World Law Group

Global Guide to Non-Competition Agreements

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WORLD LAW GROUP NON-COMPETITION ENFORCEMENT GUIDELINE

Please note that this guide provides general information only. Its purpose is to provide a brief overview of legislation governing non-competition covenants requirements in each jurisdiction covered. This information is not comprehensive and is not intended or offered as professional or legal advice, generally or in a given situation. This guide is an outline of country-specific obligations, which may change. Facts and issues vary by case. Legal counsel and advice should routinely be obtained, including locally for any particular jurisdiction. Please consult your own counsel.

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I. INTRODUCTION

During the term of his/her employment, each employee is generally bound by general obligations, such as professionalism, confidentiality, respect of company rules, regulations and hierarchical structure, and loyalty. The duty of loyalty prohibits the employee from, among other things, exercising or engaging in any activity which competes with that of the employer.

Upon termination of employment, the employee is generally free to work in any activity, even a competing one, unless the employee is subject to an employment-based non-competition agreement.

An employment-based non-competition agreement is a restrictive covenant prohibiting an employee from working for a competitor in at least certain capacities or operating a competing activity after the termination of his/her employment.

Non-competition agreements can help a business protect its confidential information, trade secrets and customer relationships and prevent unfair competition. However, whether such agreements can be enforced, and under what circumstances, vary significantly among jurisdictions.

The aim of this publication is to have a dedicated resource on the enforceability of non-competition agreements, distilling the experience of numerous World Law Group ("WLG") member firms into a single reference.

This multi-jurisdictional work shows that in many countries all over the world – and in almost all jurisdictions in which a WLG member firm contributed to this guide – there are laws, or at least judicial or agency decisions, governing enforceability of employment-based non-compete agreements.

Further, it appears that, in most of the jurisdictions, non-compete agreements are enforceable at least in certain respects, to the extent they are necessary for the protection of the employer's legitimate interests and comply with a certain number of requirements.

While having a well-drafted, enforceable non-competition agreement can be a source of significant value for many businesses, some are disappointed to discover that they have agreements that are unenforceable or otherwise inadequate.

We hope that this guide will be useful for those who have to deal with non-competition agreements in one of the jurisdictions covered.

This guide focuses on the laws around the world as they currently stand at the date of publication.

However, we cannot exclude some changes in the laws to a certain extent in this area. Please visit www.theworldlawgroup.com/noncompetesguide where we hope to post updates as they become available, and feel free to consult other reference sources.

We wish you a good read!

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ARGENTINA (Alfaro-Abogados)

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

During the employment relationship, non-competition and other restrictive covenants are governed by section 88 of the Employment Contract Law. This section states that the employee must abstain from conducting business (by him/herself or by means of another person) that may affect the interest of the employer (except in case of explicit employer's authorization). During the employment relationship, in order to be enforceable, it would not be necessary to execute a non-competition agreement in writing. However, in case of managerial staff, companies used to execute (written) non-competition agreements or to include a non-competition covenant in the employment agreement.

Post-employment non-competition agreements are not actually provided by labor law. However, case law permits the execution of such agreements and sets forth certain requirements for these agreements to be valid. To be enforceable, post-employment non-competition covenants should: (i) be agreed in writing, (ii) be reasonably limited in time (duration), geographic scope and activities/area of business, and (iii) have an adequate compensation.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Employment-based non-competition agreements are enforceable within the limits set forth by law and case law. Please see Question 1 above.

3. If your jurisdiction does not enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

During the employment relationship, the employer would evidence the violation to the non-competition obligation to be entitled to terminate the employment relationship with fair cause (in such case, no indemnification shall be due to the dismissed employee). Please note that such breach must be material to terminate the employment relationship with fair cause. Labor courts are in general extremely reluctant to admit a fair cause of dismissal. It shall be a clear and evident breach of the non-competition obligation to prevent a former employee to claim for severance payment.

Regarding post-employment non-competition agreements, provided that such the agreement is valid (please refer to Question 1 above) and in order to obtain enforcement, the employer would need: (i) to show the existence of a non-competition agreement, and (ii) evidence the breach of such non-competition obligation.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

The employer does not need to show that the employee was a particular level to enforce a non-competition restriction. However, in practice, managerial staff or certain key employees are the only ones who may compete with their current/former employer. Furthermore, case law has considered the level of the employees that executed a non-compete agreement (e.g. employees who are lawyers) and, additionally, if they executed such kind of agreements with the advice of a legal counsel.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   Judges have discretionary power in assessing the validity of the clause. They can either decide to (i) declare the covenant void and null, or (ii) revise and declare the covenant applicable within narrower limitations.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes. In order to be valid and enforceable, Labor Courts should consider the impact of enforcement of post-employment non-competition covenant. The non-competition covenant should not prevent the employee from performing his/her activities in a normal way based on the constitutional right to work.

7. **Does it matter when the employee executed the non-competition agreement?**

   Yes. If the non-competition agreement is executed when the employment agreement is in force, the consequences may be different since any breach of the non-compete obligation during the employment relationship should be considered as a fair cause to terminate the employment relationship. It is important to mention that, so far, case law would never have punished an employee with a money compensation in case of non-compliance of the non-compete agreement during the employment relationship.

   The execution date of post-employment non-compete agreements is irrelevant, if the breach occurs after the termination of the labor agreement.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   It depends on the drafting (if any) of the post-employment non-competition provision: the clause/agreement can either provide for a restriction of the non-competition obligation to certain types of termination or not.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   In order to be enforceable, case law set forth that post-employment non-competition agreements should have an adequate compensation. Such compensation may be only one important payment/installment (conducted at the termination of the validity of the post-employment non-competition covenant).

   However, the compensation of post-employment non-competition agreements is usually agreed to be paid on a monthly basis (during the whole term of validity of the post-employment non-competition covenant). Naturally, during the employment relationship, the employer must pay the employee his/her salary.

10. Can an employer use customer-based restriction instead of a geographic restriction?

Case law usually provides that the covenant must be limited to a defined geographical scope that might correspond to the area where the customers are based. However, in our opinion, technically it would be a possibility to use customer-based restriction instead of geographic restriction.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Yes, non-competition provision that the employee entered into with the employer's predecessor should be transferred to the new employer. Labor rights and obligations should be transferred to the new employer (in case of the transfer of the business).

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that the breach occurred?

The non-competition agreement should not be extended in the event a court determines that the breach occurred.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment contracts?

Yes, for the sellers who are in an employment relationship with the target company at the time of the sale.

ARGENTINA (Bruchou, Fernández Madero & Lombardi)

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

Non-competition and other restrictive covenants during the employment relationship are governed on a generic basis by the Employment Contract Act N°20,744, Collective Bargaining Agreements and Argentinean case law.

There are no specific provisions or regulations related to post-employment non-competition obligations. Therefore, our comments are based on judicial precedents and the application of general labor laws and principles.

Pursuant to case law, in order to be enforceable, a post-employment non-competition covenant must be in written and (i) necessary to protect the employer's business, (ii) reasonably limited in time and in space, (iii) fairly remunerated by an adequate compensation, and (iv) must not prevent the employee from performing his/her activities in a normal way, i.e., it must notably define a restricted area of business.

A recent judicial precedent (in re, *Leguizamón Eduardo Martín Luis c. Nidera S.A. and Others s. Acción Ordinaria de Nulidad*, Appeal Court I, ruling 83,924, November 10, 2017) considered enforceable a confidentiality and non-competition agreement where the scope of non-competition was duly described, a fair and adequate compensation was paid, a period of time was defined and no vices of the will were invoked by the plaintiff.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Employment-based non-competition agreements are enforceable within the limits set forth by law, Argentine case law and the applicable Industry-wide Collective Bargaining agreement, if any.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

Provided that the non-competition agreement is valid (please refer to Question 1 above), the employer would need (i) to show the existence of a non-competition agreement and (ii) establish by proofs/evidence items there has been a breach of the non-competition obligation in order to obtain enforcement.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

In order to be valid and enforceable, one of the conditions of the non-competition covenant is that such obligation must be necessary to protect the employer's business (please refer to Question 1 above).

In practice, this condition implies that the employee who entered into such covenant must be of a sufficiently high level by virtue of his/her functions and qualifications (e.g., a sales manager with a direct contact with the clients and with a deep knowledge of the organization and methods of the company, an engineer entrusted with significant business secrets or important know-how, etc.).

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   In such instance where all the conditions are met but one of them is overly broad, judges have discretionary power in assessing the validity of the clause. They can either decide to (i) declare the covenant void and null (which can only be invoked by the employee) and grant damages to the employee or (ii) revise and declare the covenant applicable within narrower limitations (e.g., restriction of a broad geographical scope).

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes. In order to be valid and enforceable, one of the conditions of the non-competition covenant is that it must not prevent the employee from performing his/her activities in a normal way (please refer to Question 1 above).

   A Court would look at the general structure of the covenant in order to identify whether or not the restriction is balanced.

7. **Does it matter when the employee executed the non-competition agreement?**

   The execution date of the non-competition agreement is irrelevant with respect to its validity.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   It depends on the drafting of the non-competition covenant: the clause can either provide for a restriction of the non-competition obligation to certain types of termination (e.g., dismissal for gross misconduct only) or include all types of termination.

   Also, the employer can unilaterally decide to waive the non-competition clause and thereby release itself from the obligation to pay the financial compensation, if the covenant expressly provides for this possibility.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   Yes, this is a condition of validity of the post-employment non-competition clause (please refer to Question 1 above).

   In order to be valid and enforceable, the covenant must expressly provide for a financial compensation.

   The amount of the financial compensation corresponds to a certain percentage (generally from 25 percent to 75 percent) of the average gross monthly remuneration calculated based over the past 12 months. This amount is paid on a monthly basis after termination for the length of the non-compete covenant (generally from 6 months to 24 months, depending on the particular circumstances).

10. Can an employer use a customer-based restriction instead of a geographic restriction?

In order to be valid and enforceable, the covenant must be limited to a defined geographical scope that might correspond to the area where the customers are.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Only if there is a transfer of assignment of the employment relationship between the former and the new employer. If both employers are independent entities, without any relationship, the new employer cannot enforce a non-competition provision that the employee entered with a previous employer and must agree to a new one.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

No, the non-competition restriction cannot be extended. Please bear in mind that local labor principles in Argentina are protective of employee's interests and thus, always applied in favor of the employees. An extension in the non-competition period it is considered a disadvantage measure against the employees that is unlikely to occur.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

Yes, for sellers who are in an employment relationship with the target company at the time of the sale.

For sellers who are not in an employment relationship with the target company at the time of the sale, the only applicable restrictions result from antitrust laws and regulations, and related case law.

AUSTRIA

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

Non-competition and other restrictive covenants in employment contracts are governed by the Austrian Employment Act for White Collar Workers (*Angestelltengesetz, AngG*).

The law places several restrictions on non-competition clauses: A post-employment, non-competition covenant (i) may only be concluded with a person of legal age and (ii) may only limit activity in the line of business of the employer and must not restrict the employee unduly in progressing professionally. The non-competition clause also (iii) may not exceed the period of a year and it (iv) may only be enforced if the employee's last income exceeds a certain level of income (e.g., for clauses agreed after the 29.12.2015, the level is EUR 3.420 gross, in 2018).

The parties may agree to a contractual penalty. The law limits this contractual penalty to a maximum of six times the last net salary. If the parties do not agree to a contractual penalty, the employer may request an injunction.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Employment-based non-competition agreements are enforceable within the limits set forth by law.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

Provided that the non-competition agreement is valid (please refer to Question 1 above), the employer would need (i) to show the non-competition agreement and (ii) to bring proofs/evidence items there has been a breach of the non-competition obligation in order to obtain enforcement.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

The employer needs to show that the requirement (iv) above with regards to the last level of income is met.

5. What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?

Judges have a genuine discretionary power in assessing the validity of the clause. They can either decide to (i) declare the covenant null and void or (ii) revise and declare the covenant applicable within narrower limitations (e.g., restriction of a broad geographical scope).

6. Will a court consider the impact of enforcement of the non-competition restriction on the employee?

Yes. In order to be valid and enforceable, one of the conditions of the non-competition covenant is that it must not restrict the employee unduly in progressing professionally. The Court would look at the general structure of the covenant in order to identify whether or not the restriction is balanced.

7. **Does it matter when the employee executed the non-competition agreement?**

   The execution date of the non-competition agreement is irrelevant with respect to its validity.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   The clause may not be invoked if the employer terminates the employment contract unless the employee's culpable behavior was the cause for the termination or in case the employer offers to continue to pay the employee's last salary for the duration of the restriction. The clause may also not be invoked if the employer's behavior gave the employee good reason and/or a cause to terminate the employment relationship.

   The employer can unilaterally decide to waive the non-competition clause.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   No, unless the employer terminated the employment contract without any culpable behavior on behalf of the employee. In that case, the employer must pay the employee the last salary he or she earned for the duration of the non-competition period if the employer wants to enforce the non-competition clause. The employer needs to inform the employee on his or her decision to continue to pay the latest salary when ending the employment relationship.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    The employer may use a customer-based restriction. Yet, in order to be valid and enforceable, it is highly advisable to include an additional defined geographical scope to ensure that the clause does not restrict the employee unduly in progressing professionally.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    In case of a transfer of undertaking, the non-competition provision is transferred to the new employer, and the employer may enforce that non-competition clause.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    No, the non-competition restriction cannot be extended.

13. **Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?**

    The law on non-competition provisions applies to employment relationships only. Non-competition clauses in other contracts are not subject to employment laws, but to restrictions resulting from laws on unfair competition, antitrust laws and regulations, and related case law.

BAHRAIN

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   The Bahrain Labour Law issued by Royal Decree No. 36 of 2012 (the "Labour Law") governs non-competition covenants in relation to employment.

   Pursuant to Article 73 of the Labour Law, in order to be enforceable, the employee must be aged 18 years at the time of entering into the non-competition covenant. The covenant must be restricted to a period not exceeding one-year, and the place and type of work to the extent necessary for the protection of the employer's legitimate interests.

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   Employment-based non-competition agreements are enforceable provided that they meet the requirements under Article 73 of the Labour Law, as set out above. However, in practice the remedies provided by the courts tend to be restricted to damages for quantifiable loss.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   Assuming that the non-competition agreement/provision meets the requirements of Article 73, the employer will need to provide the non-competition agreement/document containing the non-compete provision signed by the employee and evidence of the employee's breach together with evidence of its actual losses if compensation is to be claimed.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   No. The employee does not have to be at a particular level but must have been in a position to acquire knowledge of the trade secrets of the business which are confidential to the business and not in the public domain, and which would enable the employee to compete with the business.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   Judges have a great deal of discretion to determine whether the non-compete restriction is reasonable in all the circumstances with regard to the restricted activity and the geographical scope. In regard to duration, Article 73 does not permit a non-competition agreement/provision to extend beyond one year but will still consider what is a reasonable period of time for the restriction. Bahrain does not have a system of case reporting and there is no principle of binding precedent. Therefore, decisions can vary from one judge to another and each case will turn on its own facts. Nevertheless, it should be expected that judges will be looking to see that the non-compete restriction is reasonable and necessary to protect the legitimate interests of the business. Where the non-compete restriction is overly broad or otherwise does not meet the requirements of Article 73 then there is no obligation on the courts to re-write or re-interpret it to make it enforceable.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes. Although there are no explicit rules governing how a non-compete restriction will be considered, judges will likely take into account the impact on the employee and, when determining reasonableness, will consider whether the employee is unduly prejudiced and restricted.

