January 2016

Employee Business Protection

Switzerland

Summary

Under Swiss law, employers are very well protected against competitive activities and the unintended transfer of business secrets during employment. However, the statutory business protection after termination of employment is weak. Without adequate contractual protection, employers bear the risk that former employees, in particular senior staff and management, will compete against them. We therefore strongly recommend entering into enforceable clauses with relevant employees to safeguard against such risks.

Restrictions during employment

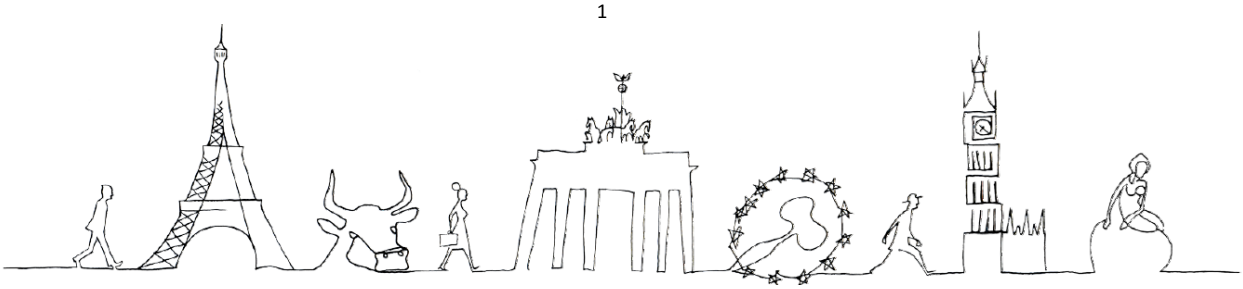
During employment, employees are subject to the statutory duty of care and loyalty. Accordingly, the employee must not perform paid work for third parties to the extent such work violates the duty of loyalty and, in particular, to the extent it competes with their employer. Furthermore, the employee must not make use of or inform others of any facts to be kept secret, such as, in particular, manufacturing or business secrets that come to their knowledge while in the employer's service.

The employer is free to set higher requirements for paid and/or unpaid work or services (also: pro bono services that limit the employee's amount of work, such as e.g. political mandates) in the individual employment agreement. Such higher requirements for members of the management and/or senior staff should be included in employment contracts.

There is no statutory provision requiring further restrictions to be compensated with additional compensation. Breaches of such restrictions are usually sanctioned by dismissal (depending on the circumstances this could be dismissal without notice) and/or indemnification or (precautionary) court measures.

Post-contractual restrictions

After employment, employees continue to be bound to keep secrets that have come to their knowledge while in the employer's service, to the extent required to safeguard the employer's legitimate interests. There are no further statutory restrictions after termination of the employment relationship.



However, the employer can require the employee to refrain from engaging in any competitive activity after termination of the employment relationship. In particular, the employee can be required to refrain from operating a business on his own account which competes with the employer's business, or from working for or participating in such a business. The following requirements must be met in order for the non-compete to be valid:

- the prohibition must be in written form;
- the prohibition is only binding if the employment relationship gives the employee access to the customers or to manufacturing or business secrets, and if the use of such knowledge could significantly damage the employer;
- the prohibition must not unreasonably impair the employee's economic prospects. Thus, the prohibition must be reasonably limited in terms of place, time (it may exceed three years only under special circumstances), and subject;
- the prohibition must not have expired. The prohibition will be treated as having expired if the employer no longer has a significant interest in its maintenance, the employer terminates the employment without justification, or if the employee terminates the employment for a justified reason for which the employer is responsible.

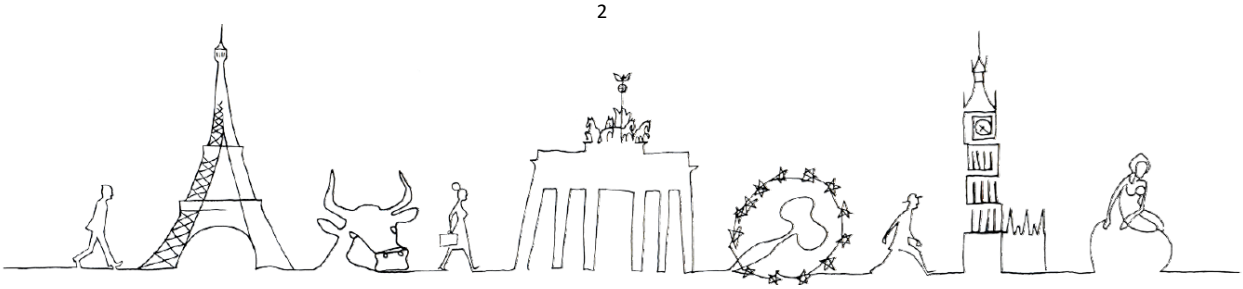
It is necessary to bear in mind that the courts have discretion to limit an excessive prohibition, taking into account all the circumstances, including whether the employee has received a separate sum in respect of the non-compete provision.

The employer may pay the employee an additional sum ("*Karenzenschädigung oder –zahlung*") for the prohibition clause. However, such additional compensation is not a requirement for a valid prohibition clause. The additional compensation can, however, be relevant (inter alia) where a judge has to consider the impairment of the employee's economic interests.

The employee must compensate the employer for damage arising from a breach of the prohibition. Liquidated damages are possible and if nothing to the contrary has been agreed upon, the employee may free himself from the prohibition by payment of this penalty. He will however remain liable for any further damage. If specially agreed in writing the employer may, in addition to the liquidated damages provisions, request the elimination of this situation (namely by way of an injunction), insofar as this is justified by the violated or threatened interests of the employer and by the behaviour of the employee.

Non-solicitation

The prohibition on the solicitation of customers and clients is subject to the same requirements and restrictions as the non-compete prohibition mentioned above. However, as a non-solicitation clause does not prohibit the employee from being involved in a competitive business, and is limited to



existing customers and clients only, such a clause is less harmful to an employee's ability to work and earn a living. Thus, the risk that such a clause will be limited by the courts is lower.

Non-poaching

Poaching of existing employees is not prohibited by statute and is not subject to the restrictions which apply to non-compete clauses. However, it is possible and recommended to prohibit the potential poaching of staff in the individual employment agreement, in particular with senior staff and management. On the other hand, please note that the enforcement of such clauses is very limited (due to the importance of freedom of contract, primarily for the poached staff).

This material is for general information only and is not intended to provide legal advice.

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