

iGlobal Strategic Guidance Series 3: Business protection

(2) Post-termination restrictions



Our Strategic Guidance 3(1) “Taking a global view” (on our website) gave an overview of employee business protection issues. This edition looks specifically at post-termination restrictive covenants worldwide.

Protecting your business against the misuse or unfair exploitation by ex-employees of your confidential information, trade connections and relationships could prove vital.

The most common approach is for the key employee to agree at the outset to post-termination non-compete restrictions.

However, most countries place controls on these types of restrictions because of the limit they can put on a person’s right to earn a living.

We provide a high level table of the position in some key jurisdictions.

Types of Restriction

Post-termination restrictions range from the more restrictive provisions such as non-compete clauses to the less controversial such as non-poaching former colleagues.

The main types used internationally are:

- ✓ Non-competes clauses - restrictions on the ex-employee working in similar employment for a competitor or setting up on their own in competition;
- ✓ Non-solicitation clauses – preventing the employee from trying to poach clients, customers or suppliers from their former employer;
- ✓ Non-dealing clauses – stopping the employee from dealing with former clients, customers or suppliers, regardless of who initiated contact;
- ✓ Staff poaching restrictions – preventing an employee from poaching former colleagues.

Strategic Approach

The starting point is to identify what protection your business needs. Which roles in which countries carry business critical knowledge and where are the relationships that need protecting? Do not waste time (or money) on restrictions for those employees who pose no threat. Equally, remember to reassess the threat posed when promoting an employee to a more senior role.

Application of an International Standard?

Once your strategic approach is agreed, it may be tempting for a global business to use, for administrative simplicity, ‘standard post-termination restrictions’ in multiple jurisdictions.

This is not recommended. Failing to account for a wide range of local differences may come at a significant cost. This cost could range from a vital covenant not being enforceable through to having to pay post-termination compensation for a covenant you never really needed and now cannot release.

Local Differences and Similarities

Some countries prohibit post-termination restrictions completely, such as Russia. Others prohibit specific types of restriction. The position can even vary by state, such as in the USA.

In India, for example, clauses preventing ex-employees from inducing employees, suppliers and clients/customers are in principle enforceable (although enforceability is difficult), whereas clauses preventing someone from joining a competitor are completely prohibited (although employers often include them as a deterrent).

Other jurisdictions allow post-termination restrictions only if the employee is financially compensated. Compensation requirements tend to vary considerably (see the table below).

Importantly, some of these jurisdictions prohibit the waiver of the restriction by the employer so the compensation remains payable even if the restriction is not needed. Italy, Portugal and Spain are examples of this.

Most countries require that employers show they are seeking only to protect legitimate business interests.

In addition, most require that employers show the restriction goes no wider than is reasonably necessary to protect that interest. The courts will generally consider whether the restriction is reasonable in light of the employee’s role, duties and seniority, the nature of the employer’s business, and the scope of the restriction (i.e. type of activity, geographical scope and duration).

Key Differences in More Detail

Compensation

Some jurisdictions require employers to compensate ex-employees throughout the period of restriction. Levels of compensation vary but typically fall in the region of 50% to 60% of salary (Norway, Portugal and Spain are examples).

In other countries, compensation is only required for specific types of restriction, which tend to be non-compete clauses (China, France, Italy and Sweden are examples); non-solicitation clauses are considered less “intrusive”. In others again (such as Japan, Netherlands and Switzerland), although not mandatory, compensating the employee is recommended because it greatly increases the chance of enforceability.

What is clear is that the covenants and any required compensation must be agreed in writing. Some employers put terms in the employment contract, but reserve the right to waive the restrictions (and therefore the obligation to pay for them) if enforcement is not needed.

Exercise caution before proceeding in this way: in jurisdictions where waivers are not permitted or require long notice periods, employers could be stuck paying significant compensation to an employee who poses no threat.

Consider also whether financial deterrents can be placed on employees if they breach their contractual restrictions: a minority of jurisdictions (such as the Netherlands) permit this.

Time period of restrictions

In the UK and certain other jurisdictions, technically there are no stated limits on the length of a post-termination restriction. The courts, however, will only enforce what is reasonable and necessary in the particular case. A good rule of thumb is that it will be difficult to enforce a non-compete clause of more than six months (although 12 months may be possible if the employee is senior or has particularly sensitive confidential information), or a non-solicitation of customers or employees for more than 12 months’ duration.