7. **Does it matter when the employee executed the non-competition agreement?**

   The employee can execute the non-competition agreement at any time during the currency of his/her employment; however, it is recommended that execution occurs before the non-compete restriction is intended to come into effect.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   Where the employment contract is terminated or not renewed through no fault of the employee, or where the employer commits any act justifying the termination of the contract by the employee, then the employer will not be able to invoke the non-compete agreement.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   There is no such requirement under the Labour Law. However, where the non-compete agreement/provision is conditional on the employee being paid during the period of the restriction then this obligation on the employer will be upheld by the courts.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    No. This is because the Labour Law requires that a non-compete restriction must also be defined in terms of its geographical scope and duration.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    Yes. If the employer is a successor employer to the employment relationship and the non-compete agreement/restriction was expressed for the benefit of the employer and its successors.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    No. This is unlikely to be permitted unless the non-compete agreement provided for an extension of the non-compete restriction on the occurrence of a particular breach. In all cases, the restriction will not be permitted for more than two years.

13. **Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?**

    Article 73 of the Labour Law addresses non-competition arising out of an employment relationship. Where there is no employment relationship between the parties then the non-competition provision will be separately considered as a matter of contract between the parties and any other applicable competition legislation.

BELGIUM

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

Non-competition and other restrictive covenants are governed by the Belgian Employment Contracts Code, Belgian Industry-wide Collective Bargaining Agreements, and interpreted by Belgian case law.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Employment-based non-competition covenants are only enforceable within the strict limits set forth by the laws as mentioned above.

Under Belgian Labor law, three different types of non-competitions covenants exist, more specifically (i) a common non-competition covenant, (ii) a derogatory, non-competition covenant and (iii) a non-competition covenant for sales representatives.

The common non-competition covenant

This covenant is for both blue-collar and white-collar workers. It is enforceable when it meets specific salary thresholds and when the clause is established in an individual written agreement that describes the prohibited competing activities for a competitor, the Belgian geographical scope to which the prohibition applies, the duration of the prohibition with an absolute maximum of 12 months, and the non-compete indemnity payable to the employee that has to be at least equal to 50 percent of the employee's gross salary corresponding to the period of application of the covenant.

The specific or international non-competition covenant (derogatory covenant)

This covenant can be inserted in contracts for certain white-collar employees. Companies to which this covenant may apply must have an international field of activity or have its own research service. This special covenant allows then to deviate from certain aspects of the common non-competition covenant, more specifically from the strict Belgian geographical area to which the prohibition applies and from the maximum duration of 12 months.

The non-competition covenant for sales representatives

This non-competition covenant has been introduced specifically for sale representatives, being employees whose main function is to visit clients with the purpose of negotiating and/or concluding deals. The conditions for the validity of this covenant deviates from the other covenants regarding the specific salary threshold, the required non-compete indemnity, and also the specific area to which the covenant will be applicable.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

Provided that the non-competition agreement is valid, the employer will need to submit the written agreement and also proof that his former employee violated the clauses of the covenant.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   Yes, the enforceability of a non-compete clause in an employment contract depends on the gross annual salary of the employee at the time of the termination of the said contract. If the annual salary does not exceed a specific indexed amount, the non-compete clause will be regarded as non-existent. When assessing this condition, all benefits – including benefits in-kind – that arise from the employment contract will be considered.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   If a judge concludes that one or more of the validity conditions of the common covenant have not been met, the whole covenant must be declared invalid and therefore unenforceable. However, since January 2015, a judge can declare the clause partially invalid and restrain its effects to the legal limits but only if such thing has been explicitly asked by both parties.

   When it comes to the derogatory clause, however, the judge has a wider margin of appreciation because the covenant is limited neither in time nor to the Belgian territory.

   Since these validity conditions exist to protect the employee, only the employee him/herself – and not the employer – can ask the judge to declare the covenant invalid.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   When determining if the validity conditions have been met, a judge will consider all elements of the case. So, the judge could in fact consider that a covenant that restricts the former employee to exercise a certain activity on the whole Belgian territory while the company's range of action was rather limited, is indeed excessive and therefore invalid.

   The covenant should be limited to places and activities where the worker can truly compete with the employer, given the nature of the company and its range.

7. **Does it matter when the employee executed the non-competition agreement?**

   The execution date of the non-competition agreement is irrelevant with respect to its validity.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   The common and sale-representatives non-competition covenants cannot be enforced, even if valid, if the employment agreement is terminated (i) during the first six months from the start of the agreement, or (ii) after this period in the event of termination by (a) the employer without serious cause imputable to the employee, or by (b) the employee with serious cause imputable to the employer. These cases of unenforceability are made mandatory by the law; therefore, the parties cannot decide to deviate from this in the covenant. The parties are however free to determine in which additional cases the covenant will not be enforceable.

For the derogatory covenant the same principle applies, with the one difference that parties are allowed to contractually deviate from these cases of unenforceability, except for the last case (ii-b) as described above.

In all cases, an employer may still explicitly waive the application of the clause within a period of 15 days, starting from the moment of the termination of the employment agreement.

9. Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?

Yes, one of the validity conditions (expect for the sale-representatives) is that a non-compete indemnity is paid to the employee. This indemnity has to be paid in one time when the employment contract is terminated.

If the employee breaches his/her non-compete obligations, he/she will not only be obliged to reimburse this compensation to his/her former employer, but he/she will also have to pay an extra indemnity equal to this compensation. Additional indemnities can be obtained by the employer provided that he/she proves the actual damages suffered.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

The provisions on non-competition clauses explicitly demands for a geographical restriction to be laid down, one that must be limited to places where the worker can truly compete with the employer. Failing to provide any information on such geographic restriction will mean that the covenant itself is invalid.

Nonetheless, you could consider adding a customer-based restriction on top of the geographic restriction. Labor law does not contain any specific regulations on this.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Yes, the non-competition covenant is transferred to the new employer in case of transfer from the personnel from one employer to another with preservation of the same employment conditions.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

No, the non-competition restriction cannot be extended.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

No, if there was no employment relationship between the concerned parties, the normal provisions of commercial law and other regulations will apply.

BRAZIL

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

In Brazil, there is no specific law regarding non-competition and other restrictive covenants.

However, Brazilian Federal Constitution establishes "freedom to exercise any work or profession", and the Brazilian Industrial Property Law (Law 9.279/1996) prevents an employee from disclosing an employer's confidential information, without prior authorization, during the employment relationship or after its termination for an indefinite period.

In addition, the Brazilian Labor Code states the contractual relations of work can be freely negotiated between the parties provided they do not contravene labor protection provisions, applicable collective agreements, and the decisions of the competent legal provisions. Thus, procedural requirements for valid non-compete clauses have been established entirely through case law.

Courts tend to consider a post termination, non-compete agreement/clause valid and enforceable provided the following requirements are present:

- **Limitation in time** – The period of the restriction must be reasonable and expressly limited to 24 months.
- **Geographic limitation** – A reasonable geographic limitation must also be established for the restriction. This means a geographic area where the company develops its business or where the worker is expected not to compete must be underlined.
- **Limitation of object** – The obligation must be established in relation to a determined object and must not exceed the limits of what is reasonable to protect the former employer's interests.
- **Fair compensation** – The worker must be compensated for the non-compete obligation to be established. There are discussions on how much would be a fair compensation, as there is no rule establishing what would be fair. The parties may negotiate what is reasonable on a case-by-case basis based on the extension of the non-compete obligation (i.e., how severe is the geographic and object restriction). A conservative scenario would be to pay the amount the worker would earn as his/her ordinary compensation during the period of the non-compete obligation if he/she remained working for the company.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Employment-based non-competition agreements are enforceable within the limits set forth by Brazilian Labor Courts precedents (please see Question 1).

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

Please see Question 1.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   In Brazil, it is possible to have a non-competition agreement/clause with any employees, independent of their level. However, it is more common for the employer to covenant such agreement/clause with an employee who occupies a high position at the company, once this employee has more access to confidential information than an employee who does not occupy such position.

   In practice, this condition implies that the employee who executed such agreement is likely to compete with his/her former employer because of his/her functions and qualification (e.g., a manager with a direct contact with the clients and with a deep knowledge of the organization and methods of the company, an engineer entrusted with significant business secrets or important know-how, etc.).

   Lower level employees usually do not perform activities that need protection and justify the non-compete restriction.

   Finally, as mentioned above (please see Question 1 above), Brazilian Industrial Property Law (Law 9.279/1996) prevents an employee from disclosing an employer's confidential information, without prior authorization, during the employment relationship or after its termination, for indefinite period. In other words, any employee that works/worked for the company is not authorized to disclose any information regarding the employer's business under penalty of characterization of unfair competition crime.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   In case of all the conditions are met but one of them is overly broad, labor courts have a discretionary power in measuring the validity of the clause. They can either decide to (i) declare the agreement void and null (which can only be invoked by the employee) and grant damages to the employee or (ii) revise and declare the agreement applicable within narrower limitations (e.g., restriction of a broad object scope).

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes. In order to be valid and enforceable, one of the conditions of the non-competition agreement is to define the limitation of the object that must not exceed the limits of what is reasonable to protect the former employer's interests as well as to not prevent the former employee from performing his/her activities in a normal way (please see Question 1 above).

   A Labor Court can look at the general structure of the agreement to identify whether or not the restriction is balanced.

7. **Does it matter when the employee executed the non-competition agreement?**

   The execution date of the non-competition agreement is irrelevant with respect to its validity.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   It depends on the drafting of the non-competition agreement. The clause can either limit a non-competition obligation to certain types of termination (e.g., dismissal for gross misconduct only) or include all types of termination.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   Yes, please see Question 1 above.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    In order to be valid and enforceable, the agreement must be limited to a defined geographical scope that might correspond to the area where the customers are based as long as it complies with the requirements set forth by Brazilian Labor Court precedent.

    However, the clause may state that the former employee cannot work for a list of customer in any or some cities they perform work.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    Yes, the non-competition provision is transferred to the new employer in case of change of employer.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    No, the non-competition restriction cannot be extended as a result of a court decision.

13. **Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?**

    Yes, for sellers who are in an employment relationship with the target company at the time of the sale and have executed non-compete agreements.

    Nevertheless, it does not prevent the parties to agree additional conditions in the sale and purchase agreement.

    For sellers who are not in an employment relationship with the target company at the time of the sale, the only applicable restrictions result from antitrust laws and regulations and provisions of the sale and purchase agreement.

CANADA (Ontario)

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

Non-competition restrictive covenants are generally outlined in commercial contracts (e.g., employment or independent contractor agreements, purchase agreements, and/or restrictive covenant agreements). The applicability and enforceability of these non-competition covenants are determined based on provincial and federal case law (i.e. the "common law"). Ontario's *Employment Standards Act, 2000* (Ontario), the province's employment standards legislation, does not explicitly address the enforceability of non-competition covenants.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Ontario is reluctant to enforce employment-based non-competition covenants outside of a limited scope. In many cases, an employer can sufficiently protect its proprietary interest with a non-solicitation covenant (of the employer's customers, clients, and/or employees). Recent Ontario case law has affirmed that an appropriately limited non-solicitation clause offers protection for an employer without unduly compromising a person's ability to work in his or her chosen field. Notwithstanding the foregoing, the presence of non-competition clauses in employment contracts remains commonplace in Ontario.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

Per Elsley v JC Collins Insurance Agencies (1978), a leading Supreme Court of Canada (SCC) decision on restrictive covenants, restrictive covenants are enforceable only if they are *"reasonable between the parties and with reference to the public interest."* Reasonableness depends on the particular facts of the case, and is examined with reference to an overall assessment of the clause itself, the agreement within which the clause is found, and any other surrounding circumstances.

The general framework for assessing the reasonableness of non-competition covenants in Ontario is as follows:

i. the employer must have a proprietary interest in need of protection;

ii. the temporal (length) and geographic features of the covenant must not be broader than reasonably necessary to protect such proprietary interest;

iii. the scope of the restricted activities must be reasonable; and

iv. the covenant must be certain and unambiguous. If the covenant is not clear, then the covenant's reasonableness cannot be demonstrated.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   Yes – if a non-competition restriction is ever challenged, the employer bears the burden of proving that the non-competition covenant was reasonable. Evidence that the employee was an employee who was involved in high-level client relationships and privy to confidential information (including trade secrets, marketing strategy, or pricing structure), and/or near key client information will lend strong evidence towards upholding the restrictive covenant.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   If a restrictive covenant is too ambiguous or overly broad, the clause will generally be deemed void and unenforceable in its entirety. Notwithstanding the foregoing, in rare instances, courts may engage in "blue-pencil" severance of a non-competition provision in cases where the part of the provision being removed or severed is clearly severable, trivial and not part of the main purpose of the restrictive covenant.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes, the courts presume that the covenants were negotiated with an inherent power imbalance between the employer and employee, and will not enforce non-compete covenants which inhibit the employee from working in their chosen profession, or using their work-related skills and abilities to make a living, regardless of whether those skills were learned while under employment with the employer. The courts maintain a reasonability test as a balance against public interest.

7. **Does it matter when the employee executed the non-competition agreement?**

   The employer and employee may enter into a non-compete agreement before, during or at termination of employment. However, any restrictive covenant will be void unless proper consideration (e.g., entering into a new employment relationship or providing a mid-employment bonus or increase in benefits) was exchanged at the time of signing. Continued employment of the employee is not considered proper consideration.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   Yes, if the employer terminated an employee (who is subject to a non-competition agreement/ provision) with or without cause, a non-competition agreement may still be enforceable; subject to the common-law reasonability test discussed in Question 3 above.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   No, although severance payments are sometimes made by an employer to a departing employee (following termination without cause) throughout the duration of the non-competition period, to lend credence to the enforceability of such provision.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

To be considered reasonable/enforceable, a non-competition agreement must consider both geographic and temporal scope in addition to the activities being restricted. If the customer-based restriction has the effect of properly limiting the geographic scope of the non-competition provision, a customer-based restricted may be considered enforceable at law.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Yes, if the employee is subject to an enforceable non-competition provision and the agreement (within which the non-competition provision was contained) was assigned or transferred to the new employer on the transfer of employment to the new employer, then the clause remains enforceable under the new employer.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

In rare circumstances, where breaches are found to have occurred, Ontario courts have extended restrictive covenants from the date of the court's order rather than of the date the employment ended.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

Courts scrutinize non-competition covenants much more rigorously in the context of an employment relationship vs. in the context of a sale of a business. The underlying concern animating judicial treatment of non-competition covenants is the need to balance freedom of contract against the public interest in discouraging restraint of trade. In the employment law context, where there is a significant imbalance of power between the parties, preserving freedom of contract is afforded less weight. This contrasts with non-competition covenants found in commercial settings such as the sale of a business, in which the parties have equal bargaining power.

