Anti-Compete Agreements

Post-Employment Non-Compete Agreements in Germany: What You Need to Know

In Germany, employees are generally not allowed to compete with their employer during the course of their employment due to the duty of loyalty. However, once the employment ends, employees are usually free to pursue opportunities with competitors. To protect their interests, many companies introduce **post-employment non-compete clauses** (nachvertragliches Wettbewerbsverbot). These agreements are designed to prevent former employees from using sensitive business information to benefit a competitor after leaving the company.

In return for agreeing to a non-compete clause, employees are entitled to receive **compensation**, commonly referred to as „Karenzentschädigung," to offset the financial burden of the restrictions. Without this compensation, the non-compete agreement is invalid. In this post, we will discuss the key legal requirements for post-employment non-compete clauses, explore what makes them enforceable, and provide tips for navigating these agreements when your employment ends.



Key Takeaways:

- **The Duty of Loyalty and Non-Compete During Employment**
- **After Employment: Can You Join a Competitor?**
- **What is a Post-Contractual Non-Compete Agreement?**
- **Special Rules for Managing Directors**
- **When is a Non-Compete Agreement Invalid?**
- **Navigating Non-Compete Agreements**
- **Non-Solicitation Clauses**

The Duty of Loyalty and Non-Compete During Employment

While employed, workers are bound by the duty of loyalty (Treuepflicht), which generally prohibits them from taking actions that could compete with or harm their employer's business interests. This duty applies to all employees, not just senior staff or executives. Violation of this duty, such as working for or investing in a competing company, can lead to disciplinary action or even termination.

After Employment: Can You Join a Competitor?

Once an employee leaves a company, they are generally free to pursue new employment with a competitor or even start a competing business. Poaching former clients or colleagues is also typically not prohibited. However, many companies use **post-contractual non-compete agreements** to limit this freedom, aiming to protect their business from the knowledge and relationships employees may take with them.

What is a Post-Contractual Non-Compete Agreement?

A **post-contractual non-compete agreement** is a legal arrangement that prevents an employee from engaging in competitive activities after leaving the company. These agreements are highly regulated by German law, specifically under sections **75ff. HGB** and **§ 110 GewO**. To ensure they are valid, these agreements must meet strict requirements:

- **Legitimate Business Interest**: Employers must demonstrate a valid business reason for the restriction, such as protecting trade secrets or important client relationships.
- **Reasonable Limits**: The restrictions placed on the employee must be reasonable in terms of geography, duration, and scope of activities.
- **Written Agreement**: A non-compete clause must be explicitly outlined in writing to be enforceable.
- **Maximum Duration**: The agreement can last no longer than two years after the employee leaves.
- **Compensation for the Restriction**: Employees must receive financial compensation for the limitations imposed by the non-compete.

Special Rules for Managing Directors

For **managing directors (Geschäftsführer)**, the rules regarding non-compete clauses differ slightly. These agreements are handled by civil courts rather than labor courts. The **Federal Court of Justice (BGH)** governs non-compete agreements for managing directors, and the guidelines for enforcement are different from those for regular employees.

When is a Non-Compete Agreement Invalid?

An employee may wonder if they can bypass a non-compete agreement when offered a new job with a competitor. Since a non-compete can last up to two years after leaving a company, it can be a significant hurdle to accepting a new opportunity. In such cases, the employee may

attempt to negotiate an early end to the non-compete agreement. If that is not possible, they need to assess the validity of the agreement. A non-compete may be invalid if:

No Compensation Provided: If the non-compete clause does not include compensation, it is deemed invalid. According to the **Federal Labor Court (BAG)**, an agreement without financial compensation cannot be enforced, even if the contract has a severability clause. The compensation must be at least **50% of the employee's final salary**.

Unreasonable Conditions: Even with compensation, the non-compete may be invalid if it exceeds reasonable limits in terms of time, scope, or geography.

Navigating Non-Compete Agreements

When ending your employment, it's crucial to review any existing **non-compete clauses** and ensure they comply with legal requirements. If you are subject to such an agreement, verify whether it includes compensation, reasonable restrictions, and a maximum duration. If you're uncertain about the validity or impact of a non-compete agreement, consulting a legal professional can help you avoid future complications and ensure a smooth transition.

Non-Solicitation Clauses in German Employment Law: What You Need to Know

A **Non-Solicitation Clause** (also called a „non-poaching" clause) is a common provision in employment contracts in Germany. This clause prevents employees from soliciting clients, customers, or other employees of their former employer during or after their employment. While such clauses are legal, they must comply with certain regulations to be enforceable.

Here's a breakdown of how non-solicitation clauses are treated under German employment law:

Legality of Non-Solicitation Clauses in Germany

In general, **non-solicitation clauses** are **legal** in Germany, but they must comply with the principles of fairness and reasonableness outlined in the **German Civil Code (BGB)**, specifically **Section 307**, which prevents clauses that unreasonably disadvantage the employee.

Requirements for Validity

To ensure a non-solicitation clause is legally binding, it must meet the following criteria:

- **Reasonableness**: The clause should not overly restrict the employee's freedom to work elsewhere.

- **Duration**: Non-solicitation clauses that last longer than **two years** after the termination of employment may be considered unreasonable.
- **Scope**: The clause should clearly define the **specific clients or business relationships** that are protected, ensuring it is not overly broad.

Duration and Scope of Non-Solicitation Clauses

The validity of a **non-solicitation agreement** largely depends on its duration and the scope of restrictions imposed:

- **Time Limit**: Typically, a non-solicitation clause should not last for more than **two years** after the end of employment. Longer periods could be deemed excessive by German courts.
- **Scope**: It should only apply to clients or business partners the employee has worked with during their employment. Restricting solicitation to a reasonable and specific group ensures the clause is not overly restrictive.

Impact on Professional Freedom

A **non-solicitation clause** must not unreasonably limit an employee's **freedom to seek new employment**. If a clause is overly broad or imposes significant limitations on future job prospects, it may be deemed **invalid** by the courts. The clause should be tailored to **protect the employer's legitimate business interests** without unduly interfering with the employee's career.

Difference Between Non-Solicitation and Non-Compete Clauses

It's essential to distinguish between a **non-solicitation clause** and a **non-compete clause**:

- A **Non-Compete Clause** prevents the employee from working for a competing business after their employment ends.
- A **Non-Solicitation Clause** specifically prevents employees from soliciting the company's clients or employees after departure.
  While a **non-compete clause** often requires **compensation**, a **non-solicitation clause** typically does not. However, exceptions may apply depending on the specifics of the contract.

Enforcement and Consequences of Breach

If an employee violates a non-solicitation clause, the employer may:

- **File for an injunction** to stop the employee from soliciting clients or employees.
- **Claim damages** for any losses incurred as a result of the breach.
  If the clause is found to be unenforceable due to unreasonable terms, the employer may not be entitled to any damages or legal remedies.

Conclusion: Key Takeaways

Non-solicitation clauses are enforceable in Germany, provided they meet legal standards for reasonableness and fairness. To be valid, these clauses must:

- Be limited in duration (usually up to two years after employment ends),
- Specifically define the restricted business relationships or clients, and
- Not unfairly limit the employee's future employment opportunities.
  Ensuring that your non-solicitation agreements are reasonable and properly drafted will help protect your business interests while adhering to German employment law.

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