MERITAS
LAW FIRMS WORLDWIDE

PROTECT YOUR BUSINESS

Non-compete Agreements in the EMEA region

INTRODUCTION

In every jurisdiction, employers are sometimes faced with the prospect of losing a key staff member, or a number of key staff members who will, sooner or later, set up in competition against that employer, whether on the employee's own account or for a competing employer.

This publication answers nine key questions per jurisdiction which are designed to help the businessperson understand how anti-competitive provisions related to the employment relationship come into play by considering the various stages of the employment relationship itself.

Please be aware that the information contained in this booklet is merely descriptive and therefore not exhaustive. As a result of changes in legislation and regulations, as well as new interpretations of those currently existing, the situations as described in this publication are subject to change. Meritas cannot, and does not, guarantee the accuracy or the completeness of information given, nor the application and execution of laws as stated.

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ABOUT MERITAS

For businesses with a global growth imperative, the difficulty of finding qualified, local legal counsel around the world means higher expenses and lost opportunities – until they discover Meritas.

Meritas is an established global alliance of independent, full-service law firms that connects businesses to its carefully selected membership: more than 6,600 lawyers in over 170 law firms worldwide. Business owners, in-house counsel, and others can easily connect with pre-qualified, like-minded, reliable legal expertise worldwide.

Businesses trust the Meritas alliance of worldwide law firms for top-tier quality, convenience, consistency, and value.

Consistent Quality

- Meritas membership is selective and by invitation only. Its extensive due diligence process saves clients time in validating law firm credentials and experience. Firms are regularly assessed and recertified for the breadth of their practice expertise and client satisfaction. Only firms performing under the tenets of Meritas' uniquely comprehensive Quality Assurance Program are allowed to maintain membership, ensuring that clients receive the same high quality legal work and service from every Meritas firm.

The Meritas Quality Assurance Program includes:

- o Rigorous screening before inviting members to join the alliance;
- o Continuous monitoring for quality of service, reflected in a Satisfaction Index score, along with client performance feedback that is available online, and;
- o Regular recertification to ensure member firms maintain practice capabilities and client satisfaction, and adhere to Meritas policies.

Convenient Access

- Qualified lawyers with skills and experience can be conveniently found through a searchable database on the Meritas Web site (www.Meritas.org), by calling a Meritas law firm directly, or by contacting Meritas headquarters at +1-612-339-8680.

Consistent Service

- Working with Meritas firms is a predictably efficient and positive experience because Meritas selects independent, mid-sized firms that are flexible, accommodating and attentive. All Meritas firms share a positive, consultative approach to business and a common commitment to excellent client service.

Proven Value

- Because Meritas firms are local, independent, and mid-sized, they can offer greater flexibility – customized billing, deep expertise and local rates – while minimizing the chance of conflicts. Meritas clients benefit from the advantage of partner-level expertise, personal service and a more collaborative, customized business approach.

- Meritas law firms are well established in their local markets, with years of valuable practical experience in local laws and business customs. Their working knowledge of local cultural and jurisdictional issues typically exceeds that of most international law firms and facilitates positive and timely outcomes.

Quality. Convenience. Consistency. Value.

In today's changing world economy, the Meritas model provides essential peace-of-mind. Meritas offers businesses global guidance and a proven path to successfully navigate the volatile legal landscape – and keep their business strategy on course.

"Lubrizol has legal issues arising all over the world. Meritas offers us high quality firms in each major metropolitan legal market and that's a huge plus."

Joseph Bauer
Vice-President & General Counsel
Lubrizol Corporation

"What I truly appreciate about working with the Meritas alliance is knowing that no matter which Meritas firm I engage, I am going to get excellent work and superb service."

Meredith Stone
Vice-President, General Counsel Americas
NACCO Materials Handling Group, Inc.

NON-COMPETITION CLAUSES IN EMPLOYMENT

1. What are the principal bases for anti-competitive provisions in the relevant jurisdiction (statute, contract, etc.)?

The principal bases for anti-competitive provisions in Albania are the law no. 7961 dated 7 December 1995, "On Labour Code of the Republic of Albania" as amended ("Labour Code" articles 26, 28, 29, 30, 31) and the eventual anti-competition agreement that the employer may enter with the employee in order to prohibit the competition by the employee after termination of the employment relationship.

Meanwhile, during the employment relationship, the employee has an obligation not to compete with the employer (Labour Code, article 26). The employee is refrained from doing any work for third parties or from being paid by third parties that may jeopardise or compete with the employer. During the validity of the employment contract and after its termination, the employee shall not disclose the data/information required to be kept confidential such as: the secret of the fabrication and the secret of the activity, on which the employee has been informed during his employment with the employer.

In order to prevent competition once employment terminates, employer and employee may enter into an 'anti-competition agreement' that shall establish the prohibition of the employee to compete with the employer.

The 'anti-competition agreement' shall clearly determine the place, time-period, and type of activity prohibited to the employee, in order not to cause future damages to the employer. The prohibition period, according to Labour Code, should not exceed one year after employment terminates.