CANADA (Québec)

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

Non-competition and other restrictive covenants are governed by the Civil Code of Québec and Québec case law.

In order to be enforceable, a post-employment non-competition covenant must be in writing, in express terms, and limited (i) in time, (ii) in place, and (iii) in type of employment, to what is necessary for the protection of the legitimate interests of the employer. The limits are governed and evaluated on the principle of reasonability.

Furthermore, the employer may only invoke a valid non-competition restriction if the employee concerned by the clause is dismissed for a serious reason or if the employee voluntarily resigns from his or her position.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

No, employment-based non-competition agreements are enforceable within the limits set forth by Québec legislation and case law.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

Pursuant to Québec legislation, the burden of proof is on the employer to demonstrate the non-competition stipulation is valid. The employer must therefore demonstrate the restrictions have reasonable limitations in time, in place and in type of employment.

The employer must also prove a serious reason exists for dismissal arising directly from the employee's actions and not from the employer. Serious reasons for dismissal are generally considered to be a breach by an employee of an essential condition of his or her employment contract or improper conduct during their work.

However, when an employee resigns, valid non-competition stipulations will apply unless the employee proves the employer has given him or her a serious reason to terminate the employment contract. Thus, the burden of establishing the serious reason for termination rests with the employee.

Once termination for cause is proven and the non-competition provision is found to be valid and applicable, the employer will need to show breach of the clause by the former employee to obtain enforcement.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

No, if the non-competition restriction is valid (please see Question 1 above), the employee's level is not important with regards to enforcing the restriction.

However, to determine whether the non-competition restriction is valid or not, courts will evaluate the reasonability of the restriction. In evaluating such reasonability, terms of the non-competition clause must be proportionate to the importance and singularity of the job held by the employee.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   Pursuant to case law, where the restricted area of business, the duration, or the geographic scope are overly broad, the clause will be deemed illegal and declared null and void. The courts will not rewrite the clause between the parties as nullity is the only possible sanction.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes, the non-competition restriction must be reasonable. In evaluating the reasonability of the restriction, case law considers that the need to protect the legitimate interests of the employer, such as the need to maintain the employer's clientele or goodwill. The employer's trade, manufacturing or other proprietary confidential information, must be assessed in the light of the employee's fundamental right to work and earn a living.

7. **Does it matter when the employee executed the non-competition agreement?**

   No. If the non-competition restriction is valid (please see Question 1 above), the moment when the employee executed the non-competition agreement is irrelevant.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   No, an employer can only enforce a non-competition agreement if there exists a serious reason for dismissal arising directly from the employee's actions. Consequently, an employer may not avail itself of a stipulation of non-competition if it has repudiated the contract without a serious reason or if it has itself given the employee such a reason for resiliating the contract.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   No, financial compensation during the non-competition period is not a condition of validity of the non-competition provision.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    No, pursuant to Québec legislation, to be valid and enforceable, the covenant must be limited to a reasonable defined geographical scope, as well as be limited in time and in type of employment.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    Yes, a contract of employment is not terminated by alienation of the enterprise or any change in its legal structure by way of amalgamation, merger or otherwise. As such, a non-competition provision is transferred to the successor of the employer and remains binding on the employee.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    No, the non-competition restriction cannot be extended due to a breach.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

No. The non-competition provision must be reasonably limited in time, in territory and in activities to what is necessary to protect the legitimate interests of the purchaser of the assets or equity. In evaluating the reasonability of non-competition provisions arising out of a sale of assets or equity, the courts appear to be more lenient in evaluating the restrictions, particularly with regards to the limitation of time. For example, although in employment matters, courts will not generally recognize the validity of non-competition clauses exceeding 24 months, non-competition clauses of up to ten years have been found valid in certain commercial contracts.

CAYMAN ISLANDS

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

There are no statutory provisions that govern non-competition and other restrictive covenants in the Cayman Islands. Such clauses are governed by common law or case law.

Non-competition clauses amount to restraint of trade and will be enforceable only if they are reasonable. Pursuant to case law, the factors that the Grand Court of the Cayman Islands will consider in order to determine whether the covenant is reasonable, so as to prevent it from being void, are:

1. Whether the employee will be deprived of employment;

2. What damage will be caused to the employer's business;

3. What damage will be caused to the goodwill of the employer's business;

4. The preservation of the employer's confidential information;

5. The public interest; and

6. Preserving the employer's financial investment.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Non-competition clauses or covenants are enforceable within the limits set out in the common law, as discussed in response to Question 1 above.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

The employer must prove that the covenant is reasonable in ambit, area and duration in order to be enforceable (please see Question 1 above).

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

In order to be valid and enforceable, one of the conditions of the non-competition covenant is that such obligation must be necessary to protect the employer's business (please see Question 1 above).

There is no specific requirement that the employee be in a particular position or at a particular level of seniority in order to enforce a non-competition restriction, but in practice the employee will usually have a deep knowledge of the organisation, be entrusted with certain business secrets or knowledge, or hold such qualifications as to be able to compete with the employer's business.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   If the court determines that the covenant is too restrictive, the clause will be invalid and unenforceable against the employee. The courts will not create a valid covenant in order to replace an impermissibly wide covenant contained in an employment contract.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes. The court will consider the impact of the employee being deprived of employment, and whether the clause is in keeping with the public interest (please see Question 1 above).

   The court would look at the general structure of the covenant to assess whether the restriction is reasonable in the circumstances.

7. **Does it matter when the employee executed the non-competition agreement?**

   The date of entering the non-competition agreement will not affect its enforceability, so that a non-competition agreement entered into after employment has commenced may be valid as long as it is reasonable (please see Question 1 above).

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   If the employee is terminated in circumstances that give rise to a claim for wrongful or constructive dismissal, a repudiatory breach of the contract has occurred. The employee is no longer bound by the terms of the contract, including the non-competition clause, save for any terms which survive termination (e.g., those relating to the preservation of confidential information).

   The employee will be bound by a valid non-competition clause (again, please see Question 1 above) if his employment is terminated lawfully. In those circumstances, his employer will be able to enforce the non-competition clause against him.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   No additional compensation is required during this period.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    Yes. Due to the small geographical size of the Cayman Islands, it is unlikely that a restriction would be based on geographical considerations. It is more likely that such consideration would be customer based.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    Yes, in the absence of a new employment contract, any non-competition provision is transferred to the new employer.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

No, the non-competition restriction cannot be extended.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

Yes. Such non-competition provisions can be void at common law as an unlawful restraint of trade. They are enforceable only if they are in the public interest and go no further than is necessary to protect the legitimate interests of the buyer.

The period of the restriction can vary on a case by case basis.

CHINA (excluding Hong Kong, Macao and Taiwan)

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

Non-competition and other restrictive covenants are governed by the Labor Contract Law of the People's Republic of China and the Interpretation on Several Issues Concerning the Application of Law in the Trial of Labor Dispute Cases published by the Supreme People's Court.

The post-employment non-competition obligation needs to be explicitly agreed to by the employer and the employee. The maximum post-employment non-competition period is two years and the employer needs to pay certain compensation to the employee for undertaking the non-competition obligation. Although both parties can agree on the compensation standard, the law also provides a minimum standard for the monthly non-competition compensation of 30 percent of the average monthly salary during the 12 months prior to the employment termination or the local minimum monthly wage standard (whichever is higher).

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

The non-competition agreement is enforceable in China. In case the employee breaches the non-competition agreement, the employer may ask the employee to pay liquidated damages (if agreed), compensate the company's loss, and continue to perform the non-competition obligation.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

The employer must prove that there is a valid non-competition agreement between the employer and the employee and that the employee breached the non-competition agreement.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

There is no such requirement under Chinese employment law.

5. What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?

Where the court determines the non-competition agreement is valid but the restricted area of business, the duration, or the geographic scope is overly broad, the court will exercise its discretionary power to decide whether the employee breached his/her non-competition obligation within reasonable limits.

6. Will a court consider the impact of enforcement of the non-competition restriction on the employee?

If the non-competition restriction is enforced through liquidated damages, the court may exercise its discretionary power to adjust the amount of the liquidated damages if it is too high to the employee. Although the employer may also ask the employee to continue to perform his/her non-competition obligation, the court rarely enforces a judgment involving personal behavior (for example, a judgment that the employee should continue to perform his/her non-competition obligation), in practice.

7. **Does it matter when the employee executed the non-competition agreement?**

   The validity of the non-competition agreement is based on the employment relationship between the employer and the employee. The law does not stipulate when the non-competition agreement should be executed. Normally, the employer will sign the non-competition agreement with the employee upon the establishment of the employment relationship or during the employment.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   Generally, the type of termination will not affect the enforceability of the non-competition agreement, unless it is otherwise agreed by the parties.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   Legally, the employer should pay compensation to the employee as agreed or according to the law during the non-competition period, but failure to pay the non-competition compensation on time does not render the non-competition provision unenforceable.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    According to the law, the employer and the employee may make an agreement on the restricted scope, period, and territory of the non-competition covenant between themselves, but the court may exercise its discretionary power to decide whether and to what extent the employee should be subject to the non-competition agreement in dispute.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    The employer which succeeds the rights and obligations of its predecessor could enforce the non-competition provision that the employee entered into with the employer's predecessor.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    No, the restricted period cannot be extended due to a breach.

13. **Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?**

    No, the non-competition provisions arising out of a sale of assets or equity are treated differently from that arising out of an employment context. The non-competition provisions arising out of a sale of assets or equity are govern under civil law, while the non-competition provisions arising out of an employment context are governed under employment law. Although Chinese civil law and Chinese employment law may share certain common legal concepts and principles, Chinese employment law imposes stricter regulation on the non-competition provisions.

COSTA RICA

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   Non-competition and other restrictive covenants are not governed by the Costa Rican Labor Code. It is a sensitive matter that is generally managed on a case-by-case basis, by case law.

   Pursuant to case law, to be enforceable, a post-employment non-competition covenant must be compensated (at least 50 percent of the former employee's salary) and for a reasonable amount of time (maximum two years).

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   Employment-based non-competition agreements are enforceable according to the limits set forth by case law, as mentioned in Question 1 above.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   Since non-competes are not expressly regulated by local law, enforceability is complex and will require a lengthy civil procedure to convince a judge that, in fact, the employer suffered damages because of the employee. For example, the employer would have to prove that, in fact, the information that the former employee is using or disclosing is, in fact, proprietary and protected information and knowledge created by the employer and not, for example, information or knowledge that is publicly available or that the employee acquired elsewhere, for example, while pursuing his/her career or at another former job.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   No, but the restrictive covenant must be reasonable to be valid and enforceable.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   If the restrictions are overly broad, labor authorities could declare the annulment of the clause and grant damages to the former employee.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes. An employee with a non-competition covenant must be compensated (at least 50 percent of the former employee's salary) and for a reasonable amount of time (maximum two years). If not, the clause could be null and damages can be granted.

7. **Does it matter when the employee executed the non-competition agreement?**

   No. The execution date of the non-competition agreement is irrelevant with respect to its validity.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   Yes, the cause for termination is not relevant for the non-competition agreement.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   Yes, the payment (50 percent of the former employee's salary) is a condition of validity of the post-employment non-competition agreement. If the employer fails to makes these payment, it is understood as an infringement of the non-competition provisions, consequently the former employee may request the corresponding indemnification.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    No, our case law has addressed this matter by saying that both conditions must be considered in any non-competition agreement, as it has prescribed that any clause pertaining to the non-compete should always mention a reasonable geographical limitation and any other item such as industry or customer based limitations to correctly configure the scope of the agreement.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    Yes, in the case of employment substitution, it is understood that the employment relation has continued without any major modification, thus the new employer may enforce a non-competition provision.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    No, the non-competition agreement period may not be extended per labor court rulings in the event of a breach.

13. **Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?**

    Yes, for sellers who are in an employment relationship with the target company at the time of the sale.

EGYPT

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   The legal provisions governing non-competition in employment relationships are found in the Egyptian Civil Code No. 131 of 1948 ("Civil Code").

   Article 686 of the Civil Code provides for that if the work delegated to the employee allows him/her to know the employer's clients or the secrets of its business, the parties may agree to prevent the employee from competing with the employer upon the termination of his/her contract or participate in a competing endeavour.

   The validity of such agreement is contingent upon the following:

   • The employee must be of full legal capacity at the time of the agreement; and

   • The agreement must be restricted to a time, place, and particular type of business insofar as it is necessary to protect the employer's legitimate interests.

   The employer may not enforce the agreement if the employer terminates the contract or refuses to renew it without cause arising from the employee or if the employee terminates the contract due to the employer's actions.

   Article 687 states that if the penalty clause for the failure to adhere to the non-competition clause is agreed upon and is excessive to the degree that it forces the employee to stay with the employer for longer than the period agreed upon, such penalty as well as the non-compete clause will be considered null and void.

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   If the non-competition agreements comply with the provisions of the Civil Code as per the above, then they can be fully enforced.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   As mentioned above, the employer must show that the non-competition agreement was made in legitimate pursuit of the employer's interest and that the agreement reflects in it the limitation on time, place and type of business. The employer must also show that the termination of the agreement was not due to its actions, in addition to proving that the penalty clause is not excessive.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   The employer must show that the employee was privy to confidential information, secrets of the business and had access to the employer's clients.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   It is up to the court to decide whether to nullify the agreement or restrict its scope.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   The court will consider the necessary business interests of the employer to ascertain whether it should enforce the restriction.

7. **Does it matter when the employee executed the non-competition agreement?**

   It does not matter when such an agreement was executed. The provisions of the Civil Code should apply by default even in the absence of a non-competition agreement.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   According to Article 686 of the Civil Code, the employer may not enforce the agreement if the employer terminated the agreement without fault from the employee.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   No.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    The employer may use a customer-based restriction in addition to a geographic one; however, the geographic restriction would still be required.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    As provided above, the non-competition clause should apply by default as a general rule under the Civil Code. If the employment contract was transferred from the employer to the predecessor, the non-competition provision can be enforceable on this basis unless the employee accepted to adhere to the same obligations vis-à-vis the new employer.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    It is up to the court's discretion to judge whether the agreement should be extended, however, the court will not likely be inclined to go beyond the reach of the agreement.

13. **Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?**

    The non-competition provisions arising out of a sale of assets or equity are contractual obligations. They do not exist in the absence of a contract. However, they are as enforceable as in the employment context or even more given that the courts sympathise with employees though would not sympathise with a seller of asset or equity.

FINLAND

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   Non-competition and other restrictive covenants are governed by the Employment Contracts Act (55/2001) (the "**ECA**") and general contract law provisions. During the employment, an employee is pursuant to the ECA prohibited from engaging in any competing activities.

   Pursuant to the ECA, an agreement regarding post-employment non-competition is valid provided that a particularly weighty reason exists relating to the operations of the employer. Such a particularly weighty reason may exist for example for employees in certain positions, i.e. managerial employees, or employees with a critical role in R&D or otherwise entrusted with significant business secrets or important know-how.

   The particularly weighty reason must exist both when the agreement is concluded and when the employer seeks enforcement.

