
DENMARK: NEW RULES ON RESTRICTIVE COVENANTS

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A new bill proposes joint regulation of the use of restrictive clauses (non-compete and non-solicitation clauses). The rules proposed in the bill tighten the existing rules seen from an employer perspective.

Background

In the spring of 2015, the Danish government proposed a bill on joint regulation of the use of restrictive clauses. Due to the election of the Danish Parliament in June 2015, the bill lapsed. On 7 October 2015, the new government reintroduced the bill in a slightly amended version. The bill was passed on 10 December 2015 and enters into force on 1 January 2016 and will apply to restrictive clauses agreed on or after this date.

The bill regulates restrictive clauses (non-competition clauses and non-solicitation of customers and employees clauses).

A non-compete clause prohibits an employee from competing with the employer.

A non-solicitation of customers clause prohibits the employee from having any business relationship with the employer's customers or other business associates.

A non-solicitation of employees clause can be either between two companies obligating the parties not to solicit or recruit each others employees, or between a company and an employee, obligating the employee not to solicit or recruit any colleagues, if he/she leaves the company.

Who is protected under the new rules?

Most of the Danish regulation on restrictive clauses is only applicable to white-collar workers. However, under the new rules both white-collar and blue-collar employees enjoy protection.

When can a non-competition clause or a non-solicitation of customers clause be enforced?

Non-competition and non-solicitation of customers clauses, or a combination thereof, are only enforceable if the following conditions are met:

	Current rules	New rules
The agreement	The clause must be contained in a written agreement.	No amendments.
Period of continuous employment	Employee must have completed at least 3 months' continuous employment at the time of termination.	Employee must have completed at least 6 months' continuous employment at the time of termination.
Term	No defined regulations regarding the term.	Term can be no more than 12 months, commencing from the termination of the employment, or 6 months if it is a combined clause.

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<p>Compensation</p>	<p>A non-competition or non-solicitation of customers clause is only valid if the employee is entitled to compensation during the entire term of the clause.</p> <p>Compensation must be at least 50% of monthly salary.</p> <p>If the employee is restricted by a combined clause, the minimum compensation is the same as if the employee was only restricted by either a non-compete or non-solicitation of customers clause.</p>	<p>No amendments except for the size of the compensation.</p> <p>If the term is 6 months or less, the compensation must be at least 40% of monthly salary.</p> <p>If term is more than 6 months, compensation must be at least equal to 60% of the salary per month.</p> <p>If the employee is restricted by a combined clause, compensation must be at least 60% of monthly salary.</p>
<p>Compensation</p>	<p>If the employee finds other suitable employment during the term of the non-compete or non-solicit of customers clause, compensation may be set off against the salary for such new employment.</p> <p>The right to set-off does not pertain to the first three months of salary for non-compete clauses.</p>	<p>If the employee finds other suitable employment during the term of the non-compete or non-solicit of customers clause, the employee is entitled to a lower compensation during terms of other suitable employment.</p> <p>During terms of other suitable employment, the employee is entitled to compensation of at least 16% if the employee was originally entitled to at least 40% of the salary, and compensation of at least 24% if the employee was originally entitled to at least 60% of the salary.</p> <p>However, regardless of any new income, the employee is always entitled to the high level of compensation (40% or 60%) during the first two months of the term of a non-compete clause or non-solicitation of customers clause.</p>
<p>Trusted position – only applicable for non-compete clauses</p>	<p>A non-compete clause may only be imposed on an employee holding a trusted position.</p>	<p>A non-compete clause may only be imposed on an employee holding a particularly trusted position. Accordingly, only employees who hold a particularly trusted position and who are trusted with confidential</p>

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		<p>information can be subject to a valid non-compete clause.</p> <p>The employer must inform the employee in writing why a non-compete clause is required.</p>
<p>Good leaver/bad leaver – only applicable for non-compete clauses</p>	<p>A non-compete clause cannot be enforced against an employee who has been dismissed by the employer without being given reasonable cause for such dismissal, or who resigns from his/her employment and the employer's omission to perform its obligations has given the employee reasonable cause for such resignation.</p>	<p>No amendments.</p>
<p>Relevant customers – only applicable for non-solicitation of customers clauses</p>	<p>A non-solicitation of customers clause may only be enforced in relation to customers with whom the employee has been doing business within the past 18 months, or in respect of whom the employer, prior to termination of employment, gave the employee particular written notice that such customers would be covered by the clause.</p>	<p>A non-solicitation of customers clause may only be enforced in relation to customers with whom the employee has been doing business himself/herself within the past 12 months.</p> <p>It will no longer be possible to make a list of relevant customers.</p>

Non-solicitation of employees clauses

Under the current rules, non-solicitation of employees clauses are invalid unless: a) an agreement has been made with each employee whose job mobility is restricted by the clauses; and b) the relevant employees receive compensation corresponding to a minimum of 50% of their salary after termination of the employment for the period in which their job mobility is restricted by the clause.

Under the new rules, it will no longer be possible to enter into non-solicitation of employees clauses as of 1 January 2016. However, to a limited extent it will still be possible to use such clauses in connection with business transfers.

Non-solicitation of employees clauses agreed before 1 January 2016 will still be valid subject to the rules in force today and may be enforced until 1 January 2021.