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Don’t let yourself be crippled by your non-compete clause

It’s definitely worth looking at the one you may have in your employment contract to see if it can even be enforced.

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Jeanette Tan

Noncompete clauses in your employment contract aren't necessarily as intimidating as your employer might want them to look. PHOTO: PIXABAY

Experts there project a US$300 billion uplift in annual wages after the rule is passed, too.

In a statement by the FTC announcing this, its director Elizabeth Wilkins notes that employers’ use of non-competes to restrict the mobility of their workers “significantly suppresses workers’ wages – even for those not subject to non-competes, or subject to non-competes that are unenforceable under state law”.

What is a non-compete clause, exactly, and how do we understand it in our context?

In the most general terms, a non-compete clause would say that if you were to leave a company, you cannot join a competitor for a specified period, supposedly to protect the first company’s interests.

If you ignore it and do so anyway, the first company could take you to court for compensation – usually a payment.

But not everything that is written into an employment contract must necessarily be followed to the letter.

This is because in a lot of cases, plenty of employers here take liberties with putting in overreaching and unreasonable terms that a young, unwitting and probably less experienced and not-legally-trained job-seeker might vaguely glance over (or not even notice) and sign off against without a second thought.

Until, of course, it comes back to bite them when the inevitable time comes to leave the company for their next opportunity.

In the industries I have worked in, for example, I have personally found, disputed and negotiated to remove year-long non-compete clauses from my contracts which included unclear, arbitrary definitions of what constitutes a competitor, and also heard from peers who have signed off similar-sounding terms.

And so here’s something I learned from employment lawyers here that might be a relief to know in mostly-employer-leaning Singapore: in the area of non-competes, in particular, our courts actually are friendlier to the employee.

“This means that the onus is on the employer to prove that (1) the employer has a legitimate interest to protect and (2) the scope of the clause goes no further than what is necessary to protect that interest,” says Elaine Low, associate director at Peter Low Chambers LLC.

There is also a set of twin criteria for “reasonableness” that has to be established by the employer: whether the clause is reasonable as between the parties, and reasonable in the interest of the public, adds Jonathan Yuen, who is head of commercial litigation, employment & benefits (disputes) at Rajah & Tann.

They’re also typically applicable to more senior executives who play key roles and are privy to more sensitive details and information at a company, RBN Chambers managing director Ramesh Nagaratnam tells me.

“But nowadays, we see such clauses are finding their way into employment contracts of employees who don’t play a vital role in an organisation and consequently are not privy to important details and information. So in a way, such clauses have been overused in the name of caution.”

How can you tell if your non-compete is enforceable or not?

Low offers some basic guidance:

employment.

Some signals I've found that your clause is probably unenforceable include:

- If you have restrictions even though your role is a low-level one;
- If it applies globally, or for a ridiculous period (like five years or more);
- If you are not going to be able to influence clients to bring their business to your new company; and
- If the purpose of the non-compete is to protect proprietary information but your contract also already has a confidentiality clause.

Might we see Singapore going in a similar direction to the US in the area of non-competes?

Sadly, probably not, according to the employment lawyers I spoke with.

Luo Qinghui, who is deputy head of employment & benefits (disputes) at Rajah & Tann, says: "Even after the ban is ultimately in place, it is likely that Singapore will adopt a 'wait and see' approach to see how the (US) ban will impact relationships between companies and their employees."

That being said, Yuen reminds me that the present approach taken by Singapore's courts already requires employers to initially show that its restrictions are legitimate and reasonable.

If they succeed in doing this, it is only then that the employee has to show why those aren't.

"This case-by-case approach affords judges the opportunity and latitude to take into account the frequent complexities and nuances of employment law disputes; and ensure that fairness prevails," he says.

"This calibrated approach is something that the blunt instrument of an outright blanket ban does not address, and is incapable of performing."

Low suggests a possible glimmer of hope, however.

If US companies with Singapore offices are required to or decide to standardise their employment contracts globally, they may affect our business climate especially if they are large enough to set the trend for the rest of the industry – meaning it becomes industry practice not to have non-competes, compelling companies here to follow suit or risk losing talent to employers who don't have them.

"However, even if this happens, I envision that this process of change will be slow and gradual as it depends largely on market forces rather than legislative change," she adds.

Ultimately, if you're planning to quit your job (and join a potential competitor), and your employment contract has non-compete clauses in it, it would probably be a good idea to lawyer up early, even before hitting send on your resignation email to your bosses.

Get advice on how enforceable the non-compete is, as well as how likely your current employer is to sue you for compensation in your specific circumstances.

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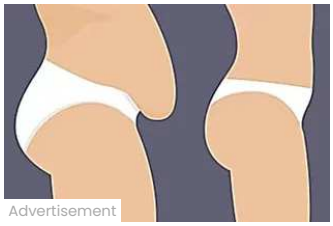

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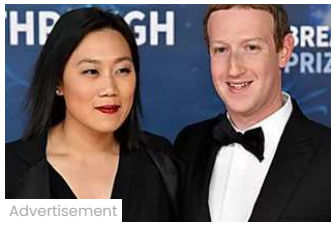

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