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   Employment-based non-competition agreements are enforceable within the limits set forth in the ECA.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   Employment-based non-competition agreements are enforceable within the limits set forth in the ECA. If the non-competition clause is valid, the employer would only need to show that there has been a breach of the agreed non-competition provision in order to obtain enforcement. It is also advisable for the employer to include liquidated damages in case of breach, as normal damages are difficult to prove.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   What is important is that the non-competition provision was valid (i.e., there was a particularly weighty cause) at the time it was concluded and continues to be valid at the time of enforcement.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   In such instances, the court would deem the restriction to be invalid at least to the extent that it is overly broad and depending on the circumstances, rarely in its entirety.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   In general no, as long as the clause itself is valid and has been legally concluded. However, should the clause put an unreasonable burden on the employee, the court may make it equitable.

7. **Does it matter when the employee executed the non-competition agreement?**

   Yes, to the extent that the particularly weighty reason must have been prevalent at the time of signing. Otherwise, the timing of the conclusion does not matter.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   Yes, as long as the reason for the termination is due to the employee. In case the employment is terminated for reasons deriving from the employer (e.g., terminated on collective grounds), the employer may not enforce the non-competition restriction.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   The maximum term for a non-competition agreement is six months from the end of the employment relationship and for that period, no additional compensation is required. The term may, however, be extended to 12 months if the employee is paid a reasonable compensation for the restrictions imposed on him or her by the agreement. However, employees in managerial positions, which in practice means members of the management team or equivalent positions, may be bound by a non-competition restriction of up to 12 months without additional compensation.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    Yes, non-competition clauses may in general be very broad under Finnish law as long as they fulfill the statutory requirements set forth in the ECA and are reasonable.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    Yes, as long as particularly weighty cause exists, e.g., the employee's role is still the same and the employer has changed for example in an asset transaction. If there exists doubt over the validity or coverage of predecessor's clause, it is advisable to enter into a new non-competition agreement.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    No, the non-competition restriction may not be extended past the agreed duration.

13. **Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?**

    Yes, for persons who are in an employment relationship and who may have minor shareholdings.

    However, for persons who are not in an employment relationship, the ECA does not apply and the restrictions would come from antitrust and general contract laws.

FRANCE

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   Non-competition and other restrictive covenants are governed by the French Labor Code, French Industry-wide Collective Bargaining Agreements, and French case law.

   Pursuant to case law, to be enforceable, a post-employment non-competition covenant must be in writing and (i) necessary to protect the employer's business, reasonably limited (ii) in time, (iii) in space, (iv) fairly remunerated by an adequate compensation, and (v) must not prevent the employee from performing his/her activities in a normal way (i.e., it must notably define a restricted area of business).

   In addition, some industry-wide Collective Bargaining Agreements provide for mandatory provisions with respect to those limitations (e.g., a maximum duration of the non-competition clause and a rate for the financial compensation, etc.).

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   Employment-based non-competition agreements are enforceable within the limits set forth by law, French case law and the applicable Industry-Wide Collective Bargaining Agreement, if any.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   Provided that the non-competition agreement is valid (please refer to Question 1 above), the employer must (i) show the non-competition agreement and (ii) bring evidence there has been a breach of the non-competition obligation to obtain enforcement.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   To be valid and enforceable, one of the conditions of the non-competition covenant is that such obligation must be necessary to protect the employer's business.

   In practice, this condition implies that the employee who concluded such covenant is likely to compete with his/her former employer because of his/her functions and qualifications (e.g., a sales manager with a direct contact with the clients and with a deep knowledge of the organization and methods of the company, an engineer entrusted with significant business secrets or important know-how, etc.).

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   In such instance where all the conditions are met but one of them is overly broad, judges have discretionary power in assessing the validity of the clause. They can either decide to (i) declare the covenant void and null (which can only be invoked by the employee) and grant damages to the employee or (ii) revise and declare the covenant applicable within narrower limitations (e.g., restriction of a broad geographical scope).

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes. In order to be valid and enforceable, one of the conditions of the non-competition covenant is that it must not prevent the employee from performing his/her activities in a normal way (please refer to Question 1 above).

   A court would look at the general structure of the covenant to identify whether or not the restriction is balanced.

7. **Does it matter when the employee executed the non-competition agreement?**

   The execution date of the non-competition agreement is irrelevant with respect to its validity.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   It depends on the drafting of the non-competition covenant; the clause can either provide for a restriction of the non-competition obligation to certain types of termination (e.g., dismissal for gross misconduct only) or include all types of termination.

   The employer can unilaterally decide to waive the non-competition clause and thereby release itself from the obligation to pay financial compensation, if the covenant expressly provides for this possibility, or expressly refers to the Industry-Wide Collective Bargaining Agreement, which provides for this possibility.

   In case of resignation, the employee is entitled to the payment of the financial counterpart, unless the employer renounced the application of the non-competition covenant under the conditions provided in the covenant or in the Industry-Wide Collective Bargaining Agreement.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   Yes, this is a condition of validity of the post-employment non-competition clause (please refer to Question 1 above).

   In order to be valid and enforceable, the covenant must expressly provide for a financial compensation, or at least make a clear reference to the Industry-Wide Collective Bargaining Agreement, which provides for a financial compensation. The amount of the financial compensation must be at least equal to the one provided by the Industry-Wide Collective Bargaining Agreement, if any.

   The amount of the financial compensation corresponds to a certain percentage (generally from 25 percent to 75 percent) of the average gross monthly remuneration calculated based over the past 12 months. This amount is paid on a monthly basis after termination for the length of the non-compete covenant (generally 12 months or 24 months maximum).

10. Can an employer use a customer-based restriction instead of a geographic restriction?

In order to be valid and enforceable, the covenant must be limited to a defined geographical scope that might correspond to the area where the customers are based, as long as it complies with the requirements set forth by case law and/or by Industry-Wide Collective Bargaining Agreement.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Yes, the non-competition provision is transferred to the new employer in case of change of employer.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

No, the non-competition restriction cannot be extended.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

Yes, for sellers who are in an employment relationship with the target company at the time of the sale.

For sellers who are not in an employment relationship with the target company at the time of the sale, the only applicable restrictions result from antitrust laws and regulations and related case law.

GERMANY

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

The German Commercial Code (*Handelsgesetzbuch – HGB*) and case law of the Federal Labor Court (*Bundesarbeitsgericht – BAG*) are the most important sources in Germany. During the existing employment relationship, the employee is prohibited from carrying out any competing activity that is to the disadvantage of the employer even when the employment contract contains no provision for this. A breach of this prohibition on competition generally justifies extraordinary dismissal without notice. For the period after the termination of the employment relationship, the employee is free to carry out any competing activity. The parties may, however, agree to a post-contractual non-compete covenant provided it meets the requirements under the German Commercial Code.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

No. As long as the legal requirements are met, post-contractual non-compete-covenants are enforceable.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

A post-contractual non-compete covenant will be enforceable only if

- It is concluded in writing and handed out to the employee,
- It does not exceed a period of two years,
- It is necessary to safeguard a justified commercial interest of the employer,
- It does not unfairly impede the employee's further career,
- The employer pays compensation for the duration of the non-compete covenant in the amount of a least half of the last received annual remuneration (including all benefits) for each year of the duration of the covenant.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

No. A post-contractual non-compete covenant can be entered into with every employee regardless of the level of hierarchy in the company. However, in most cases such a covenant only makes sense for employees on "higher" hierarchy levels and "normal" employees most likely are in no position to compete.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   If a court determines that the restricted area of business and/or the geographic scope is too broad and/or the duration too long, it has power to reduce the scope or duration to what is justified by the employer's commercial interest when balanced against the interests of the employee in general. However, relying on the court's power to reduce the scope or duration of the non-compete covenant is not recommended. The scope of the non-compete covenant should instead be adapted to the protection of the relevant legitimate commercial interests of the employer from the beginning.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes. The post-contractual non-compete covenant may not unfairly impede the employee's further career (please see Question 3 above).

7. **Does it matter when the employee executed the non-competition agreement?**

   Yes. The post-contractual non-compete covenant has to be concluded prior to the termination date of the employment relationship.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   It depends on the reason of the termination. If the employer terminates the employment relationship, the employee has a right within one month of the termination to end the prohibition on competition to the extent that the employment termination was not based on the employee's conduct in breach of the contract or another reason personal to the employee. If the employer wishes to avoid the employee's right to end the prohibition, it must promise the employee that it will pay compensation of 100 percent of his or her remuneration for the duration of the prohibition. The employer may end the prohibition on competition within one month of the termination if the employment relationship has been terminated extraordinarily on the grounds of conduct and then does not have to pay compensation.

   Besides that, the employer may waive the prohibition on competition before the end of the employment relationship by way of a unilateral written declaration. The waiver has the effect that the employee may, with immediate effect after the end of the employment relationship, carry out competing activities. If the waiver is made a year before the ending of the employment relationship or earlier, the employer must no longer pay any compensation. If the waiver is made less than a year before the ending of the employment relationship the employer must pay compensation from the ending of the relationship until the expiration of a year after the declaration of waiver.

   Last but not least the parties are also free to mutually agree on the cancellation of the non-competition agreement at any time.

9. Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?

Yes. Post-contractual non-compete covenants are only enforceable if they provide for a compensation payment in accordance with the requirements of the German Commercial Code. Employees must be paid at least half of the last received annual remuneration (including all benefits) for each year in which the non-compete obligation applies. A post-contractual non-compete covenant without a compensation is not enforceable. (please see Question 3 above).

10. Can an employer use a customer-based restriction instead of a geographic restriction?

Yes, it is possible to use only a customer-based post-contractual non-compete covenant, or both a customer and geographic non-compete covenant, depending on the employee's role. It is recommendable to then directly name the relevant customers. Nevertheless, for reason of clarification and in order to prevent that a court might reduce the scope of the covenant, the geographical area of the customer should always – if possible – also be stipulated.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Yes, the non-competition provision is transferred to the new employer in case of change of employer (e.g. in case of a transfer of business). As long the new employer steps into the existing contractual relationship, all employment related agreements from the predecessor apply.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

No, the non-competition restriction cannot be extended.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

No. Typically, non-competition and other forms of restrictive covenants arising from a sale of business context are easier to enforce, and on a broader basis, as no single employees – who enjoy more protection according to the will of the German legislator – are affected.

GREECE

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

Non-competition and other restrictive covenants are governed by Greek case law.

Due to the absence of specific legislation applicable to non-competition clauses, both courts and legal theory have adopted a series of requirements that need to be met for covenants to be valid. Case law mostly uses the following criteria when examining the enforceability of the clauses:

- *The duration.* The duration of the restriction has to be reasonable. Courts tend to consider as reasonable a maximum duration of one year.
- *The geographical scope of the restriction.*
- *The kind of business activity that the employee cannot pursue.* The most important criterion applied to determine the validity of a non-competition clause is the prohibited business activity as it directly affects the employee's freedom to work.

Two additional criteria are added by legal theory as prerequisites for the validity of the covenants:

- *Reasonable compensation.* The provision of reasonable compensation to balance the restriction imposed on the employee may lead to the affirmation of the clause's enforceability.
- *Application of the proportionality rule to guarantee that the restriction imposed on the employee is indeed appropriate, sufficient, and necessary in order to ensure the employer's justified interests.*

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Employment-based non-competition agreements are enforceable within the limits set forth by Greek case law.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

Provided that the non-competition agreement is valid (please refer to Question 1 above), the employer would need (i) to show the non-competition agreement and (ii) bring proofs/evidence that there has been a breach of the non-competition obligation in order to obtain enforcement.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

In order to be valid and enforceable, one of the conditions of the non-competition covenant is that such obligation must be necessary to protect the employer's business (please refer to Question 1 above).

The existence of the employer's justified business interest constitutes a fundamental condition for the covenant's enforceability, in the absence of which there is no need for further examination as the covenant is deemed to be *de facto* void.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   Any non-compliance with the described requirements will result in the respective clause being invalid.

   It is questionable whether the court may revise and declare the covenant applicable within narrower limitations (e.g., restriction of a broad geographical scope). Even though legal theory argues that the Court should limit the unreasonable clause in terms of duration or geographical territory, Greek case law tends to decide on the invalidity of the clause as a whole.

   In addition, it is rather questionable and in any case not certain and therefore cannot be assessed whether a severability clause will be accepted by Greek Courts. There is no case law at present.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes. In order to be valid and enforceable, one of the conditions of the non-competition covenant is that it must not prevent the employee from performing his/her profession. If the covenant in fact covers the entire scope of the employee's professional skills or their practical applications, because he or she is specialized to such an extent that it is absolutely impossible for him or her to find a job, the covenant is deemed invalid.

   In any case, a Court would look at the general structure of the covenant in order to identify whether or not the restriction is balanced.

7. **Does it matter when the employee executed the non-competition agreement?**

   The execution date of the non-competition agreement is irrelevant with respect to its validity.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   Usually non-competition covenants provide for the application of a restriction of the non-competition obligation to all types of termination, including unilateral termination and resignation.

   The employer can unilaterally decide to waive the non-competition clause and thereby release itself from the obligation to pay the financial compensation, if the covenant expressly provides for this possibility.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   Yes, this is a condition of validity of the post-employment non-competition clause.

   In order to be valid and enforceable, the covenant must expressly provide for a financial compensation according to Greek case law.

   The amount of the financial compensation must be at least sufficient to compensate the employee for the restriction imposed.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

In order to be valid and enforceable, the covenant must be limited to a defined geographical scope. A customer based restriction is not sufficient.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Yes, the non-competition provision is transferred to the new employer in case of change of employer.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

No, the non-competition restriction period cannot be extended.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

No, different rules apply especially with respect to duration of the non-compete clause and compensation for non-competing. In comparison to the duration of a non-compete clause included in a employment contract, Courts may permit longer non-compete periods. Also it is not required for the sale of assets agreement to expressly provide for a separate amount as a compensation for the non-compete obligation.

INDIA

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   Non-compete and other restrictions pertaining to employment are governed by the Indian Contract Act of 1872 and judicial precedents. As per the Indian Contract Act of 1872, an agreement by which anyone is restrained from exercising a lawful profession, trade or business, is to that extent void. The statute, however, permits reasonable restrictions with respect to businesses of which goodwill is sold.

2. **Does your jurisdiction not enforce employment-based non-competition agreements?**

   Indian courts have drawn a distinction between non-compete restrictions that operate during the term of employment and post-termination restrictions. While restrictions during employment have been held to be enforceable, post-employment non-competes are unenforceable.

3. **If your Jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   As stated above, post-employment non-competition agreements are unenforceable in India, irrespective of the nature or reasonability of the restriction. If the restriction is with respect to the term of employment, the employer would essentially need to demonstrate (i) the existence of the non-compete agreement; and (ii) the fact that the employee breached the obligation by working/engaging with a competitor during the course of employment with the employer.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   Post-employment, non-compete restrictions are unenforceable irrespective of the level of the employee. With respect to restrictions that apply during the terms of employment, while the designation or the level of the employee is not the key determining factor, courts are likely to be more inclined to enforce such restrictions against key employees who would be privy to significant confidential information of the employer.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope is overly broad?**

   As stated above, only non-compete restrictions that apply during the term of employment are enforceable. If a court determines that the restriction is overly broad or unreasonable, either the entire covenant could be declared void or the covenant could be enforced to a limited extent.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes, courts in India will give consideration to the impact of enforcement of the non-competition restriction on the employee. That said, since only non-competition restrictions during the term of employment are enforceable, an employer prohibiting an employee from providing services to a competitor during the term of employment would typically be justified.

