

COVID-19 PANDEMIC: NON-COMPETITION AND CONFIDENTIALITY OBLIGATIONS IN EMPLOYMENT AGREEMENTS

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The Covid-19 pandemic has affected the businesses of many companies in unprecedented ways and will forever change the way businesses operate. Employers looking to hire may wish to change the terms in their employment contracts to suit the work transformations that have taken place as a result of the pandemic. In particular, the effectiveness of the terms relating to obligations post-termination should be reconsidered.

In this respect, an important consideration may be the enforceability of non-competition clauses which impose restrictions on former employees. The Singapore Courts have enforced such clauses in some cases, but dismissed similar claims in other cases. The different outcome in each of the cases is due to the fact-sensitive approach taken by the Courts in examining the non-competition clauses and confidentiality clauses. As such, an understanding of the approach adopted by the Singapore Courts on the enforceability of a non-competition clauses in employment agreements will help employers in assessing the post-termination repercussions and risks which they may face when their former employees take on employment or carry out business activities which are in competition with their businesses.

The test adopted by the Courts

Under Singapore law, a non-competition clause is enforceable if the clause:

1. protects legitimate proprietary interests such as trade connection and/or confidential information (where there is no confidentiality clause); and
2. is reasonable in the interests of both the parties and the public.

Reasonableness of the clause would be ascertained at the time it was entered into. The Courts would

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analyse the reasonableness of a non-competition clause with reference to the following:

- **Scope of restricted activities:** The ambit including the industry, type of business, and activity the employee is restricted from engaging in.
- **Geographical scope:** The geographical area in which the employee is restricted from competing in.
- **Temporal scope:** The time period of the restriction on the employee.

Covid-19 and reasonableness of non-competition clauses

Now that the pandemic has paved the way for new and flexible work arrangements, employers may be concerned about the enforceability of non-competition clauses and may wish to review such clauses to conform with the reasonableness requirements.

Geographical scope

The geographical aspect of a non-competition clause was addressed by the High Court in *HT SRL v Wee Shuo Woon* SGHC 96. In that case, the non-competition clause in question had no geographical limit and would apply worldwide. However, the ex-employee was engaged primarily for the employer's business in the Asia-Pacific region only. The High Court was thus of the view that the non-competition clause was far wider than necessary to restrain the employee from affecting the trade connection. The non-competition clause was held not to be enforceable.

With remote working, employees are able to perform their roles without attending at the office premises physically. Post-termination, an employee may relocate to their home country (if they are foreigners) or another country to work for a foreign company. How should employers deal with the employees who attempt to conduct businesses in Singapore remotely that are in direct competition with their former employer? In such circumstances, there will be an issue whether the existing non-competition clauses are sufficient to protect the employer and how the clauses, if found to be valid, can be enforced against a former employee who is no longer in Singapore. The concerns over competing activities being carried on by a former employee are best addressed looking beyond the drafting of the geographical limits of the non-competition clause.

Scope of restricted activities

Non-competition clauses have been found to be unenforceable where there is a blanket prohibition against employees from engaging in business activities in which the employees did not participate. Non-competition clauses which do not distinguish seniority, nature of work or level of access to confidential information and trade connections amongst employees have also been held not to be reasonable and therefore unenforceable.

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Confidentiality Obligations

Employment contracts typically include a confidentiality clause which imposes an obligation of confidentiality on employees during the period of employment and post-termination. The confidentiality clause is a cornerstone in employment contracts as it prohibits an employee from removing and/or using proprietary information and trade secrets which are core to a company's business. The breach of confidentiality clause allows employers to seek an injunction against an employee and make a claim for monetary losses suffered by reason of the former employee's breach of confidentiality.

The implementation of remote working has accelerated digital transformation. As a result, employees have greater ease of access to business and customer information due to the digitization of such data. It is common for employees to use their personal devices, such as personal laptops and mobile devices, to access documents or other forms of confidential information. Consequently, companies may not be able to control their employees' access to information and monitor dealings and interaction with customers as closely as before. It is timely for employers to review their information security systems to ensure that they have a system to protect their proprietary information and keep track of how proprietary or sensitive information was being accessed by employees.

Employers would be concerned with protecting the trade connections of the company and it is common to see contractual restrictions prohibiting employees from using customer information other than for the employer's business and to return all documents pertaining to the customer on termination. Depending on the nature of the information accessed by the employees, employers may stipulate obligations that require employees to provide access to their personal devices and accounts to independent third parties to ensure that confidential information is not improperly retained by the employees.

Conclusion

"n indiscriminate application would suggest that the true purpose of the provision was to restrain competition rather than to protect a legitimate interest of an employer."

(Powerdrive Pte Ltd v Loh Kin Yong Philip and others 3 SLR 399)

It is imperative to remember that there is no one size fits all when it comes to drafting non-competition clauses in order to achieve its intended effect for the protection of the employers' interests.

It is important that employers be able to articulate the interest which they intend to protect through such clauses and to remember that such clauses are not intended to prohibit competition as the Court recognises the need for the former employee to have a livelihood.

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