2. How are post-termination anti-competitive provisions affected by "public policy" considerations?

Taking into consideration that the Albanian labour market has suffered drastic changes after the private sector was introduced in 1990 and the fact that labour legislation is relatively new and lacking the necessary doctrine, we cannot really refer to any public policy consideration affecting such provisions or other provisions of the labour legislation in general.

3. To what extent is compliance with legal requirements necessary for post-termination anti-competitive provisions to be enforceable, and what are those requirements (formalities, duration, remuneration and others)?

The post-termination anti-competitive provisions should be in compliance with the relevant provisions of the Labour Code. Anti-competition provisions, after termination of the employment relationship, are enforceable only where the employer and employee have previously entered into a written 'anti-competition agreement.'

An employee over the age of 18 may declare in writing that after the termination of the employment relationship he shall not compete in any way and especially shall not establish a competitive company/undertaking and shall not work for it or collaborate with it.

The agreement for the prohibition of competition is valid provided that during employment the employee had the opportunity to be informed on the fabrication secrets or activity secrets of the employer and that the eventual use of the employer's activity secrets may cause serious damages to the latter.

According to Labour Code, the period of prohibition of competition determined in the 'anti-competition agreement' should not exceed one year. To be noted is that the employer may enforce the anti-competition agreement only when the employer offers to the employee, during the period of prohibition of competition determined in such agreement, not less than 75% of the salary that the employee would be entitled to receive had the employment relationship not been terminated.

If the salary is subject to changes, such indemnification (75% of the salary) is calculated on the basis of the average salary of the previous year and is indexed. The 'anti-competition agreement' is not enforceable when the employer terminates the employment contract for unreasonable grounds or when the employee terminates the employment contract for a reasonable ground which is related to the employer.

4. What obligations does the employee owe to the employer prior to any termination of the employment relationship (incl. prior to any notice period of termination) with regard to preparations and negotiations to compete?

As per the Labour Code, during the employment relationship the employee is required to comply with the principle of loyalty (which constitutes an obligation of the employee toward the employer). According to such obligation, the employee is refrained from doing any work for third parties during the employment relationship or from being paid by third parties that may damage the employer or causes competition to him. Moreover, the employee, during the employment relationship and after his termination, shall not disclose the information required to be kept confidential by him such as: the secret of the fabrication and secret of the activity of the employer, on which the employee has been informed during his work for the employer.

5. How are the obligations under Question 4 affected by the employer being on notice of termination of the employment relationship?

Even when the employer is on notice of termination of the employment relationship by the employee, the employee is obliged to honour his obligation toward the employer regarding the competition. As mentioned in question 4, until the termination of the employment relationship, the employee is refrained from doing any work for third parties or from being paid by third parties that may damage the employer or causes competition to him.

6. To what extent can the employer limit the ability of the employee to compete and to what extent can goodwill and confidential information be protected after the termination of the employment relationship?

These limitations shall be subject to an 'anti-competition agreement' to be entered into between the parties. In absence of such agreement, the employer may not limit the ability of the employee to compete.

Exception is made regarding any fabrication secrets or activities secrets (i.e., confidentiality obligation) for which the employee is under obligation to preserve to the benefit of the employer even after the termination of employment and in absence of any 'anti-competition agreement.'

7. What obligations does the employer owe to the employee during any period of post-termination anti-competitive restriction?

Subject to the 'anti-competition agreement,' the employer is obliged to offer the employee a remuneration consisting of not less than 75% of the salary that the employee would be entitled if the employment relationship between them would have continued. This remuneration will be received by the employee for a period of not more than one year.

8. What are the effects of the employer's failure to comply with the obligations under Question 7 and what remedies are available to the employee?

In case the employer fails to comply with the obligation mentioned under question 7, the employee may file in Court a claim against the employer requiring the enforcement of such obligation as per the 'anti-competition agreement,' as well as the compensation of damages caused to the employee due to the non-execution of the said obligation.

9. What remedies are available to an employer should the employee breach his obligations under Questions 4 - 6 above?

According to Labour Code the employee that breaches the obligation consisting of prohibition to compete the employer, is obliged to indemnify the damage caused to the employer. In case the 'anti-competition agreement' provides for a penalty to be paid by the employee being in breach of obligation regarding prohibition to compete, such employee may be allowed to perform its competitive activity in the future only after he has paid to the employer the respective penalty provided in the agreement. Moreover, the employee shall also pay to the employer the difference between the penalty and the damage caused to the employer. The Court may decide to reduce the amount of the penalty applicable in case of breach of the prohibition to compete, if the amount of the penalty is excessive taking into consideration the circumstances that led to the breach.

In case the 'anti-competition agreement' expressly provides for a penalty to be paid by the employee being in breach of the obligation on prohibition to compete, the employer, besides the payment of the penalty and other determined indemnifications, may request the employee stop the competitive activity. The employer may make this request only when such measure is reasonable and justified and taking into consideration the infringed or harmed interests of employer as well as the conduct/behaviour of the employee.

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