7. **Does it matter when the employee executed the non-competition agreement?**

   No, it is immaterial as to when the employee executed the non-competition agreement.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   A post-employment non-compete restriction is not enforceable irrespective of whether the employment was terminated at the behest of the employer or employee.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   Post-employment, non-compete agreements are unenforceable irrespective of whether the employer pays the employee for the non-compete period. That said, since such restrictions are enforceable during the course of employment, employers sometimes include long notice periods with respect to employees who have access to critical confidential information.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    Post-employment non-competition restrictions are unenforceable regardless of whether such restriction is in relation to a specified geography or customer. However, courts in certain cases have enforced non-solicitation restrictions with respect to customers.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    No, since post-employment, non-competition restrictions are unenforceable, an employer would not be able to enforce a non-competition provision that the employee has entered into with a previous employer.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    In the event of a breach, a non-competition agreement would only be enforceable for the restricted period originally agreed to between the parties. As mentioned above, a non-compete is not enforceable beyond the term of employment.

13. **Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment agreement?**

    While certain principles that govern non-competition restrictions with respect to employment also apply to agreements for sale of assets or equity, the Indian Contract Act, 1872 recognizes the enforceability of an agreement restraining the buyer or any person deriving title to goodwill from carrying on the business of which goodwill is sold.

INDONESIA

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

Law No.13 of 2003 on Manpower ("**Manpower Law**") is silent on the non-competition and/or restrictive covenants issue. There is no specific law regulating non-competition and restrictive covenants. There are regulations prohibiting specified actions, , such as Law No. 11 of 2008 on Information and Electronic Transactions, as amended, under which no one may transmit confidential information which belongs to another party, and Law No. 40 of 2007 on Limited Liability Companies ("**Company Law**") which prohibits the Board of Directors from representing a company in the event of a conflict of interest, however these do no relate specifically to non-competition or restrictive covenants.

In practice, non-competition clauses and other restrictive covenants are usually included in the employment agreement between the employer and the employee. The Indonesian civil legal system adopts the principle of freedom to contract, and under Article 52 (1) of the Manpower Law, an employment agreement requires:

a. the agreement of both parties;

b. the capacity to perform legal acts;

c. the existence of the agreed to job/work; and

d. the agreed upon job/work does not contravene public order, ethics or the prevailing laws and regulations.

One of the principles of an employment agreement is the consent of both parties. Theoretically, the agreement between the parties is binding on both of them, including any non-competition clause and/or restrictive covenant. It is considered a private agreement between the parties, i.e., the employer and the employee.

When drafting a non-competition clause or restrictive covenant, the following needs to be taken into account:

a. Article 5 of the Manpower Law, under which all workers have an equal opportunity to work; and

b. Article 38 (2) of Law No.39 of 1999 on Human Rights, under which everyone is free to choose the work that they like and fair employment requirements.

Although there is no limitation or restriction on the effective term of a non-competition clause or the details of a restrictive covenant as it is based on the contracting parties consent, the clauses must not violate the above Articles which fundamentally seek to protect the right to seek work.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

There has been no reported decision to date on such litigation. However, Indonesian courts are not bound to follow precedent, even if the cases and legal basis are similar. Indonesian courts are free to rely on their own principle of justice and fairness, and therefore, each dispute is considered on a case-by-case basis.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   There is no specific regulation, but as general rule, a written non-competition clause should be included (usually in the employment agreement), and the restriction should not breach any existing law. One way to "determine" the maximum scope for this type of clause is to check the respective industry's standard. A company is in a better position to argue that its standard non-competition clause does not violate the Manpower Law or Human Rights Law if it can prove that the clause is standard in the industry.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   No, there is no requirement to do so, as any non-competition restriction is considered a private agreement between the parties. However for purposes of enforcing the agreement, this will be dependent on the ability to establish the non-competition restriction was within acceptable industry standards and not in breach of any prevailing laws.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   If the court rules that the restriction is overly broad and therefore violates the Manpower Law or Human Rights Law, the court can declare the agreement null and void. Therefore, employers should consider including a "severability clause" in their standard employment agreement, so that if a court rules that a non-competition clause violates the law, it will arguably not affect the remaining clauses of the employment agreement.

   An Indonesian court will declare an agreement null and void based on a claim filed by one of the parties (the employee). The employee may also try to claim compensation from the employer on the ground that the alleged violation has caused the employee to suffer a loss.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes, this will be one of the considerations that will be applied in determining of the enforceability of the clause.

7. **Does it matter when the employee executed the non-competition agreement?**

   In principle, it does not matter when the employee executed the non-competition agreement as long as both parties agreed to it. However, in practice, the employee will usually execute the non-competition agreement and the employment agreement at the same time or a non-competition clause may be included in the employment agreement. In some cases, this type of agreement can be signed by the employee before leaving the company (e.g., in the mutual termination agreement between the employee and the company/employer).

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   A non-competition restriction is considered a private agreement between the parties. Therefore, it depends on the wording of the non-competition agreement and the considerations set out in Question 3 above.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   There is no such requirement in law; it depends on the agreement between the parties.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    As mentioned above, a non-competition restriction is considered a private agreement between the parties. Therefore, the employer can arguably impose a customer-based restriction. The general rule is to check whether this type of restriction is standard in the industry with the due observance of the prevailing laws.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    A non-competition restriction is considered a private agreement between the parties, and therefore it only binds the parties to the agreement. The new employer cannot enforce compliance with the agreement between the employee and the employer's predecessor as it is not a party to the agreement, unless agreed otherwise between the new employer and the employee.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    There have been no reported decisions of such nature. However, in general, the employee will only be bound to the obligation as agreed under its agreement with the employer. Theoretically, the employer can ask the court to prevent the employee from engaging in any activity which could cause a further breach of the non-competition agreement. It is up to the court whether to accept the petition.

13. **Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?**

    This is dependent on the wording of the non-competition agreement. Both provisions could be treated equally if the provisions are provided in an employment agreement.

IRAQ

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

There is no specific law that governs restrictive covenants. However, Article 910 of the Iraqi Civil Code No. 40 of 1951 (The "Civil Code") applies to employees' non-competition clauses.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Employment-based non-competition agreements are enforceable provided that they are entered based on Article 910 of the Civil Code mentioned above. This Article states that both parties (Employer and Employee) may agree that the employee, after expiration of the employment contract, shall not compete or participate in a project/work which competes with the employer's activity. In order however for this agreement to be valid:

(i) The employee must have attained majority age at the time of execution of the contract;

(ii) The restriction must be confined as to the time, place, and kind of work to the extent which is necessary for the protection of the lawful interests of the employer;

(iii) The restriction must not have any unfair effect on the economic aspect of the employee's future;

(iv) The contract shall determine compensation to the employee for the restriction made on his/her freedom of work, which must be proportionate to the scope of said restriction.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

Other than the requirement to submit the non-competition agreement itself, and according to conditions listed in Question 2 above, evidence and proof of breach of the non-compete obligation (such as employment contract with another competitor, etc.) must also be presented.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

No, however, the court shall decide if this is necessary for the protection of the lawful interests of the employer.

5. What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?

The court will not enforce the non-competition obligation and will dismiss the case. However, if the employer is able to prove that actual damages are/were incurred, then the court might award damages.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes. The court will take into consideration whether or not such restriction will have an impact on the employee. Please refer to Question 2 above "The agreement shall not have any unfair effect on the economic aspect of the employee's future".

7. **Does it matter when the employee executed the non-competition agreement?**

   The execution date of the non-competition agreement is irrelevant with respect to its validity.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   No, according to Paragraph No. 2 of Article 910 of the Civil Code, the employer shall not avail itself of such agreement if the employer has rescinded or has refused to renew the contract without the employee giving it adequate grounds for such action; nor shall the employer avail itself of such agreement if the employer itself has given the employee adequate grounds to rescind the contract.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   Yes, one payment as a compensation (please refer to Question 2 above). This is a condition of validity of the post-employment non-competition clause. In order to be valid and enforceable, the covenant must expressly provide for a financial compensation.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    No, the Civil Code clearly mentions that the basis of the restriction must be confined as to the time, place, and kind of work only.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    Yes, the non-competition provision is transferred to the new employer in case of change of employer.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    No, the non-competition restriction cannot be extended.

13. **Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?**

    No, they are not the same. Any non-competition provision arising out of an employment context is subject to the Competition and Anti-Monopoly applicable laws.

ITALY

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

Non-compete and other restrictive covenants are governed by section 2105 of the Italian Civil Code and relevant case law.

Pursuant to section 2125 of the Italian Civil Code, post-termination non-competition covenants are deemed to be valid and enforceable only if they:

(i) are established in writing;

(ii) provide for a specific and adequate consideration in favor of the employee (which can be paid either during the term of the employment or after its termination);

(iii) are limited as to their scope and geographical extent; and

(iv) their term does not exceed a specific duration (three years for employees other than executives and five years for executives).

2. Does your jurisdiction not enforce employment-based, non-competition agreements at all?

Employment-based non-competition agreements are enforceable within the limits set forth by law.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

Provided that the non-competition agreement is valid (please refer to Question 1 above), in order to obtain enforcement, the employer would need (i) to show the non-competition agreement and (ii) to bring proof/evidence that there has been a breach of the non-competition obligation.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

No.

5. What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?

Where one of the aforesaid conditions is not met, the non-compete clause can be deemed null and void by the Court. The court may not redefine the content of the covenant.

6. Will a court consider the impact of enforcement of the non-competition restriction on the employee?

Yes. In assessing the validity of the covenant, the judge will consider whether the covenant is too broad so as to refrain the employee from performing a reasonable residual working activity. A Court would look at the general structure of the covenant in order to identify whether or not the restriction is balanced.

7. Does it matter when the employee executed the non-competition agreement?

The execution date of the non-competition agreement is irrelevant with respect to its validity.

8. Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?

It depends on the content of the non-competition covenant: the clause can either provide for a restriction of the non-competition obligation to certain types of termination (e.g., dismissal for gross misconduct only) or include all types of termination.

According to the prevailing relevant case law, the non-compete covenant providing for the unilateral option of the employer to waive or to enforce the non-compete obligations upon or after the termination of the employment is null and void. It is disputable as to whether this principle applies also in case of exercising of the option before the termination of the employment. Since it is a grey area, it is strongly advisable not to insert this kind of option clause as it may jeopardize the validity of the covenant.

9. Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?

Yes, this is a condition of validity of the non-compete covenant. As stated under Question 1 above, the consideration can be also paid during the employment provided, however, that a minimum guaranteed compensation is provided for.

An adequate consideration usually ranges from 30% to 50% of the employee's salary depending upon the length, subject-matter, and geographic scope of the non-compete obligations.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

The covenant must be limited to a defined geographical scope that might correspond to the area where the customers are based as long as it complies with the requirements set forth by case law.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Yes, only if the employment contract is transferred to the new employer either by operation of law as a result of transfer of assets (qualifying as a transfer of going concern or a portion thereof) to which the concerned employee is assigned or by means of assignment of the individual employment contract under a trilateral agreement among the employee, the new and old employers.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

No, the non-competition restriction cannot be extended.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

Under Section 2557 of the Italian Civil Code, sellers are bound to non-compete obligations arising out of a sale of assets (qualifying as a transfer of going concern or a portion thereof), for a term of 5 years.

JAPAN

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   There are two important parameters, namely (i) whether he is an officer (such as Director) or an employee, and (ii) whether the restricted period is during or after the service/employment. In case of an employee, he/she is subject to a non-compete obligation during the employment even if there is no such provision in the employment agreement. For other combinations of the two parameters (namely non-compete for officers as well as post-contractual non-compete for employees), a contractual arrangement on non-compete is needed. The Corporate Act and the Act against Unfair Competition refer to non-compete clauses (and some other restrictive covenants), but the case law provides concrete guidelines on the validity of non-compete clauses.

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   Under case law, a non-compete clause is valid and enforceable only under certain conditions. Namely, a non-compete clause is against public policy and void if the clause constitutes an unreasonable restriction, taking the following factors into consideration: (i) the purpose of such a clause, (ii) position during employment or service (in case of a Director), (iii) the scope of non-compete, in terms of business, period and geography, and (iv) whether there is reasonable compensation or not.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   The employer must prove (i) the existence of a valid non-compete clause and (ii) the facts constituting violation thereof.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   See Question 2 above – the position of the employee is one of the factors considered when determining the validity of the non-compete clause.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   This determination may well have negative impact on the validity of the non-compete clause. The court decides the effectiveness of such a clause taking all factors mentioned in Question 2 above into consideration.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   The various factors to decide the validity of the non-compete clause as mentioned in question two above are to compare the negative impact of such clause on the employee and protection of the legitimate interest of the employer.

7. **Does it matter when the employee executed the non-competition agreement?**

   As a matter of principle, it does not matter.

8. Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?

The rules mentioned in Question 2 above apply regardless of whether the employment ends peacefully (upon expiration of the term or upon mutual consent to end the agreement) or through unilateral termination.

9. Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?

As mentioned in Question 2 above, payment of reasonable compensation is one important factor under the case law when considering the validity of a non-compete clause. However, there is no clear criteria, which creates a high barrier for the employee who tries to challenge the validity of the non-compete clause.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

Since the elements mentioned above are major (but not necessarily all) factors to be considered by the Court, the provision may be declared valid if the Court determines the given customer-based restriction reasonably protects the interest of the employee.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Yes, if the employment agreement (with the non-compete clause) has been validly succeeded. If the function of the employee has changed after the succession, the "reasonable intention of the parties" – which is one of the key words in Japanese legal practice – shall be determined by the Court if the scope and effectiveness of the non-compete clause is disputed.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

No, the breach will in most cases end up with a damages claim.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

- In case of a share deal, the parties to the employment agreements remain unchanged, and thus the agreements remain valid.
- In case of an asset deal, each employment agreement must be (i) transferred from seller/employee agreement to purchaser/employee agreement, or (ii) newly agreed upon between the purchaser and the employee after the old seller/employee agreement is terminated. Since the purchaser cannot force such change to the seller's employee, individual negotiation on the terms (including the non-compete clause, if any) will be necessary.
- In case of a corporate split, the employment agreements of the employees belonging to the carved-out business will transfer without individual consent by the relevant employee.

JORDAN

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   There is no specific law that governs non-restrictive covenants. However, Articles 818 and 819 of the Civil Code apply to non-competition clauses.

