3 Key takeaways
Employment Essentials webinar

Non-compete, non-solicitation, non-recruitment, ancillary activities, and confidentiality clauses are known as 'restrictive covenants' in international employment law. Much can be said about these types of restrictions, especially since the non-compete clause became the focus of social and political attention in the Netherlands. In a recent webinar, Homme ten Have and Peter Vogels discussed the legal framework of restrictive covenants, and practical experiences, strategies and negotiation considerations regarding such clauses as well as recent political developments. The webinar also helped the over 100 participants to get answers to any related questions currently on their minds. These are the three main takeaways.

#1 Mitigating a non-competition clause requires a balanced weighing of interests

If a non-competition clause is validly agreed, then it is in principle enforceable. The clause can, however, be mitigated by a court (e.g. in summary proceedings) when it limits an employee unreasonably. The court will assess whether this is the case based on a balanced weighing of the interests of the employer and those of the employee. In this regard, it should be noted that a non-competition clause is not aimed at preventing competition in general. This clause prevents employees from working for a competitor or starting a similar enterprise, using knowledge of the employer's business which would not have been gained without the (former) work for that business.

Courts have a large discretion in deciding whether and to what extent the non-compete clause should be mitigated, what interests should be considered and how heavily those interests should weigh. As a result, case law is rather difficult to predict. The potential outcome of a mitigation by the court usually serves as relevant discussion material for negotiations regarding the non-competition clause.

Examples of relevant circumstances to consider are:

- The investments in the employee made by the employer
- Specific knowledge that the employee gained during his employment
- The nature and duration of employment
- Promotion opportunities
- How the employment agreement ended
- The employee's personal situation
- Industry loyalty
- Statements made by the parties

#2 Modernisation of the non-competition clause is to be expected

According to the 2021 Panteia report 'the effect of the non-compete clause' one in three employers in the Netherlands use a non-competion clause. Rather than to protect their market position, they mostly use it as a deterrent. Employees often misunderstand the clause and do not realise that it applies outside direct competitors. Furthermore, they underestimate its legal enforceability. Employers often see no alternative to the non-compete clause and deem it necessary to protect their customer base and business-sensitive information. In most European Union member states, employers must compensate employees when restricting their right to work for others. This requires consideration whether invoking a non-compete clause is necessary.

In a letter to the House of Representatives dated 6 June 2023, the outgoing minister of Social Affairs and Employment announced the government's intention to modernise the non-compete clause. Referring to the conclusions of the Panteia report, the government is working on the following statutory changes:

- Legally limiting the duration of non-compete clauses
- When including the clause, the geographical scope must be included, specified and justified
- Furthermore, employers will have to justify the 'compelling business interests' in case of fixed term employment agreements as well as employment agreements for indefinite term (which is currently not required)
- When invoking the clause, an employer will in principle have to pay compensation, set at a percentage of the employee's last-earned salary determined by law.

These changes could have a significant impact on the handling of the non-competition clause in the Netherlands. However, it should be noted that the discussion revolving around the modernisation of the non-competition clause has been ongoing for some time. It remains to be seen in what period such changes will be effectuated.

#3 Prohibition of ancillary activities is limited as of August 2022

The ancillary activity clause prohibits employees from performing other activities during their employment. With the introduction of the Transparent and Predictable Working Conditions Act (in Dutch: **Wet transparantie en voorspelbare arbeidsvoorwaarden**) on 1 August 2022, employers can no longer prohibit employees from working for others outside the scope of their employment agreement without a legitimate reason. An objective justification such as health and safety reasons, protection of company information or avoidance of conflicts of interest, is now required to enforce a prohibition of ancillary activities.

Existing agreements with an ancillary activity clause remain valid: when invoking the clause, the employer must be able to provide an objective justification. This

justification does not need to be included in the employment agreement. It can also be put forward if the ancillary activity clause is invoked. Although the change in the law seems to offer more protection to employees on paper, it also leaves room for the employer to argue the objective justification to the (current) circumstances. The effect of this change is still uncertain, but it may for example be relevant in dismissal cases where the justification of ancillary activities is in dispute.

Our Employment & Pensions team has wide experience in drawing up, and advising on this type of clauses and frequently advises on their enforceability. Do you have questions on this topic? We are happy to help you.

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