-COMPETITION AGREEMENTS IN OUR COUNTRY

NCC must be strictly abided with by both parties:

- The employer must pay the NCC compensation monthly; if not, the NCC is not enforceable
- The NCC usually provides that the employer may waive it when the employee leaves, in order not to pay the NC compensation
- The employee cannot work for another employer in breach of the NCC



Filip Corvelyn



BELGIUM

IN OUR LANGUAGE:

Niet concurrentievergoedin (more specifically 'Non Compete Clause').

Restrictive Covenants cover a wider range of post-employment obligations (confidentiality, non-solicitation, disloyal competition).

NON-COMPETE CLAUSES ARE REGULATED BY:

The Employment Contract Act of 3 July 1987.

TIME RESTRICTIONS?:

Maximum validity = 12 months.

Only in exceptional circumstances, a longer term can be provided.

GEOGRAPHICAL RESTRICTIONS?

No. It must concern:

- > Similar activities
- > For a competitor
- > Within the territory of Belgium – For sales people: limited the actual sales territory
- > In general only applicable as of a certain salary level: 66K annual salary

DIFFERENT REGULATIONS FOR DIFFERENT PROFESSIONS?

There are mainly 3 types:

1. Normal employees: only valid as of a certain salary level: 66K annual salary
2. Sales representatives
3. Executives that have been active internationally or that had access to specific company information

DO EMPLOYERS HAVE TO PROVIDE EVIDENCE TO INCLUDE AN NCC IN AN EMPLOYMENT CONTRACT?

No

OTHER IMPORTANT FACTS ABOUT NON-COMPETITION AGREEMENTS IN OUR COUNTRY

NCC's usually require the employer to pay a NCC compensation, usually limited to 50% of the annual salary for the whole term of the NCC. Only for sales reps this does not apply.

NCC's traditionally only apply when the employee leaves. Not when the employer terminates, unless for serious cause.

NCC's can be waived. Waiver should occur within 15 days following the end of the employment relationship. Best practice is to confirm such waiver in writing.



Marc Vogel



IN OUR LANGUAGE:

non-concurrentiebeding
relatiebeding

NON-COMPETE CLAUSES ARE REGULATED BY:

These clauses are governed by Dutch law and included in the chapter on employment contracts (Book 7 article 610 and following Dutch Civil Code; generally referred to as article 7:610 BW)

TIME RESTRICTIONS?

The law provides no time restrictions.
In practice only in specific circumstances a period in excess of 1 year is accepted by the Courts.

GEOGRAPHICAL RESTRICTIONS?

The law provides no geographical restrictions. Whether a wide geographical scope will uphold in Court depends on the interests at stake.

MUST THE NCC BE PAID AND IF SO IS THERE ANY RULE FIXING THE CONSIDERATION?

As such there is no such obligation. It can be agreed however and it may be that the Court will uphold a NCC but imposes payment for a period.

DIFFERENT REGULATIONS FOR DIFFERENT PROFESSIONS?

No.
The Court may in weighing parties' interests take a profession or type of job into account. E.g. a non-compete clauses may be more easily affected for administrative than for commercial positions.

DO EMPLOYERS HAVE TO PROVIDE EVIDENCE TO INCLUDE AN NCC IN AN EMPLOYMENT CONTRACT?

The law prescribes it only to be valid if it has been accepted in writing.

OTHER IMPORTANT FACTS ABOUT NON-COMPETITION AGREEMENTS IN OUR COUNTRY

As per 1 January 2015 NCC's are only valid for indefinite term employment contracts. For definite term contracts these may be agreed but only if there is a serious (exceptional) reason for doing so with the requirement to motivate in writing.

Please note that a relationship clause is considered as a NCC under the law.

Please note that the law does not provide for specific rules concerning NCC's for independent contractors.



Sergio Barozzi



IN OUR LANGUAGE:

Patto di non concorrenza

NON-COMPETE CLAUSES ARE REGULATED BY:

Governed by article 2125, 2596, and 1751 bis of the Civil Code. See also Case Law.

TIME RESTRICTIONS?

The law provides a maximum of 3 years for employees and 5 years for executives (i.e. top level managers –Dirigenti)

GEOGRAPHICAL RESTRICTIONS?

There are no geographical restrictions. However the law requires that they are reasonable in order not to extremely compromise the capability of the employee to find another job.

(i.e. the geographical area where the employee renders his work activity)

MUST THE NCC BE PAID AND IF SO IS THERE ANY RULE FIXING THE CONSIDERATION ?

The validity of the NCC is subject to an adequate compensation. However, the law gives no indication of what “adequate” is. The consideration must not be merely symbolic, but must take into account:

- the sacrifice imposed on the employee (in terms of duration, geographical limitation of the NCC);
- employee’s salary;
- the professional level achieved by the employee.

It may be considered a reasonable compensation a sum between 15% and 35 % of the annual gross salary, depending on the extension of the restrictive covenant. The consideration may be paid during the employment relationship or at the end of the employment relationship in a lump-sum or in instalments.

DIFFERENT REGULATIONS FOR DIFFERENT PROFESSIONS?

No, there are not.

NCC may vary depending on the job position and on the interests that the Company may have to protect its know-how or confidential information which the employee could have acquired during the employment relationship.

DO EMPLOYERS HAVE TO PROVIDE EVIDENCE TO INCLUDE AN NCC IN AN EMPLOYMENT CONTRACT?

The law requires that both parties agree NCC in writing. In the NCC it must be specified:

- Geographical limitation (i.e. city, region, country) and also
- Duties performed by the employee related to the effective commercial interest of the Company to protect
- Time restriction
- Consideration

All the above mentioned elements must be reasonable and proportional: for example, wider are the activities that the employee cannot render in favor of a competitor, less wide should be the areas in which he cannot work, or, alternatively, higher is the compensation, longer can be the duration.

These requirements will be revised by the Courts in the event that the NCC is challenged and the lack of any of these requirements is argued, as is often the case.

OTHER IMPORTANT FACTS ABOUT NON-COMPETITION AGREEMENTS IN OUR COUNTRY

It is common practice to add in the NCC a penalty clause in the event the employee will decide to work for a competitor, breaching the no-compete agreement. Furthermore, in the NCC it is provided for a clause in which the employee undertakes to inform in writing the Company about any new job.

Should the employee breach the NCC, the employer may apply for the following remedies:

- To ask for the payment back of the amount of consideration already paid;
- To obtain an injunction from the court to forbid the employee from continuing to carry out the business in favor of a competitor;
- To obtain a compensation for damages.

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