

Management Contracts and post-contractual non-compete Clauses under Austrian Law

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In cases, where a company located in Austria (e.g., an Austrian subsidiary) concludes a management contract in the form of an employment contract, it is important to note that in such cases, Austrian mandatory labour law may be applicable. Whereas managers of stock corporations (*Aktiengesellschaft*) are not considered employees under Austrian law, the status of an employee cannot be ruled out in the case of a manager of a company with limited liability (*Gesellschaft mit beschränkter Haftung*). Each case has to be assessed individually; the personal dependence of such a manager cannot be ruled out *per se*. Provided that a manager of a company with limited liability does not have a significant influence on the company, he is classified as executive employee (*leitender Angestellter*) and subject to the Act on White Collar Workers (*Angestelltengesetz*)

Post-contractual non-compete Clauses under Austrian Law

Even if German law is chosen by the parties for this type of contract, it applies only, if mandatory rules of Austrian labour law are not infringed, provided that the habitual place of work is in Austria. This also has to be taken into consideration upon agreement of post-contractual non-compete clauses (Konkurrenzklause). Pursuant to Sec 36 of the Austrian Act on White Collar Workers, such clauses may only be concluded under the following conditions: The employee has to be of full age while concluding the agreement, the restriction on the competition can only apply to the employer's line of business and can only be concluded for up to one year (contrary to the legal situation in Germany). Furthermore, the agreed temporal, geographical and material restrictions may not impose an unreasonable burden on the employee's professional development.

In principle, no Compensation has to be Paid

Under Austrian law, a compensation payment (so called "Karenzentschädigung") is no pre-requisite for a post-contractual non-compete clause to be valid. However, the criterion of "unreasonable burden on professional development" will be assessed strictly by a court during the overall assessment of the validity of the non-compete clause. Nevertheless, it is possible to agree on a compensation payment. This can be advisable, if else, the employer cannot insist on the employee's compliance with the clause. In contractual practice, a compensation payment is agreed in cases where the employer terminates the employment contract without any specific reasons attributable to the employee. In such cases, the employer can enforce the non-compete clause vis-à-vis the employee only, provided that the employer expressly confirms upon termination of the contract that he will pay the compensation during the period covered by the non-compete clause.

Partial Invalidity of a non-compete Clause

Contrary to the legal situation in Germany, in Austria it is possible to conclude a post-contractual non-compete clause only for a period of up to one year. If a longer period of time is agreed upon, the agreement is partially invalid, which means that the agreement is invalid for the time going beyond the one-year period. This partial invalidity regarding the temporal restriction also has to be taken into account by the court when determining if to reduce a contractual penalty, as the penalty should not correspond to the shorter period of time.

If, following the practice in Germany, a two-year post-contractual non-compete clause with compensation in the amount of 50% of the employee's last salary is agreed upon, the case law of the Austrian Supreme Court (Oberster Gerichtshof) must be followed. From this can be derived that the partial invalidity of a non-compete clause also releases the employer from an obligation to pay the compensation for the excess time. Because of the reciprocal ("synallagmatic") connection between the employer's obligation to pay the compensation and the employee's obligation to comply with the non-compete clause, the partial invalidity should, in accordance with the purpose of the agreement, affect the obligation of both parties to the non-compete clause. Thus, in such cases, neither the employee nor the employer is required to fully honour their obligations resulting from the clause. Nevertheless, the compensation has to be paid, provided the employee refrains from competition during the whole period of time agreed upon, unless the clause has been declared invalid.

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