
NON-COMPETITION AND CONFIDENTIALITY CLAUSES IN THE EMPLOYMENT CONTRACT

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Due to the globalization and the huge competition in the employment market in general, companies have developed a growing concern about the confidentiality of their information including their business, strategies and future projects, thus, keeping them all in absolute secrecy.

The matter becomes more complicated with regard to certain employees, for instance - the executives. They generally hold confidential and/or privileged information to their strategic and specialized positions in the company. The main worry in the corporate environment is the misuse of this confidential information for unreasonable competition.

For that reason, in order to avoid the possibility of disclosure of strategic information by employees or former employees, the number of companies inserting Non-competition and Confidentiality Clauses in the employment agreement is becoming more and more common. Some of those clauses may even supersede the life of the contract, "quarantine", in order to avoid the possibility of the employee using the confidential or privileged information on his own behalf or on others behalf.

Through the Non-competition and Confidentiality Clauses the employee commits himself not to practice, on his own behalf or on the behalf of third parties, any act of competition against the employer during the employment contract or after its termination, and it also commits

himself to maintain confidential all the information available when performing his position. The purpose is to avoid unfair competition against the employer.

The unfair competition and the violation of information are not subject only to the Labor Law sphere.

In the commercial law the Federal Constitution guarantees the principle of free enterprise in the economic order making reference to the free enterprise as a way of sustaining economic order as well as the individual's search for full employment.

According to the Brazilian Criminal Code the revelation of any confidential information that the employee may hold because of his position and its disclosure may harm others is considered a crime. The Industrial Property law equally considers being a crime of unfair competition the advertisement, exploitation or use of any confidential information in industry, commerce or services without previous authorization.

With all the above mentioned, it is possible to notice the existence of several legal provisions that guarantees the free enterprise in the market and also the pursuit of the full employment and the freedom of work.

In the Labor Law sphere there is no law prohibiting an employee of having more than two jobs simultaneously and it is also

legal for such employee to perform another activity, especially in positions that do not require exclusivity or an specific qualification.

However, despite the absence of a right of exclusivity during the employment contract, labor law explicitly guarantees the free enterprise and confidentiality of the employee when performing his duties, because these are implicit obligations based on the employment agreement.

Therefore, it is totally possible to insert Non-competition and Confidentiality Clauses in employment contracts in Brazil because these obligations are already implicit in the contract and the employee must observe and understand these clauses and must not use confidential information, to which he has access due to, for his own benefit or for the benefit of others under the penalty of having his employment terminated for cause.

Although during the employment contract the Brazilian labor Law ensures the employees' confidentiality and non-competition. Upon the termination of the contract there is no legal provision which foresees the existence of a Non-competition Clause. Conversely, the Federal Constitution guarantees the employee the right of full employment.

However, even though the Constitutional Law ensures the pursuit of the full employment, the existence of a specific and restricted non-competition clause executed between the parties will be considered valid if the employer receives indemnity during that period.

This is because according to the Federal Constitution, the employee will not be prevented from pursuing a new employment. The employee will only have to abide to certain requirements, as a

result of the position performed by him, in order not to use confidential information, even if indirectly, for his own or for the benefit of others.. For that reason, while the clause if valid, he shall receive an appropriate financial compensation.

The Labor Department of Almeida Advogados is at your entire disposal to clarify and provide any further information regarding Non-competition and confidentiality clauses in the employment contract.