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   It does, provided that the non-competition agreement is limited in time, geographical area and business nature. Practically speaking, the more limited the agreement is the higher chance of enforceability.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   Other than the requirement to submit the non-competition agreement itself, evidence and proof of breach of the non-compete obligation (such as employment contract with another competitor etc.) must also be presented.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   No. However, in practice, the employer will have a higher chance to rule for enforceability if the employee is competing at the same level.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   Then the court will not enforce the non-competition obligation and will dismiss the case. However, if the employer is able to prove that actual damages are/were incurred, then the court might award damages.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes. The court will take into consideration whether or not such restriction will have an impact on the employee. In any event, from our experience the courts and judicial precedents have not ruled for specific performance (obliging the employee to stop competing) and always awarded damages.

7. **Does it matter when the employee executed the non-competition agreement?**

   No.

8. Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?

In Jordan, non-compete clauses or agreements are usually entered into after termination of employment. The lawful termination of employment is only subject to the provisions of the Jordanian Labour Law and any other termination outside such provisions will be deemed as unfair and will hold the employer liable for payment of unfair dismissal compensation (even if such conditions were agreed upon within a non-compete agreement). In other words, provisions which will render the employment terminated (which are outside the scope of the Labour Law) are deemed null and void and therefore will not be enforceable.

9. Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?

Not necessarily. What might happen in Jordan is that the employee usually agrees with the employer to serve his/her garden leave during which he/she cannot perform a competing work for another employer. For the employee to practically accept such arrangement (given that it is purely contractual), the employer pays the employee during the garden leave/non-compete period.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

Article 818 of the Civil Code provides for the three restrictions mentioned under Question 1. However, we see no issue with the employer entering into a non-compete arrangement with the employee to use a customer-based restriction and this will be deemed by the courts as a contractual undertaking that will be enforceable (if reasonably limited) as a normal contract.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Yes.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

No.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

Yes.

LUXEMBOURG

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   Non-competition and other restrictive covenants are governed by the Luxembourg Labour Code and Luxembourg case law.

   Pursuant to the Luxembourg Labour Code, in order to be valid, a non-compete covenant:

   - must be agreed in writing;
   - cannot be agreed with a minor;
   - must be included in the employment contract or in an addendum to the employment contract;
   - must prevent the employee from running a competing business in his own name and for his account, but not from working for a competitor (e.g. under a new employment contract);
   - must provide that the annual gross remuneration of the employee exceeds a level determined by a Grand-Ducal regulation at the end of the employment relationship (currently EUR 55,518.22);
   - must be restricted to a specific professional sector as well as to professional activities which are similar to those performed by the employer; and
   - must have limited geographical scope determined in consideration of the nature of the employer's activity and cannot exceed the territory of the Grand Duchy of Luxembourg.

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   Employment-based non-competition agreements are only enforceable within the above limits set forth by law and Luxembourg case law.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   Provided that the non-competition agreement is valid (please refer to Question 1 above), the employer would need (i) to show the non-competition agreement and (ii) to present proof/evidence there has been a breach of the non-competition obligation in order to obtain enforcement.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   Legal provisions do not define a specific level of qualification with respect to the employee, but require the employee to run a competing business in his own name and for his account as well as having a certain salary level. (Please refer to Question 1 above)

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   A non-compete covenant which does not fulfil the validity requirements (please refer to Question 1 above) is not deemed to be null and void. Its effects should be limited by a given court as follows:

- non-compete covenants that prohibit employees from working in any sector in Luxembourg would be limited to a specific professional sector and to activities similar to those carried out by the former employer;
- non-compete covenants that may require employees to refrain from competition for a period of more than 12 months would be reduced to a period of 12 months.
- non-compete covenants that may extend beyond the territory of Luxembourg would be limited to Luxembourg localities where employees could actually compete with their former employers.

6. Will a court consider the impact of enforcement of the non-competition restriction on the employee?

Yes, a given court will look at the general structure of the covenant in order to identify whether or not the restriction is balanced.

It is to be noted that recent case-law has accepted non-compete agreements exceeding the scope of the legally foreseen possibilities (mentioned in Question 1), in case such agreements provide for financial compensation of the former employee subject to the non-compete arrangement. It will be interesting to see how such arrangements will be treated by relevant courts in case of litigation in the future.

7. Does it matter when the employee executed the non-competition agreement?

Yes, pursuant to the Labour Code, the non-competition clause must be concluded during the employment relationship and apply for the period (max. 12 months) directly following the employee's departure from the company.

8. Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?

Yes, it must however comply with the legal provisions governing dismissals with immediate effect and dismissals with notice.

9. Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?

No, the law does not require payment of non-compete compensation; if such is agreed between the parties, its amount or the manner of its determination must be clearly indicated in the contract.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

In order to be valid and enforceable, the covenant must be limited to a defined geographical scope that may correspond to the area where the customers are based, as long as it complies with the validity requirements mentioned in Question 1.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Yes, the non-competition provision is transferred to the new employer in case of change of employer.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

No, in principle the non-competition restriction cannot be extended.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

No, the non-competition provisions that arise out of a sale of assets or equity are not subject to the Labour Code but are subject to the general provisions of the Civil Code and the Commercial Code.

MALAYSIA

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   Non-competition and other restrictive covenants are governed by the Contracts Act of 1950. Section 28 of the Contracts Act of 1950 prohibits any form of a restraint of trade after the cessation of the employment relationship. There are limited exceptions to the general restraint of trade, namely where the goodwill of a business is being sold, one may agree with the buyer to refrain carrying on a similar business within specified local limits, so long as the buyer or any person deriving title to the goodwill from him, carries on a like business therein; or by way of agreement between partners prior to a dissolution or in the case of during continuance of a partnership. In any of these instances, limits must be reasonable regard given to the nature of the business.

2. **Does your jurisdiction not enforce employment-based non-competition agreement at all?**

   In Malaysia, employment based non-competition agreements are only enforceable during the period of employment. Any restraint, post cessation of the employment relationship, is unenforceable.

3. **If your jurisdiction does not enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   It is not possible to do so given that the restraint itself would be regarded as being void and unenforceable unless it falls within the limited exceptions provided for under the Contracts Act of 1950.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   No. The level of an employee does not have any bearing on the enforceability of a non-competition restriction because such restraints are unenforceable once the employment relationship has ceased.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   The geographical scope and other criteria would not have any bearing on the restraint which is intended to be enforced post cessation of the employment relationship because it cannot be enforced.

6. **Will a court consider the impact of enforcement of the non-competition restriction of the employee?**

   No, this will not be considered if it is about the period post-employment.

7. **Does it matter when the employee executed the non-competition agreement?**

   The execution date of the non-competition agreement is irrelevant with respect to its validity given that any such restraint would be regarded as being void and unenforceable post-employment.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   No. A non-competition agreement would cease to have any affect if the employment relationship is no longer in existence. The validity of the non-competition is only valid during the existence of an existing employment relationship.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   No payment is required given that such clauses are unenforceable**.**

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    This would not be enforceable post cessation of the employment relationship.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    This would not be acceptable given that the enforceability of a non-competition restraint is only valid during the period of employment.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    No. As the restraint itself would not be valid.

13. **Are the non-competitive provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?**

    It is not treated in the same manner in that the exceptions to the Contracts Act of 1950 recognize situations where the goodwill of a business is being sold and the law permits such limited restraints subject to the test of reasonableness.

MEXICO

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

The Political Constitution of the United Mexican States ("Mexican Constitution"), in article 28, states that monopolistic practices are prohibited in Mexico and that the law will punish any type of agreements that prevent free competition in the markets. That article also provides that the Federal Economic Competition Commission ("COFECE"), an autonomous and independent constitutional institution, will be the authority in charge of guaranteeing free competition in the markets.

Non-compete provisions are prohibited in Mexico when entered into by competitors or potential competitors, as according with article 53 of the Federal Law on Economic Competition (the "FLEC"), as such agreements will be considered as absolute monopolistic practices (a.k.a. cartel practices). However, in the understanding that some non-compete provisions are necessary in a business context, the COFECE in general does not object to the inclusion of non-compete and non-solicitation clauses in certain contexts, such as in joint-ventures and after a M&A transaction, subject to complying with the guidelines that such authority established for those purposes. The COFECE has not issued any opinion in relation to non-compete provisions in labour relationships.

From an employment perspective, in general terms, non-compete provisions are considered null and void because they breach Article 5 of the Mexican Constitution, which establishes that no one can be prevented from performing the profession, industry, trade or work s/he may wish, as long as it is legal. The exercise of such right can only be limited in view of a judicial resolution when third parties' rights are attacked or by government resolutions when the people's rights are offended.

Further, Article 5 of the Mexican Constitution states that any agreement by means of which someone temporarily or permanently waives his/her right to carry out certain profession, industry or commerce will be ineffective.

In view of the above, any private agreement contrary to the foregoing will be unenforceable, especially those attempting to have effects after termination of the employment relationship, irrespective of (i) the time period to which the non-compete covenant is subject, and (ii) whether financial compensation is paid in return.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Employment-based non-competition agreements are unenforceable before Conciliation and Arbitration Boards (Labour Authorities in Mexico).

Notwithstanding the foregoing, from a practical perspective, post-termination non-compete provisions have been used for psychological purposes, since they create a moral commitment on employees.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   In order to give an appearance of enforceability to the non-compete provision before a civil court, it is essential to link it to the employees' confidentiality duty, so that at the moment he/she competes, the employee will also breach his/her confidentiality commitment. Since the non-compete agreement must not affect the individual's fundamental right to work, the purpose of the non-compete provision shall be "not to do or perform" a particular action, as opposed to forbid the individual from carrying out certain profession, industry or commerce.

   Nonetheless, since there are no precedents regarding post-employment non-competition covenants, and there is the Constitutional right previously described, it is not possible to guarantee that these arrangements will be upheld in a civil court if challenged.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   There are no rules or precedents on this particular aspect given that Constitutional provisions and related rights apply to all employees irrespective of their level.

   However, it would certainly make for a better legal argument to defend the enforceability of the non-compete restriction if the employee had performed a job position with high responsibilities (for instance, a General Director) and/or had been in contact with employer´s clients (as in the case of Sales Directors/Managers).

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   We understand that in other countries a non-compete obligation shall be valid as long as it is limited to a reasonable period of time, to specific territory and to a particular business activity, or else, when former employees are financially compensated during the non-compete period. However, no precedents have been issued by Mexican courts in this regards.

   Once again, even though this type of agreement is becoming more common in Mexico and some employers are paying former employees in exchange for their duty to not compete, it is not possible to guarantee that these arrangements will be upheld in court if challenged, irrespective of them being specific or broad.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes, the non-compete agreement must not affect the individual's fundamental right to work, and hence the purpose of the non-compete provision shall be "not to do or perform" a particular action, as opposed to forbid the individual from carrying out certain profession, industry or commerce.

7. **Does it matter when the employee executed the non-competition agreement?**

   The execution date of the non-competition agreement would be irrelevant with respect to its validity. Non-compete provisions are usually included within the employment contracts. Non-competition agreements are also executed at the employment termination.

8. Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?

Taking into account the limitations outlined above, if the non-competition agreement provides that same is binding irrespective of the termination cause, an argument could be made regarding its validity.

Also, it would be convenient to include the right of the employer to waive the non-competition clause and thereby release itself from the obligation to pay the financial compensation, as the case may be.

9. Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?

Since Mexican law does not regulate this issue, there is no specific obligation to pay any amount during the non-competition period. However, typically an economic incentive is included within the non-competition agreement with the intention of motivating the employee to fulfil her/his non-compete commitment. There are no particular rules regarding the amount of the economic compensation, and thus there is room for negotiation between the employer and the employee.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

Other than the limitations outlined above, there are no restrictions regarding non-competition agreements. Therefore, it would be possible to use customer-based covenants.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

From a strict legal perspective, all obligations and rights acquired by the former employer are transferred to the substitute employer in case of employment transfers.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

No, the non-competition restriction cannot be extended. Regarding this, please note that in Mexico typically non-compete agreements are executed to cover a one year period after the employment termination.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

Under a competition law perspective, yes. The FLEC does not differentiate between non-competition provisions in the context of a merger/acquisition or in the employment context; even though the rationale behind each of them is completely different.

As mentioned above, non-compete provisions in the context of a merger/acquisition or a joint-venture have been analyzed by the COFECE in several transactions, and the COFECE has informally recognized that it will not investigate and prosecute them if they comply with the guidelines that it has issued in the subject. However, non-compete provisions in the employment context have not been studied by the COFECE yet, and therefore, no guidelines are available to know what will be considered acceptable, if any, to the COFECE in this regard.

THE NETHERLANDS

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

The provisions concerning non-competition covenants are governed by the Dutch Civil Code. Under the law, a non-competition clause between an employer and an employee is only valid when the employee is an adult, the clause has been agreed to in writing, and the employee's employment contract is a permanent one.

It is possible to agree on a non-competition clause with a fixed-term employment contract, but only if this is necessary due to substantial business or service interests of the employer. What is meant by "substantial business or service interests" is determined in case law.

Case law shows that the non-competition clause must be motivated very specifically per employee and per position. With regard to determining the substantial business or service interest of the employer, all circumstances of the case must be considered.

A non-competition clause kicks in after termination of the employment and it is therefore recommended that this is reflected in the wording.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Employment-based non-competition agreements are enforceable by Dutch law. The sub-district court has jurisdiction to hear a claim for compliance with the non-competition clause.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

If a non-competition clause has been agreed upon, it is highly advisable to ensure that the prohibited activities or which companies fall under the scope of the non-competition clause are clearly defined in the clause. It must be clear to the employee which activities are prohibited and/or whether the employee is entitled to work (paid or unpaid) for a competitor. Clauses which are vague or unclear usually lead to suspension. For enforcement of a non-competition clause on the basis of a fixed-term employment contract, a written motivation requirement applies. This means that the employer must include a written statement of reasons showing that the clause is necessary due to substantial business or service interests.

If the employee does not comply with the non-competition clause, the employer can try to recover damages suffered due to the employee's breach. Usually the exact damage is difficult to substantiate. Therefore, in most cases, a non-competition clause includes a penalty clause. The contractual amounts set out in a penalty clause can be moderated by the court.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

For enforceability of the non-compete clause, except for the conditions set out before, it is important to determine whether the obligation for the employee to comply with the clause is necessary to protect the interests of the employer. The level of the employee is not always decisive. It is more important to determine whether the non-competition clause was signed by the

employee in his last position or whether the clause was renewed in light of a career change or because of changes within the organization of the employer as a result of which the clause has a bigger impact on the employee than under the circumstances the original clause was agreed upon. Usually the higher the position of the employee, the easier a court will take the view that the employee may compete especially when the employer can substantiate the confidential knowledge the employee has, and might use to the benefit of a new employer.

5. What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?

If the non-competition clause is formulated too broadly, the employee can request the court to suspend the clause or to declare the clause wholly or partly invalid or void. It is possible that the non-competition clause remains in place for a shorter period (a term of 6 to 12 months is common) or for a limited geographic scope.

6. Will a court consider the impact of enforcement of the non-competition restriction on the employee?

In a procedure, the court will always weigh the interests of the employer in enforcing the non-competition clause and the interests of the employee in suspending the non-competition clause or to declare the clause invalid or void.

The weighing of interests of both parties includes, among other things, the protection of the company, any investments by the employer in the training and expertise of the employee, and the circumstance that the employment contract has been canceled by the employee or not.

