

BULLETIN

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Employee's Prohibition of Competition

Employee's Duty of Loyalty Throughout the Duration of the Employment Contract

Duty of loyalty is one of the most important obligation of the employee during the continuation of employment relationship. Duty of loyalty is regulated by the Turkish Code of Obligations.

Accordingly, the employee's duty of loyalty covers the obligations of protecting and observing the interests of the employer, doing the work diligently, using the equipment belonging to the employer duly and taking care of the material delivered to him/her for the execution of the work. During the period of the employment relationship, the employee is under the obligation of not competing with the employer, not serving a third party in return for wages, and keeping secrets within the scope of debt of loyalty.

In the event that the employee violates one of the obligations listed above during the duration of the employment relationship, the employer has the right to terminate the employment contract immediately for good cause and without paying any severance/notice and the employer may also demand compensation for the damages caused by the employee due to his/her behavior against the duty of loyalty.

Employee's Obligation of Prohibition of Competition After the Termination of the Employment Contract

Along with the other debts of the employee, the debt of loyalty also disappears with the termination of the employment contract. However, if the employee uses the information he/she has acquired during the duration of the employment relationship, in the business he/she has established or in the competitor business that he/she has entered later, it is likely that the previous employer will suffer losses. To avoid that possible damages, the employer may draw up a provision in employment contract regarding the non-competition obligation or the parties may separately sign a non-compete agreement.

With the non-compete agreement employee undertakes not to compete with his/her employer in a certain area of activity, in a certain geographic area and in a certain period of time after the termination of the employment contract.

The relevant articles of the Turkish Code of Obligations are taken into account when drawing up a non-compete agreement.

Conditions of the Non-Compete Agreement

1. Employee should have the capacity to act.
2. Non-competes agreement must be made in written form. According to the mandatory provision in the Code of Obligations, unwritten non-competes agreements will be deemed invalid.
3. In order to draw up a non-competes agreement, the employer must have an interest worthy of protection.

In order to draw up a non-competes agreement; during the employment relationship, the employee must have the opportunity to access information about the employer's production secrets, customer information, sales and marketing conditions or the employer's work. In addition, the use of the acquired information must be of a nature that will cause significant damage to the employer.

In this respect, non-competes agreements cannot be signed with the employees who have information that can be accessed by everyone.

Limitations of the Prohibition of Competition

1. Limitations on Place

The prohibition of competition should be limited to a certain geographical region or city, provided that it does not exceed the geographical area in which the employer operates. This limitation cannot exceed the area of activity where the employer operates.

2. Limitations on Type of Work

The prohibition of competition should be limited to the scope of work in which the employer and the employee is engaged in, and should not exceed the employer's field of activity.

3. Limitations on Time

According to TCO duration of the non-competes agreement cannot exceed 2 years. The period starts from the date of termination of the employment contract.

The period of 2 years at the most should be determined by establishing a balance between the economic future of the employee and the legitimate interests of the employer, and the prohibition of competition should be limited to a reasonable time.

4. Limiting the Excessive Prohibition of Competition

If the prohibition of competition is determined to be excessive in the contract, the judge may limit the disproportionate competition prohibitions in terms of scope and duration according to the characteristics of the concrete case. In this case, the limits set by the judge are considered valid.

Sanctions That Can Be Applied to the Employee Who Acts Against Prohibition of Competition

1. Employee's Obligation to Pay Compensation

If an employee acts against the prohibition of competition, he/she is under the obligation to compensate the employer's incurred damages due to his/her act. The scope of damage includes actual damage and loss of earnings, and the burden of proof is on the employer. In order to avoid paying compensation, the employee must prove that he/she has no fault in the damages suffered by the employer.

2. Employee's Obligation to Pay Penalty

If the behavior against the prohibition of competition is clearly stipulated in a penalty clause, the employee must also pay the specified penalty clause. If the employer has a loss exceeding the amount of this penalty clause, the employee has to compensate for this damage as well. However, it is possible to reduce the penalty clause determined as excessively high by the judge in favor of the employee.

3. Expiration of Employee's Behavior Against the Prohibition of Competition

The employer may also request the expiration of the behaviors against his/her interests that are violated or that are in danger of being violated, apart from the penalty clause and compensation.

In order for the employer to make such a request, it must expressly reserve this right in writing in the contract.

Expiration of Prohibition of Competition

1. When the period stipulated in the contract expires, the obligation of non-competition automatically expires.
2. If it is determined that the employer has no real benefit in maintaining the prohibition, the prohibition of competition will expire. Change of field of activity and exclusion of contractually protected information from the scope of confidentiality can be given as examples.
3. When the employer terminates the employment agreement without a good cause, the obligation of non-competition will expire.
4. In case the employment contract is terminated by the employee for a reason attributable to the employer, the non-compete agreement ends.

Conclusion

The employer who wants the employee not to compete with him/her after the termination of the employment contract must sign a written non-compete agreement with the employee.

While drafting this contract, the provisions stipulated in the relevant articles of the TCO must be complied with.

One of the most important issues to be considered in the non-compete agreement is that the employee has the opportunity to access information that may be subject to competition, and if this information is used, the employer may incur a significant damage.

In the event that the necessary conditions are met, the compensation and penalty clause payment of the employee who violates the competition agreement is legally stipulated.