Courts will not typically ‘water down’ excessive provisions: if they are unenforceable as drafted then they are void. Employers should avoid unnecessarily long periods of protection, especially in jurisdictions where no payment is due. In countries with payment obligations, it can be possible to enforce longer periods (although there is still a requirement for reasonableness): for instance up to two years in France, Germany and Portugal; in Italy up to five years for executives and three years in other cases.

Geographical range

Most European jurisdictions require the geographical scope of a post-termination restriction to be no wider than is reasonably necessary to protect the employer’s business.

Accordingly, it often requires an employee to have strong business connections internationally in order to prevent them from competing outside of the jurisdiction in which they worked.

iGlobal Recommendations

- ✓ Assess the business need for covenant protection for each role in each jurisdiction, particularly in countries where compensation is required. Avoid wasting money on unnecessary non-compete compensation. Remember, however, that an employee’s threat to the business could change with promotion. Remember too that in some jurisdictions, a restriction agreed for one type of role may not assist if the employee later moves to another role internally in the business: reassess and if necessary renegotiate the contractual terms.
- ✓ Understand the local enforcement requirements. An unenforceable covenant gives little protection. Have available and keep up to date country-specific guidance to help HR when negotiating the employment/covenants with prospective employees. Legal assistance when preparing or updating guidance is recommended.
- ✓ Even where post-termination restrictions are unenforceable, consider including them anyway for their deterrent effect.
- ✓ Choose a clear approach and apply it consistently. For example, a global approach to restrictive covenants might be: (A) in countries where no covenant compensation is payable > always include; (B) where compensation is payable but the covenants can be waived on termination to avoid compensation payments > always include but make sure your HR systems implement the waiver when needed; (C) where compensation is payable and you cannot waive the covenant on termination > only include for roles where you clearly need protection.
- ✓ Have clear lines of authority for negotiating and signing off employment contracts (and separate NDAs if applicable), especially for key personnel hires.
- ✓ Review staff restrictions periodically throughout employment. In most countries reasonableness (and therefore enforceability) is judged at the time the restriction was entered into. Tie in updates to the covenants with an incentive, such as a pay rise or promotion to ensure the change is binding.

Snapshot – The Global Picture

Country	Post-termination restrictions valid?	Maximum length post-termination	Compensation required or recommended?	Waiver permitted?
China	Yes	No maximum	Non-competes only: 30% of salary is minimum	Yes, before termination. Otherwise compensation
France	Yes	2 years	Non-competes only: 30% - 50% of salary.	Yes, but a CBA may say otherwise
Germany	Yes	2 years	Yes - at least 50% of salary	Yes, but release requires 12 months' written notice
Hong Kong	Yes	12 months	No	–
India	Non-compete > No Non-solicitation > Yes	Non-solicitation: 6 – 12 months	No	–
Italy	Yes	5 yrs (executives) 3 yrs (other staff)	Non-competes only: 30-35% of salary	No
Japan	Yes, but the courts do not like them	No maximum, but hard to enforce	Not required, but strongly recommended	Yes
Netherlands	Indefinite term > yes Fixed-term > limited	Generally 6 months to 1 year	No but recommended for non-competes	Yes
New Zealand	Yes	Non-competes > yes, but hard to enforce	Generally no, but payment recommended	Yes
Norway	Yes	12 months	Yes - 100% of salary, subject to annual limit	Yes
Portugal	Yes	2 years	Yes - generally 50% of salary	No
Russia	No	–	–	–
Saudi Arabia	Yes	2 years	No	–
Singapore	Yes	No but 6 months to 1 year is safer	No	–
Spain	Yes	2 years if the individual is senior otherwise 6 months	Yes - 60% to 100% of salary	No
Sweden	Yes	2 years for non-competes. No maximum for others	Non-compete only: up to 60% of salary	Yes
Switzerland	Yes	3 years at the top end, but without payment safer to have 6 months to 1 year	Not required, but strongly recommended to ensure enforceability	Yes
UK	Yes	6 - 12 months for non-compete	No	–

iGlobal Law, 71 Queen Victoria Street, London EC4V 4AY
 T: +44 (0)20 7406 1639 • E: info@igloballaw.com
 www.igloballaw.com

We would welcome your feedback:
 Please contact Karen Mosley
 karen.mosley@igloballaw.com

Global labour and compliance law solutions for multi-national employers