Restrictive Covenants and the Cross-Border Employer

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This article is the second in a series addressing employer considerations when beginning or acquiring cross-border operations.

In most U.S. states employers are free to bind employees with restrictive covenants – which commonly take the form of post-employment restrictions on soliciting clients or employees – as a condition of employment. The wide acceptance of such restrictions in the U.S. does not necessarily translate to other countries, however, and although restrictive covenants may be permitted in some form, are generally much more limited in scope outside the U.S.

One size does not fit all.
Although post-employment restrictive covenants may be quite common in the U.S., they are not nearly as common outside the U.S. Employers' reasons for using them are varied, but in general, employers feel that post-employment restrictive covenants help them to retain global talent, guard against the theft of trade secrets and confidential information, protect against unfair competition, and provide employers time to reinforce key client relationships following the loss of a critical employee. In the U.S., state laws related to restrictive covenants are generally employer-friendly, and assume that employers have protectable interests following the departure of an employee. In many states, employees must accept a post-employment restrictive covenant as a condition of employment, and employers are not required to provide additional consideration to ensure the restriction is enforceable. Provided the restrictive covenant has reasonable geographic and temporal limits, U.S. employers have wide latitude regarding the number and categories of employees subjected to restrictions, and generally do not worry about enforceability as long as statutory requirements are met.

Outside of the U.S., however, post-employment restrictions may not be permitted at all. For example, in Mexico, non-competition and post-employment non-solicitation agreements are deemed to be a violation of the principle of "freedom of work." Similarly, in India, post-termination non-competition agreements are generally unenforceable. Unlike Mexico, however, Indian post-termination non-solicitation and non–disclosure agreements may be enforceable.

While many European countries permit post-employment restrictive covenants, it is common for employers to pay employees at least a portion of their former salary for the duration of the non-competition period. In Germany, for example, post-employment restrictions are enforceable only if they are in writing, do not exceed two years in duration, and provide the employee compensation of

they are in writing, do not exceed two years in duration, and provide the employee compensation of at least fifty percent of his or her salary for the duration of the restricted period, inclusive of bonuses and commissions. Spain imposes similar requirements, generally requiring employees be compensated 40-50% of their salary for the restricted term. In contrast, Romania requires that employees subject to post-employment restrictions be paid a monthly benefit during the term of their employment as part of the employee's regular compensation, compensating them in advance for the restricted period.

In addition to providing adequate compensation for post-employment restrictions, many countries that permit post-employment restrictions will only enforce such restrictions provided the employer narrowly tailors the agreement to address its legitimate business interests, not theoretical risks. In many cases, employers must demonstrate that the employee *actually* possesses confidential information or business secrets and that the employee's new job is directly competing with and damaging the new employer. In many European countries, for example, it is not uncommon for post-employment restrictions to be enforced only for the highest-level employees.

Tips for cross-border post-employment restrictions
As part of an employer's global strategy regarding restrictive covenants, employers should thoughtfully consider the following:

- Whether legitimate business needs warrant restrictive covenants outside the U.S.
- Each country likely has a different approach toward restrictive covenants – make sure you understand the law in each country in which you plan to use such agreements.
- How much consideration is required and when must it be paid?
- How are such agreements typically enforced and what is the burden of proof? In many jurisdictions, the burden of proof is on the employer, and requires the employer to demonstrate actual unfair competition, trade secret theft, or damages. Keep in mind that most jurisdictions have not yet recognized the doctrine of inevitable disclosure.
- Tailor the agreements as narrowly as possible. If you are worried primarily about theft of trade secrets or confidentiality, tailor your agreements accordingly. A non-competition agreement may not be necessary. Because many U.S. states employ "blue penciling" (that is, striking overbroad language or provisions while leaving the rest of the agreement intact) to overbroad agreements, employers may routinely draft overbroad agreements, comfortable in the knowledge that a court will simply strike or modify overbroad provisions, but will not strike the entire agreement. Many jurisdictions outside of the U.S. do not recognize blue-penciling, however, and overbroad provisions could result in the entire agreement being struck.

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