With regard to the interest of the employee, it is important whether he/she will encounter a disadvantage in finding a job if the non-competition clause remains in place. Other important factors are whether the employee will have an improvement of position (both in terms of career prospects and working conditions) and whether he/she has taken the initiative to terminate the employment contract.

7. Does it matter when the employee executed the non-competition agreement?

In order to ensure the applicability of employment rules on the non-competition clause, the clause should be agreed upon in the employment agreement or in light of the employment agreement and prior to or during the employment. If parties, for whatever reason, agree on a non-competition clause in a settlement agreement, terminating the employment agreement then this non-competition clause is seen as a regular contractual agreement between parties. The latter is not common to agree upon.

8. Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?

Yes, the employer can enforce a non-competition in case of dismissal. It is common when parties negotiate about a termination of employment that in the settlement agreement the employer confirms that the non-competition clause will be annulled. If no explicit agreement on this clause is made, then the non-competition clause remains in place.

9. Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?

If the non-competition clause significantly impedes the employee to work somewhere else, the court may determine the employer must pay the employee compensation for the duration of the non-competition clause. The court will then determine the amount of this compensation (meaning that the employee must seek for this compensation). There is no statutory obligation for the employer to compensate the employee during the term of the non-competition clause.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

It is possible to agree on a customer-based restriction. This is usually called a non-relationship clause. It is possible that a non-competition clause includes both a customer-based restriction and a geographic restriction. It may be advisable to provide the employee upon termination of employment with a list with the most relevant competitors for which the non-competition clause applies. It is not common to include the list in the employment agreement since the list may vary from time to time. It is important to ensure as an employer that clear definitions are used in these clauses, failure of which can lead to the annulment of the clause in favor of the employee.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

In the case of a transfer of an undertaking, all rights and obligations are transferred. This means that the non-competition clause in principle also transfers to the new employer. However, the non-competition clause may burden the employee heavier as a result of the transfer of undertaking or merger (for example, the definition of competitor has a much wider scope after a merger or take-over by a large company). Therefore, it remains advisable to re-confirm the validity of a non-competition clause after a transfer or undertaking or merger/take-over.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

No, in principle it cannot. An employer may request the court, however, to impose a non-competition limitation on the employee even if parties have not agreed on such a clause. This may be the case if the employer can substantiate that the employee is structurally and consistently approaching clients and customers of the former employer trying to entice them to do business with him or with a new employer.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

No. In principle a non-compete clause, which has been agreed with the individual in light of a transaction, is bound by different rules than the non-compete which is agreed upon as employment term. Courts tend to rule more strictly towards the individual who has signed a non-compete in another type of agreement then when it comes to determining the validity of the non-compete in an employment agreement.

NORWAY

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

Non-competition and other restrictive covenants in employment relationships are governed by the Norwegian Working Environment Act ("**WEA**").

The CEO of the company may waive his protection from the Norwegian Working Environment Act regarding restrictive covenants against severance pay. In such case, the restrictive covenants will be regulated by general contractual law and the Norwegian Contract Act (with a possible review based on it being unreasonable).

Our answers to the following questions are based on the regulation in the WEA.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Employment-based non-competition agreements are enforceable within the limits set forth by the WEA.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

Non-competition or non-solicitation of customers' agreements must be in writing.

On written enquiry by employee, the employer shall within four weeks provide a written statement regarding whether and to what extent a non-compete or non-solicitation of customers' clause will be invoked. If the employee gives his notice of dismissal, the notice shall be regarded as an aforementioned enquiry. If the employer dismisses the employee, enquiry shall be given at the same time as the notice of dismissal. A statement regarding non-competition clauses must state the employer's particular need for protection against competition. A statement regarding non-solicitation of customers' clause must state which customers are comprised by the obligation. Only customers which the employee has been responsible for or had contact with the last year before the written statement is given may be comprised. The non-competition clause is void if the requirements regarding statement are not met. The statement is binding upon the employer for three months (and upon termination, until end of notice period). No statement is required to invoke obligations of non-solicitation of employees.

Compensation is required for a non-competition clause to be invoked. No compensation is required to invoke obligations of non-solicitation of customers or employees.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

A non-competition obligation may only be invoked to the extent necessary to safeguard the employer's particular need for protection against competition. Generally, the employer will have such need for protection from competition against employees who have knowledge of trade secrets or know-how, which often are management and key employees.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   The court may either find a clause invalid in its entirety or amend the clause to a scope which the court finds appropriate. It is up to the court to consider whether the clause should be found invalid in its entirety or amended.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   The court will consider whether the non-competition clause has a wider scope than what is necessary to safeguard the employer's particular need for protection against competition. However, the court is not obliged to consider the impact on the employee as the regulation with mandatory compensation etc. is seen to safeguard the employee.

7. **Does it matter when the employee executed the non-competition agreement?**

   Please see our response to Question 3 above.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   A non-competition obligation may not be enforced by the employer if the employee is dismissed by the employer unless the dismissal is validly based on circumstances relating to the employee. The same prohibition applies if the employee has terminated the employment due to the employer's breach of its obligations.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   Compensation is required for a non-competition clause to be invoked. The employee is compensated equal to 100% of the remuneration the employee received the previous year (including base salary, overtime payment, bonus, etc.) up to 8 G (G = national basic amount, currently 1 G = NOK 93 634) and 70% of remuneration above 8 G. The compensation may be capped at 12 G.

   The employer can unilaterally decide to waive the non-competition clause and thereby release itself from the obligation to pay the financial compensation.

   No compensation is required to invoke obligations of non-solicitation of customers or employees.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    Non-solicitation of customers is regulated specifically in the WEA. A non-solicitation of customers' clause may only apply to customers with whom the employee has had contact or for whom he has been responsible during the last year prior to the written statement enforcing the non-solicitation obligation.

    Non-competition clauses may only be enforced to the extent necessary to safeguard the employer's particular need for protection against competition. This applies regardless of whether the restriction is customer-based or geographically based.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

If the employment relationship is terminated, the employee is not bound by a restrictive covenant entered into with the former employer unless this was invoked by the previous employer. Exceptions are in cases for instance of transfer of undertaking, where the previous employment contracts are transferred while the transferee is identified with the transferor towards the employee.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

No, it may not be invoked for a longer time period than what is agreed between the parties and follows from the written statement provided by the employer.

A non-competition or non-solicitation of customers' clause may not in any event be invoked for longer than one year from termination of the employment (end of notice period, or at the date of summary dismissal).

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

No. The WEA only applies to restrictive covenants entered into in employment relationships. Other non-competition provisions will be regulated by general contractual law and the Norwegian Contract Act unless the link to the employment relationship is so strong that the obligations must be considered entered into as part of the employment relationship.

OMAN

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

The Civil Transactions Law (Royal Decree 29/2013) (the "Civil Code") provides for restrictive covenants in commercial transactions including employment.

Article 661 of the Civil Code provides that any restrictive covenant, such as a non-compete clause will only be effective if it is reasonable, such that it is restricted in time, place and type of work to the extent necessary for the protection of the legitimate interests of the party taking the benefit of the covenant.

In an employment context, if an employee has knowledge of the "secrets" of the employer in terms of how the employer conducts its business, or if the employee is familiar with the employer's clients, the employment contract may contain post-term restrictions to prevent the employee from: gaining employment at a competitor of the employer; or participating in competitive work.

The Expatriate Residency Law (Sultani Decree 16 of 1995 (as amended)) reinforced by the Ministry of Manpower ("MOM") in July 2014, restricts expatriates from obtaining employment with a new employer in Oman within two years after termination of an employment contract in Oman. An expatriate can only join another company in Oman, prior to the expiry of the two years period, if he or she can obtain a Non Objection Certificate ("NOC") from the terminating employer.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

No. Such provisions can be enforceable if considered by the court to be reasonable in order to protect the legitimate interests of the employer in accordance with the general principle of all individuals' freedom to work.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

A valid non-compete clause must protect the legitimate interests of the employer. The provisions should strike a balance between protecting the legitimate interests of the employer and the employee's rights to work and to earn a living. The nature of an employer's business, the level of restriction imposed on an employee and the employee's seniority will be taken into account in the court's decision when considering whether to enforce any such covenant. The ambit of the restrictions in terms of time, geography and nature of work prohibited must all be reasonable and proportionate to the interests to be protected.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

Seniority and ability to compromise the legitimate interest of the employer, if subsequently employed by a competitor, will be considered by the court in order to determine whether the ambit of any restrictions are reasonable.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   The entire clause will not be enforceable although some damages may be awarded if the employer can evidence loss. Attempts to draft penal clauses with inflated liquidated damage provisions will render covenants non-enforceable.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes.

7. **Does it matter when the employee executed the non-competition agreement?**

   No.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   Restrictive covenants shall be deemed non-enforceable if the employer commits an act that justifies the termination of the employment contract by the employee.

   Where the employer institutes an involuntary termination, restrictive covenants will only be enforceable where the termination is held as non-arbitrary. In order to be found not arbitrary the termination must be justified by one of the grounds set out by section 40 of the Labour Law, i.e.:

   - If an employee assumes a false nationality or resorts to forgery to obtain work;
   - If an employee commits a mistake resulting in a heavy loss to the employer, provided that the employer informs the Ministry of the incident within three days from the date on which it becomes aware of it;
   - If an employee does not comply with the instructions made for the safety of the workers and the work site, in spite of being given a written warning, provided that such instructions are in writing and fixed in a conspicuous place;
   - If an employee is absent for more than ten days without lawful excuse in any one year or more than seven consecutive days, provided that the dismissal is preceded by a written warning given by the employer to the employee for a previous case of absence for five days;
   - If an employee divulges secrets belonging to the place in which he/she works;
   - If a final judgment is rendered against an employee for committing a misdemeanor or a crime concerning breach of trust or honor or for committing a misdemeanor at his/her place of work, or while carrying out work;
   - If an employee is found in an obvious state of drunkenness or under the influence of a narcotic substance during working hours;
   - If an employee commits an assault on his/her employer or the responsible manager or if he/she commits grievous assault on one of his/her supervisors during or by reason of work, or if he/she strikes one of his/her colleagues at the place of work causing sickness or delay of work for more than ten days.

- If an employee commits a gross breach of his/her obligation to perform the work agreed upon in his/her employment contract.

9. Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?

No.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

Yes, if such restriction meets the other requirements to be enforceable.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Only where there is an effective written agreement (in Arabic or in English with a certified Arabic translation attached) signed by both employer and employee confirming the arrangement.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

No.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

Such provisions tend to be treated in a similar way but may be more readily enforceable where they bind sellers who are given significant consideration for the benefit of a business.

PERU

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

In Peru, there is only one provision related to non-competition covenants, and it is included in section 25 of the Single Text of the Labor Productivity and Competitiveness Law, approved by Supreme Decree No. 3-97-TR (hereinafter, "LPCL"). According to this provision, unfair competition during the employment relationship is a cause of dismissal, since it represents a breach of the duty of good faith.

Besides that, no legislation about non-competition and other restrictive covenants exists. However, our doctrine and certain case law have established some guidelines to evaluate whether these covenants are lawful. Pursuant to the doctrine, to be enforceable, a post-employment non-competition covenant must be in writing and it has to be (i) necessary to protect the employer's business, (ii) reasonably limited in time and space, and (iii) fairly remunerated with an economic compensation.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

As previously mentioned, Peruvian labor legislation only regulates employment-based non-competition as a cause of dismissal when the competition is unfair. Restrictions to compete with the employer during the labor relationship (different from unfair competition) and post-contractual non-competition is not addressed in our labor law; thus, the parties of each labor relationship must execute an agreement to regulate these covenants, subject to the above-mentioned guidelines.

In that vein, non-competition obligations during the employment relationship do not always have to be specifically provided for in the employment agreement to be enforceable pursuant to LPCL, given that unfair competition is sanctioned whether a non-competition obligation has been established in the contract or not. By contrast, post-contractual non-competition obligations must be agreed to in writing by the parties to be enforceable. Whether or not such obligations are enforceable depends on the facts described above.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

During the employment relationship, all employees are subject to a non-competition obligations since they owe loyalty to their employers. For this reason, in case of unfair competition, employers are entitled to terminate the employment relationship, following the dismissal proceeding established by law.

On the other hand, regarding post-contractual non-competition obligations, in case of a breach, employers can only sue their employees to obtain a compensation for damages or the payment of a penalty if the parties have agreed to a valid post-contractual non-competition covenant. In this case, they would need to show such agreement and provide evidence of the breach in order to obtain enforcement.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   In order to be valid and enforceable, one of the conditions of the non-competition covenant is that such obligation must be necessary to protect the employer's business (please refer to Question 1 above).

   In practice, this condition implies that the employee who entered into such covenant is of a sufficiently high level by virtue of his/her functions and qualifications (e.g.: a sales manager with direct contact with the clients and with a deep knowledge of the organization and methods of the company; an engineer entrusted with significant business secrets or important know-how, etc.).

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   In such situation where all the conditions are met but one of them is overly broad, judges have discretionary power in assessing the validity of the clause, since there is no legislation that regulates this matter. They can either decide to (i) declare the covenant void and null (which can only be invoked by the employee) and grant damages to the employee or (ii) revise and declare the covenant applicable within narrower limitations (e.g., restriction of a broad geographical scope).

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes, since the non-competition restriction implies a limitation of the freedom of employment, a judge will always evaluate whether that limitation is reasonable in order to determine the validity of the non-competition agreement and, therefore, of its enforcement. The restriction must be balanced.

7. **Does it matter when the employee executed the non-competition agreement?**

   No, the execution date of the non-competition agreement is irrelevant with respect to its validity.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   The non-competition clauses are usually drafted in a broad sense; thus, the non-competition obligation typically exists even when the employment termination has been caused by the employer. However, the enforcement will depend on what the parties agree.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   Yes, it is one of the requirements that must be fulfilled in order to execute a valid covenant.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    Since there is no legislation about this topic, the restriction must be analyzed on a case-by-case basis. In that sense, the courts determine whether such a restriction would be valid.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Yes, the non-competition provision can be transferred to the new employer if the written agreement provides for this.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

Since there is no rule for this issue, it will depend on what the parties have agreed to. However, considering that the non-competition obligation must be subject to a fixed-term to be valid – given that it implies a restriction of the freedom of employment – it is unlikely that a court would rules in favor of an extension of the non-competition period.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

Yes, for sellers who are in an employment relationship with the target company at the time of the sale.

For sellers who are not in an employment relationship with the target company at the time of the sale, the only applicable restrictions result from antitrust laws and regulations, and related case law.

PHILIPPINES

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   Non-competition and other restrictive covenants are governed by the Civil Code of the Philippines and relevant jurisprudence.

