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Panel - Termination of Employment and Restrictive Covenants

Moderated:

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Participants:

DLA Piper partners: Evan Parness, US | Vinita Arora, UK | Helen Colquhoun, Hong Kong | Dr. Kai Bodenstedt, Germany | Helene Bogaard, Netherlands

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Question #1:

On a scale of 1 to 10, how hard is it to separate from an employee in your Country?

- Non-unionized workplace – proper hearing process and termination not based on unlawful reasons – low risk
- “Real life” terminations more complex – employer’s prerogative often subject to the court’s scrutiny
- Procedurally - hearing process constantly developed by the courts e.g. new obligation on employers to make effort to offer an alternative position instead of terminating
- Even if employers adhere to the process – termination decision may be unlawful if employee can show discrimination, lack of valid reason, etc.
- Once termination decision is made - courts reluctant to grant injunction enforcing employment relations, especially where the relationship has reached an irreparable crisis. Court will try to bring the parties to agreement: employee receives an ex-gratia benefit and termination takes effect.
- So, 6 out of 10!

It depends!

2 layers of protection - contract and statute

Always look first at the employee length of service - if less than 2 years service it is usually easier

If over 2 years service - more process is required

Need to consider discrimination risks regardless of service - e.g. race, gender, religion & belief, age etc.

Essentially you need a fair reason AND a fair process if you want to avoid/reduce risks on termination.

Also need to consider contractual terms and any covenants

- 5 out of 10
- **The good news - no collective consultation obligations, very limited union activity, limited protected characteristics under discrimination law**
- The bad news - its only easy until its not….Pockets of employee-friendly legislation plus judicial creativity:
  - Sick leave and pregnancy/maternity leave very protected
  - Implied terms - breach of trust and confidence; anti-avoidance

That depends on the headcount of the German operation:

Operations with 10 or less employees: 1

Options with more than 10 employees: 6

8

- In the U.S., the employment relationship for most employees is “at will.” This means that the employer (or employee) may terminate the relationship, at any time, for any lawful reason, with or without notice.

- If the employee at issue is a member of a protected class or has recently made a good-faith complaint, there may be certain risks to the termination to be discussed with counsel.

- In the event of a reduction in force or plant closing, employers may have certain legal obligations pursuant to the Older Workers Benefit Protection Act, the Worker Adjustment and Retraining Notification Act, or state or local equivalents.

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Question #2:

To what extent does the jurisdiction in your Country tolerate restrictive covenants, such as non-compete and non- solicitation obligations?

- Non-compete covenants rarely enforced
- Court may order employee to adhere to minimal non-compete period if employer proves there is a trade secret that must be protected or employee acted in bad faith
- Non-solicitation undertakings similar – potentially upheld where employer proves employee acted in blatant bad faith (rare)
- Employers seldom turn to court - prefer to reach agreement on certain restrictions with employees who are leaving

- If drafted appropriately they are certainly tolerated and can be upheld by the courts in the event of a dispute
- BUT they need to be REASONABLE. Reasonable in length and overall scope and aimed at protecting business interests.
- Non-compete covenants are the hardest to enforce. Need to carefully consider notice provisions
- Confidentiality obligations are regarded as standard.
- Enforcing or defending them is typically very expensive
- Always ensure new recruits are not subject to covenants - otherwise you could be inducing a breach

- Legally permissible (and market standard)
- No requirement to compensate separately
- Have to be reasonably necessary to protect legitimate business interest - one size does not fit all
- Courts will not re-write for you….

Non-compete and other restrictive covenants are generally enforceable in most states, so long as the covenant is supported by adequate consideration; is reasonably limited in duration, geographic scope, and subject matter; is reasonably necessary to protect one or more legitimate business interests of the employer; and does not impose an undue hardship on the employee. (Non-competes are unenforceable in California).

In recent years, the federal government has provided states specific ***policy objectives*** to consider:

1) Banning non-competes for certain categories of workers (such as workers in public health and safety, low-wage earners and workers laid off or terminated for cause);
2) Improving the transparency and fairness of non-competes (through notice or consideration provisions or regulating the timing of execution); and
3) Encouraging employers to draft enforceable agreements through the adoption of the "red pencil" doctrine (throwing out the entire covenant).

Numerous states have passed non-compete reforms over past 18 months, including California, Colorado, Idaho, Illinois, Massachusetts, Nevada, New Mexico, Oregon, Utah, and Washington State. New York Attorney General recently issued guidance on non-competes.

Question #3:

What are the “hot button” issues that should be double checked when considering termination of employment?

- Strict mandatory limitations – pregnancy, fertility treatment, maternity leave, sick leave, military service

- “Soft” limitations (not exhaustive):

  - Age
  - Gender / sexual orientation / marital status / parenthood
  - Religion
  - Race / nationality / country of origin / place of residence
  - Party affiliation / views
  - Disability
  - Unionization
  - Whistleblowing

- Redundancy – not a “magic word” - requires transparent, reasonable and relevant process

- Does the employee enjoy special dismissal protection (pregnancy, registered disability etc.)?
- How many employees does the Company employ in Germany / in the respective operation?
- Is a works council established at the respective operation?
- In case of a summary dismissal – when did we learn about the misconduct?
- Who has signing authority for the legal entity which employs the employee in question? Is this person registered with the commercial register?
- How do we deliver the notice letter?
- Do we want the employee to work during the notice period?
- Do we want to offer a severance payment against a release of all claims?

- Unilateral termination is not permitted; consent needed from semi-governmental body or court
- Sound and solid rationale with supporting documentation is required
- One rationale (performance and redundancy cannot be mixed)
- 90% of the cases result in an amicable settlement