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French Supreme Court Invalidates Agreement between Employers Not to Solicit Each Other's Employees

In Europe, the validity of post-employment noncompete covenants is generally viewed with great suspicion by the courts and legislatures. Thus, in France, Spain and Germany, an employee's agreement not to compete with a former employer is often rejected as an infringement of the principle of freedom of occupation. Similarly, in the United Kingdom, the noncompete obligation must not impair the freedom of trade.

Therefore, in these jurisdictions (and others with similar requirements), a noncompete obligation is permitted only if and to the extent that it is justified by a legitimate interest of the employer. The courts strike a balance between the employee's freedom to work, which is a fundamental right, and the employer's legitimate interest in protecting its business. To obtain a valid noncompete agreement, an employer must (among other requirements) pay the employee an adequate financial compensation, to indemnify him for the loss caused by the infringement of his freedom of occupation.

In a recent decision, the French Supreme Court has taken these principles a step further, requiring an employer to indemnify an employee for injury to his freedom of occupation when the loss was not the result of a noncompetition agreement between the employee and the employer, but rather resulted from an agreement between employers not to solicit each other's employees. (March 2, 2011, No. 09-40-547).

In this case, a French unit of Reuters and a company called Sophis were parties to such a mutual nonsolicitation agreement. An employee of Reuters claimed that he had been constructively discharged by Reuters when an additional layer of management was inserted above him and his job duties were diminished, and he also claimed that he had been injured by the nonsolicitation agreement.

The lower court ruled in favor of the employee on both claims, awarding damages of €15,000 Euro for the injury to the employee's freedom of occupation, and Reuters appealed.

The Supreme Court affirmed the ruling that the nonsolicitation agreement violated the freedom-to-work principle, entitling the employee to compensation for the injury. This is the first time that the Supreme Court has recognized a violation of the freedom-to-work principle.

The French Supreme Court has also demonstrated its antipathy towards noncompete agreements in other contexts, outside of the confines of an employment contract. Thus, the Supreme Court has held that a noncompete agreement incorporated in a shareholder

agreement between a company and an employee is void if it is not limited in time and geographic area, and if it is not supported by adequate compensation to the shareholder/employee. The fact that the noncompete is not part of the employment contract is irrelevant, the Court held. As a consequence, the validity requirements apply, whether the noncompete obligation is included in the employment contract or in another commercial arrangement. Similarly, these mandatory conditions for establishing a valid noncompete obligation will be applied when the employee is asked to accept a noncompete covenant in order to be granted stock options.

While French employers should avoid a strict prohibition against recruiting a competitor's employees, they may be able to achieve some relief with a non-poaching agreement, which prevents ex-employees from soliciting the people that they worked with and persuading them to join a new company. Such an arrangement might be enforceable, as it does not prohibit the employees themselves from being hired by the competitor.

A recent case in the UK may point to another way to get around the impact of the Reuters decision. A provision in an employment agreement requiring the employee to inform his employer if he receives an approach from a rival has been declared lawful. The Court held that this provision would not amount to a restraint of trade, as the employee could decide whether or not to move to the new company. (*Tullett Prebon Plc v BGC Brokers Lp.*)

Whether such an agreement would be enforceable in France is unclear, as the requirement that employees inform their employers about the offers they receive from competitors could be seen as a violation of the freedom-to-work principle. It might also be seen as an intrusion in the employee's personal life and as a disproportionate infringement of individual liberties.

Proskauer's International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world.

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