

Restrict with care

Noyan Turunç of TURUNÇ discusses how Turkish law governs restrictive covenants in employment agreements

As the Turkish economy is growing at a rapid pace, foreign direct investment into the country is rising and the country's economy is becoming more dynamic by the day, one of the hot issues for employers and employees in Turkey is the status of restrictive covenants under Turkish law, in particular as it pertains to covenants not to compete. The issue also comes up frequently in M&A deals, for example, where the target is a family business, as is often the case in Turkey, and the selling shareholder will stay with the company as an employee for a set period of time to oversee the transition of the business.

Under Turkish law, the use of restrictive covenants is a common mechanism to protect contractually the employer's business interests from the risk of competition by its former employees, whereby the worker agrees to refrain from conducting business similar to that of the employer. Non-compete obligations can cover both the term and a period following the termination of the employment contract.

As a matter of law, non-competition obligations arise from the employee's duty of loyalty and aim to protect the employer's interests. The new Turkish Code of Obligations (COO), which entered into force on July 1, imposes a non-compete obligation on workers during their term of employment. The COO also sets forth, as did its predecessor, that a former worker may contractually undertake to refrain from engaging in any competitive activity post-employment, in particular operating a business that competes with the employer for his/her own or a third-party's account, or participating or engaging in a beneficial relationship with such a competing business.

Such covenants may be signed at the time of hiring, during the employment relationship or after termination. Note, however, that courts tend to favour workers' allegations that non-compete agreements entered into during the term of employment were unduly imposed on the employee.

Non-compete covenants are subject to certain statutory and court-mandated conditions and limitations. Specifically, under the COO, a non-compete covenant is valid only if the worker is at least 18 years old, he or she has access to the employer's customers or business secrets during his or her employment, and the use of such information could materially damage the employer. Furthermore, the COO empowers courts to limit non-compete covenants in scope and time. In doing so, courts take into account and balance the conflicting interests of employers and workers, and must reasonably protect them. When balancing the employer's legitimate business interests with the interests of the worker, judges take into account, among other things, the interests granted to the worker in exchange of the restriction. Having said that, based on the theory that the public has an interest in permitting individuals to carry on their trade freely, Turkish courts are generally reluctant to uphold any restraint on trade that is seen as contrary to public interest. As such, they do not favour covenants that would unduly burden an ex-worker or do not protect a legitimate interest of the employer. Therefore, if the non-compete restrictions are broad, the employer must prove their justifiability and reasonableness. In making the enforceability determination, reasonableness with respect to the specific circumstances is of the essence for courts. Not all industries travel at the same speed: two years in the retail field is not the same as two years in fast-paced technology development.

There are five main limitations on non-compete covenants under Turkish law. The first relates to the prohibited activity: employers must always keep in mind that departing workers need to be able to make a living. As such, the non-compete restriction must be limited to the scope of the employer's present business, and the restricted areas of activity must be specified.

Second, the covenant must be limited to the geographical territory in which the former employer carries out its business. Courts may find geographical restrictions that are too broad unenforceable. For example, in one case, the Court of Cassation found a non-competition agreement imposed on a former

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bank employee prohibiting the employee from working at any bank throughout Turkey overbroad.

Third, a worker cannot be kept out of an industry or prevented from competing with the former employer for an indefinite period. Although the maximum limitation is two years under the COO, the COO permits longer restrictions for extraordinary situations. On the other hand, courts can also shorten the restricted time period. For example, in one case in 2008, the Court of Cassation determined a six-month restriction as the maximum permitted non-compete period for the particular case at hand (under the old code of obligations, which did not contain a maximum non-compete period, courts had ruled one year as the absolute maximum permissible non-compete period). The duration of the covenant needs to be considered on the merits of each employment relationship.

Fourth, a worker may be contractually prevented from engaging in competitive activity only if he or she had access to the employer's customers or business secrets and the use of such information may cause considerable damage to the former employer.

Finally, an employer must have a legitimate interest in preventing a worker from competing with it by taking advantage of the information and knowledge acquired as a result of his or her employment with the employer.

If the employer terminates the employment contract without a justified reason or if the worker terminates it for a justified reason, the non-compete obligation ends and no lawsuit may be filed against the worker for breach of the non-compete covenant. Furthermore, if the employer no longer has a real interest in its maintenance, the prohibition against competition ceases to exist.

Non-solicitation clauses, which aim to prevent the former employee from approaching the former employer's customers or poaching the employer's other workers, and non-disclosure clauses, which aim to protect the trade secrets and confidential information of the employer from disclosure to third parties, may also be incorporated into employment agreements as restrictive covenants.

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Duties outside of covenants

Good faith and honesty are two fundamental principles of the Turkish legal system. In employment relationships, the duty of loyalty, which stems from these principles, means that workers are obliged to protect the interests of the employer and the workplace, and, when using their rights and performing their duties, refrain from actions that may cause damage to the employer or the workplace. Examples of this obligation are refraining from disclosing the employer's trade secrets, confidential information and data to third parties, abusing the employer's trust, and working in another job during leave on a doctor's report. Furthermore, if legitimate interests of the employer require it, the duty of non-disclosure can be extended after the employment is over. The scope of the duty of loyalty changes based on the specifics of the employment relationship, which is personal in character. As there is no comprehensive list enumerating the conducts that breach the duty of loyalty, it is best practice to include workplace-specific provisions in contracts.

Conduct in violation of these duties is a just cause for the termination of the employment contract by the employer without having to prove any actual damages. The contract can be terminated with no compensation to the employee and the employer may seek compensation for its damages.

