

Non-Competition provisions in employment relationships

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Employers often have concerns about their employees competing with them after they leave. Many employers put substantial resources into training people and giving them valuable work experience. Thus, departing employees are a cause for concern in terms of potential loss of customers and business. To address this risk, many employers ask us whether they should include non-competition provisions in employment agreements and whether such provisions are enforceable.

In Thailand, non-competition provisions are governed primarily by Section 14/1 of the Labour Protection Act and the Unfair Contract Terms Act. Principally, they are enforceable in Thailand, subject to some restrictions.

The Labour Protection Act provides that, "for an employment contract between an employer and employee, work rules, regulations or orders of an employer that provide for the employer to have an improper advantage over employees, the court shall have the power to order that such employment contract, work rules, regulations or orders be applicable only to the extent that they are fair and appropriate in the circumstances".

Similarly, the Unfair Contract Terms Act stipulates that "contract terms that are not void but cause the person whose rights or freedoms has been restricted to shoulder more of a burden than a reasonable person could have anticipated under normal circumstances shall only be enforceable insofar as they are fair and reasonable in the circumstances".

In evaluating non-competition provisions, courts must consider the geographical area specified and the period of restriction on rights or freedoms. They must also consider the ability and opportunity of the employee to carry on his or her occupation or otherwise do business as well as all legitimate advantages and disadvantages of the contracting parties.

In determining the extent to which terms are enforceable as fair and reasonable, courts will take all circumstances into account including good faith, bargaining power, economic status, knowledge and understanding, adeptness, anticipation, guidelines previously observed, and other alternatives. As well, they will consider all advantages and disadvantages of the contracting parties according to actual conditions; ordinary usage applicable to such kind of contract; time and place of performance or making the contract; and whether one party is made to bear a much heavier burden than the other.

The statute does not require employers to give additional consideration or other benefits to an employee or former employee during a non-compete period. However, it is possible that terms providing for such an arrangement may be included in an employment agreement and that a departing employee may negotiate such an arrangement with an employer. In either case, the employer's obligation to pay would be enforceable.

A non-competition provision is acceptable and enforceable under Thai law as long as it is not contrary to public order and good morals and is fair and reasonable. Considerations are to be based on:

- the period and geographical area of restriction;
- the opportunity and ability for the employee to follow his or her occupation;
- all other lawful interests of the parties.

Thus, Thai courts will typically enforce a non-competition provision as long as it is lawful, is used to reasonably protect the employer's business and does not impose undue hardship on the employee.

As a general matter, enforcement is problematic with respect to professionals. For a doctor or lawyer, a non-competition agreement, depending on its scope, could easily have the effect of eliminating all opportunities to practise one's occupation. Thus, a court would consider this within the context of the factors described above, with the likely result that it would call for changes or rule that the agreement cannot be enforced at all.

When an employer seeks to enforce a non-compete agreement, it may face problems proving that the employee's breach actually caused the employer to suffer economic damages. Moreover, given the time taken for the case to get to court, it is likely that, in many cases, the period of restriction may have already expired.

Several Supreme Court judgements have upheld as justifiable and enforceable a restriction period of 24 months (without stated geographical restrictions) prohibiting an employee from directly or indirectly engaging in businesses in competition with those of his or her (former) employer. In one case, the Supreme Court upheld a non-competition provision applicable to a foreign employee, with a restriction period of five years and covering Thailand, Vietnam, Cambodia, Laos and Myanmar.

Thus, when crafting non-compete provisions, it is important to consider what a court will likely enforce. Generally, we would advise you to work with your counsel to construct provisions carefully, such that they specify a restriction period of not more than 24 months and within a specific geographical area.

Importantly, the non-compete provision must not operate to eliminate any possibility of employment for the employee.

While a court always has discretion, such an approach offers the employer a reasonable level of protection.