Garden leave

Although the concept of so-called garden leave (requiring an employee who has given notice or has been terminated to depart from the workplace while continuing to pay him or her during the applicable notice period) is not specifically regulated under Turkish law, an employer may grant such rights to employees.

For unilateral terminations of employment contracts, the law provides minimum notice periods but longer periods may be provided in favour of workers. During notice periods, time must be accorded to the worker to seek new employment within working hours, and the worker can aggregate those hours and use them before his or her separation. Because of the continuation of the employment relationship during the period of garden



About the author

Noyan Turunç is a partner based in the Istanbul and Izmir offices of TURUNÇ, a full-service corporate law firm, established in 1990, with offices in Istanbul, Izmir and Ankara, and is the firm's founding partner.

In addition to being one of the leading practitioners of labour and employment law in Turkey, Turunç's diverse practice covers a wide spectrum of areas, including banking and finance, mergers and acquisitions, restructuring and insolvency, project finance, competition (antitrust) and tax. He has also litigated hundreds of cases in many areas, including with respect to labour and employment law, corporate matters, competition law, tax, and customs. He has decades of experience advising domestic and international corporations and

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Turunç is the author of many publications on labour and employment law, and related topics, including the English-language books *Turkish Labor Law* and *The Law and Practice of Mergers and Acquisitions in Turkey*. He wrote and co-wrote the Turkish chapters of various publications including the books *International Labor and Employment Laws* and *Restrictive Covenants and Trade Secrets in Employment Law: An International Survey*, both published by the American Bar Association and BNA Books.

Before founding TURUNÇ, he was general counsel at Boeing Services (Turkey) and The Coca-Cola Export Corporation (Turkey).

Turunç received his LLB degree and his LLM degree (in competition law) from the Ankara University School of Law.

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leave, the worker remains bound by the employment contract and the duties thereunder, including any non-compete, non-solicitation and non-disclosure covenants.

Litigation

There is a duality of jurisdiction in labour law disputes in Turkey: while labour courts have jurisdiction over labour law cases, commercial courts can also have jurisdiction over disputes involving restrictive covenants.

In labour disputes, the parties may freely agree on the applicable law, except for any statutory protections provided by the country where the worker regularly works. If the parties have not agreed on the applicable law, the law of the country where the worker regularly works will be applicable. If the employee works in more than one country, the law of the country where the principal workplace of the employer is located will be applicable. The law of a country that is more related to the contract may also be applicable, however. The parties may also agree on how to resolve conflicts of laws issues.

Unless provided otherwise, claims are time barred after 10 years, except claims regarding wages, which are forfeited after five years. Statutory periods cannot be modified and the limitation period will start to run as of the notice date.

The burden of proof in disputes is on the claiming party. Likewise, the other party has to prove its points of defence. That means that the former employer must prove the enforceability of any restrictive covenant it wants to enforce against the employee, and also the reasonableness of the scope of such covenant.

Remedies

As a principle, in cases of a breach of a non-compete covenant, the breaching employee must compensate the employer for all damages suffered by the employer.

It is possible for employers and employees to include various remedies for breaches of non-compete obligations under the principle of the freedom of contract. As such, inserting a liquidated damages clause in the contract may be the best practical way to guarantee compensation for damages by a breaching former employee, who can free himself or herself from the non-compete obligation by paying such damages and continuing to compete, or ceasing the competition and complying with the restriction. Liability for any further damages suffered will remain, however. Note, also, that judges are empowered by the COO to invalidate or modify any penalties they deem as excessive. Finally, a liquidated damages clause will be valid only if it is applicable to both parties, the damages are proportionate, and the contract is terminated with just cause.

In addition to being entitled to damages, the employer may seek equitable relief for violations of restrictive covenants and the court may order the immediate cessation of the infringing activities, provided that the right to such relief was included in writing in the non-compete agreement. The employer may, however, encounter difficulties and delays in the enforcement of such orders, for example the closing-down of a competing workplace or the termination of the employee's employment at a competitor.

Furthermore, if the risk of irreparable harm is present due to the breach, an employer may seek to

restrain the worker from violating a covenant through a temporary restraining order (TRO), which is obtained *ex parte*, pending a hearing with the defendant present. A TRO will be granted only if the court views that reasonable grounds exist for an imminent, irreparable prejudice to the requesting party's rights. The related lawsuit must be filed within 12 days of the issuance of a TRO; the TRO will otherwise automatically become void.

Finally, if clarity is sought regarding the validity and enforceability of a restrictive covenant, either party may file a declaratory action. In order to have standing, the claimant must have a specific interest in filing such an action and must be in a position at the time as not to be able to file an action for enforcement. The defendant can lodge counterclaims and request the court to declare, for example, the covenant unreasonable or the related termination unjustified.

If a worker leaves his or her employment before the expiration of the employment contract or without complying with the notice period and works for another employer, the contract can be terminated by the employer. The new employer will be jointly liable with the worker if it caused the worker's conduct or employed the worker being aware of the conduct or continues to employ the worker after becoming aware of the conduct.

In summary, Turkish law represents a typical example of the civil law system. Turkish labour and employment laws are detailed and comprehensive but judges still play an important role in applying the basic principles of the legal system, including social policy concerns with respect to the protection of the interests and livelihood of workers. As such, each employment contract is unique based on the specifics of the employment relationship, such as the industry involved, and the relative bargaining positions of the employer and the employee. Therefore, employers cannot follow a one-size-fits-all approach for the restrictive covenants they wish to use in their employment contracts, and each restrictive covenant must be carefully tailored to pass muster with Turkish courts.