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   Employment-based non-competition agreements are enforceable as long as it is reasonable or it does not constitute an unreasonable restraint of trade.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   An employer must establish that the non-competition agreements/provisions are not unreasonable or oppressive, or it does not constitute an unreasonable restraint of trade. In determining whether the restrictive covenant is reasonable, the following factors must be considered: (a) whether the covenant protects a legitimate business interest of the employer; (b) whether the covenant creates an undue burden on the employee; (c) whether the covenant is injurious to the public welfare; (d) whether the time, trade, and territorial limitations contained in the covenant are reasonable; and (e) whether the restraint is reasonable from the standpoint of public policy.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   No, it is not necessary.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   The court may declare the non-competition agreement as void.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes. Non-competition agreements must not be unduly harsh or oppressive in curtailing the employee's legitimate efforts to earn a livelihood and must be reasonable in light of sound public policy.

7. **Does it matter when the employee executed the non-competition agreement?**

   No, it does not matter.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   Yes, provided it is specified the non-competition agreement will survive termination of the employment.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   No.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    No.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    Yes.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    No.

13. **Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?**

    No. In the Philippines, labor contracts are not ordinary contracts since they are imbued with public interest and must yield to the common good. Courts may review non-competition provisions in employment contracts with greater scrutiny.

PORTUGAL

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   Non-competition and other restrictive covenants are governed by the Portuguese Employment Code.

   In order to be valid and enforceable, a post-employment non-competition covenant must be agreed by the parties in writing and must (i) have a reasonably limited scope necessary to protect the employer's business; (ii) have a duration that cannot exceed two years (three years for high-level management and/or very sensitive positions);(iii) have a limited geographic scope; (iv) be fairly remunerated by adequate compensation; and (v) not prevent the employee from working in a normal way, i.e., it must specifically define a restricted area of business.

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   Employment-based non-competition agreements are enforceable within the limits established by law.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   Under Portuguese law, the breach of a valid post contractual non-competition obligation on the employee entitles any former employer that benefits from the obligation to obtain compensation for any loss and damage it has suffered as a result of a failure to respect the obligation.

   The former employer would need to provide evidence (i) of the existence of the non-competition agreement, (ii) of the specific aspects of the non-competition obligation that were breached, and (iii) indicate and prove the loss and damage suffered.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   The level of the employee is generally irrelevant, except to determine the applicability of an extended duration (three years) of the non-competition duty.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   If the court finds that all the conditions are met but one of them is overly broad, a judge has discretionary power to assess the validity of the clause. The general principle of the law is to reduce the scope of the obligation excluding the invalid part. In practical terms, the court may decide either to (i) declare the covenant null and void (which can only be invoked by the employee) or (ii) revise and declare the covenant applicable within narrower limitations (e.g., restriction of a broad geographic scope).

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes. In order to be valid and enforceable, one of the conditions of the non-competition covenant is that it must not prevent the employee from working normally (please see Question 1 above).

   A court would look at the general structure of the covenant to identify whether or not the restriction is balanced.

7. **Does it matter when the employee executed the non-competition agreement?**

   The execution date of the non-competition agreement is irrelevant with respect to its validity.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   Yes. The employer can enforce the agreement, regardless of the cause for termination.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   Yes, this is a condition of validity of the post-employment non-competition clause (please see Question 1 above).

   Employment courts tend to consider that compensation is adequate and proportional if is set at a percentage off between 25% to 50% of the gross basic monthly salary. This amount is paid monthly for the length of the non-competition covenant.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    To be valid and enforceable, the covenant must be limited to a defined geographical scope that should correspond to the area where the company engages in its marketing activity. In addition, a customer-based restriction is also accepted.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    Yes, the non-competition provision is transferred to the new employer in case of change of employer.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    No, the non-competition restriction cannot be extended beyond the limitations provided by law.

13. **Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?**

    The freedom to work is constitutionally protected. There is no specific framework of non-competition provisions outside the scope of employment relationship. However, the courts hold that any non-competition duty agreed in a relationship of a different nature that has an equivalent impact on an individual worker, is only valid if it complies with standards applicable to the non-competition duty in an employment relationship.

QATAR

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

Qatar has two jurisdictions and accordingly two separate employment law frameworks. Employers licensed by the Qatar Financial Centre (QFC) are governed by QFC Regulation No. 10 of 2006 (QFC Employment Regulations) and employment relationships in Qatar proper are governed by Law No 14 of 2004 (Labour Law). For the purpose of this questionnaire, we have included answers for both jurisdictions.

Qatar

Article 43 of the Labour Law provides that if the nature of an employee's work gives an employee knowledge of the employer's clients or the employer's trade secrets, the employer may compel the employee not to compete with the employer or take part in any competitive business after the termination of the employment contract. Such a restriction may be applied, in terms of its geographical scope, duration and the type of work concerned, only to the extent that it is necessary to safeguard the employer's legitimate interests. The maximum duration of such a restriction is two years. Where there is no such information available then there is no scope under the Labour Law to impose such a restriction.

However, under the provisions of Law 21 of 2015 (Sponsorship of Expatriates Law) where an employee has worked pursuant to an unlimited term contract and has completed less than five years of service, such person cannot take employment in Qatar with another employer unless the previous employer provides a certificate of no-objection, which is entirely at the discretion of the previous employer. Given that the vast majority of employees in Qatar are expatriates, this will effectively restrain any such employee from working in Qatar for two years by operation of law.

QFC

Article 20 of ("QFC Employment Regulations"), provides that any non-compete clause must not constitute an unreasonable restraint on trade and should be appropriate to the circumstances of the employee's employment with the employer.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Qatar and QFC

Employment based non-compete agreements are enforceable within the limits set forth by the Labour Law or QFC Employment Regulations (as applicable).

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

Qatar and QFC

Providing that the non-compete provision is in line with the requirements stipulated in the Labour Law or QFC Employment Regulations (as applicable), then it should be possible to enforce the same before the courts (Qatar courts or QFC courts). The employer must present the employment agreement or non-compete agreement and prove with sufficient evidence that there

has been a breach by the employee of the non-compete obligation. Noting that it can be difficult, in practice to prove a breach of a non-compete. Furthermore, the employer will need to establish that damages have been suffered as both Qatar courts and QFC courts are unlikely to enforce any injunctive relief sought.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

Qatar

There is no requirement to demonstrate that an employee was at any particular or specific level of employment. However, as indicated in order to enforce a non-compete provision under the Labour Law, there is a requirement that the employee has, during the course of his/her employment, been engaged in a position that allows the employee access to knowledge and know-how regarding such matters as the nature of business, employer know-how, identity of clients or the secrets of the business. Accordingly, an employer would only be able to enforce a non-compete provision against employees who have been employed in a position where they have direct access to information about the business operations and know-how of the employer and/or contact with clients and/or knowledge about secrets of the business.

QFC

The QFC Employment Regulations require that any non-compete provision *"be appropriate to the employee's employment with the employer"*. The QFC Employment Regulations do not provide any guidance as to what the QFC courts would deem as *"appropriate or not"*, and in the absence of any QFC court decisions on such matter, reference should be made to English common law decisions.

5. What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?

Qatar

The maximum duration of the non-compete restriction is two years, as set out by the Labour Law. However, it must be kept in mind that this a maximum and a duration must be reasonable taking into account the purpose and intent of the restriction. In terms of geographical scope, because Qatar is a small country (less than 12,000 km^2) and most of the population live within Doha or neighbouring centres, it is not likely that any geographical scope of restrictions will be considered overly broad even if the same were to include "all of Qatar". In any event, we consider that a judge will determine the validity of the restriction, and that, given the size of Qatar, restrictions in terms of geographical area are not likely to be restricted.

QFC

In line with principles of English common law, the employer must be reasonable (i.e., not unduly or unnecessarily harsh) in its application of restrictions imposed on an employee. The QFC Employment Regulations do not stipulate any maximum duration or geographic limits. We consider that the courts would take into consideration all relevant factors, and that the courts would not favour overly broad or wide restrictions imposed harshly or unnecessarily.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

Qatar

Yes. If the provision is in accordance with the Labour Law, the court will decide based on the evidence provided by the employer for a breach of non-compete restriction and consider all relevant factors, including but without limitation the effect of the restriction on the employee and damage suffered to the employer's business.

QFC

Yes, it must be reasonable and appropriate to the employee's employment. The QFC courts will consider all relevant factors, including but without limitation the effect of the restriction on the employee and damage suffered to the employer's business.

7. **Does it matter when the employee executed the non-competition agreement?**

Qatar and QFC

No.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

Qatar and QFC

There is no legal prohibition on the application of restrictive covenants based on the method or reason for termination of employment. That being said, we consider that this would be a factor to be taken into consideration by the Qatar courts and QFC courts in order to determine whether or not any restrictive covenant was unduly harsh on any employee and whether enforcement of the same would be upheld.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

Qatar and QFC

No. There is no payment requirement under the Labour Law or QFC Employment Regulations. However, where the employee is paid a salary or other compensation during any period of "non-competition", this would be likely viewed by the courts as less restrictive or harsh on any employee. That being said, there is no available court decision in Qatar to support any contention that this would be the likely view adopted by the Qatar courts or QFC courts.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

Qatar

Yes.

QFC

Yes, provided the restriction still satisfies the requirements described in the QFC Employment Regulations (i.e., reasonable, must not constitute an unreasonable restriction on trade and must be appropriate to the circumstances of the employee's employment).

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Qatar and QFC

Yes, provided that the original relationship has been transferred to the new employer, i.e., that the employee is still employed under the same employment contract. Where there is a new contractual relationship with a succeeding employer, any new contract will supersede the previous contract.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

Qatar

No, as per the Labour Law, restricted period cannot be longer than two years.

QFC

As indicated the QFC Employment Regulations do not provide for any maximum restricted period and therefore what is reasonable must be determined based on all relevant factors.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

Qatar and QFC

No. The sale of assets would not be within the scope of provisions of the Labour Law and QFC Employment Regulations.

SAUDI ARABIA

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

The KSA Labour Law issued by Royal Decree No. M/51 dated 23 Sha'ban 1426 (September 27, 2005) (the "Labour Law") governs non-competition covenants in relation to employment.

Pursuant to Article 83(1) of the Labour Law, in order to be enforceable, a post-employment non-competition covenant must be in writing and specific in terms of time, place and type of work and the duration of the restriction cannot exceed two years from the date of termination of employment.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Employment-based non-competition agreements are enforceable provided that they meet the requirements of Article 83(1) of the Labour Law, as set out above. However, in practice the remedies provided by the courts tend to be restricted to damages for quantifiable loss.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

Assuming that the non-competition agreement/provision meets the requirements of Article 83(1), the employer will need to provide the non-competition agreement/document containing the non-compete provision signed by the employee and evidence of the employee's breach together with evidence of its actual losses if compensation is to be claimed.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

No. The employee does not have to be at a particular level but must have been in a position to acquire knowledge of the trade secrets of the business which are confidential to the business and not in the public domain, and which would enable the employee to compete with the business.

5. What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?

Judges have a great deal of discretion to determine whether the non-compete restriction is reasonable in all the circumstances with regard to the restricted activity and the geographical scope. In regard to duration, Article 83(1) does not permit a non-competition agreement/provision to extend beyond two years but will still consider what is a reasonable period of time for the restriction. The KSA does not have a system of case reporting and there is no principle of binding precedent. Therefore, decisions can vary from one judge to another and each case will turn on its own facts. Nevertheless, it should be expected that judges will be looking to see that the non-compete restriction is reasonable and necessary to protect the legitimate interests of the business. Where the non-compete restriction is overly broad or otherwise does not meet the requirements of Article 83(1), then there is no obligation on the courts to re-write or re-interpret it to make it enforceable.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes. Although there are no explicit rules governing how a non-compete restriction will be considered, judges will likely take into account the impact on the employee and, when determining reasonableness, will consider whether the employee is unduly prejudiced and restricted.

7. **Does it matter when the employee executed the non-competition agreement?**

   The employee can execute the non-competition agreement at any time during the currency of his/her employment; however, it is recommended that execution occurs before the non-compete restriction is intended to come into effect.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   Yes. The manner in which the employment terminates should not affect the employer's right to rely on the non-compete restriction unless the contract or the non-compete agreement/provision stipulates otherwise.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   There is no such requirement under the Labour Law. However, where the non-compete agreement/provision is conditional on the employee being paid during the period of the restriction, then this obligation on the employer will be upheld by the courts.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    No. This is because the Labour Law requires that a non-compete restriction must also be defined in terms of its geographical scope and duration.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    Yes, if the employer is a successor employer to the employment relationship and the non-compete agreement/restriction was expressed for the benefit of the employer and its successors.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    No. This is unlikely to be permitted unless the non-compete agreement provided for an extension of the non-compete restriction on the occurrence of a particular breach. In all cases, the restriction will not be permitted for more than two years.

13. **Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?**

    Article 83(1) of the Labour Law addresses non-competition arising out of an employment relationship. Where there is no employment relationship between the parties then the non-competition provision will be separately considered as a matter of contract between the parties and any other applicable competition legislation.

SINGAPORE

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction**

   The common law applies.

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   In appropriate circumstances, non-competition agreements are enforced.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   The employer must show some legitimate interest meriting the protection of the clause. Recognized legitimate interests include the protection of confidential information/trade secrets, maintaining a stable workforce, and trade connections. Furthermore, the employer must also show that the clause is reasonable. Reasonableness is determined having regard for the parties involved and the public interest. Thus, clauses must not be too wide.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   No, although given the factors mentioned in Question 3 above, it is unlikely that a non-competition clause can be enforced against employees who do not hold a certain level of responsibilities.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographical scope are overly broad?**

   The Court will consider if the doctrine of severance can be applied to save the otherwise offensive clause. There are three prerequisites which have to be satisfied before severance can be undertaken:

   (i) The unenforceable provision must be capable of being removed without adding to or modifying the wording of what remains with the remainder continuing to make grammatical sense;

   (ii) The remaining contractual terms must continue to be supported by adequate consideration; and

   (iii) The severance must not change the fundamental character of the contract between the parties.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   The court may consider the impact of enforcement of the non-competition restriction on the employee during an injunction application when considering where the balance of convenience in granting the injunction lies. However, this is generally not a consideration in determining whether the restriction is legally enforceable. The clause will be enforceable if it passes the test mentioned in Question 3 above.

7. **Does it matter when the employee executed the non-competition agreement?**

   Yes. The reasonableness (or otherwise) of the non-competition agreement is determined at the time of its formation.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   It is potentially enforceable, although much will depend on the language of the clause as well as the circumstances of the termination.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   No.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    Much depends on the drafting. However, there is case law to the effect that limiting the restraint to certain clients does not adequately address the issue about the width of the geographical scope.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    Generally, the common law position is that during an acquisition, the agreement with the ex-employer is deemed terminated and a new employment agreement is entered into between employee and acquiring company.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    Generally, no.

13. **Are non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that out of an employment context?**

    No. The courts take a stricter approach towards non-competition clauses in an employment context as compared to a sale-of-business context.

SOUTH AFRICA

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

Restraints of trade are governed by the agreement entered into between the parties as well as case law setting out the legal principles that have been established in practice.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

The Supreme Court of Appeal has held that restraint of trade agreements are *prima facie* enforceable unless the party seeking to avoid enforcement of the restraint can show that the restraint is contrary to public policy or unreasonable.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

The employer has the onus to first prove the existence of a *prima facie* valid and enforceable restraint agreement. The employer would have to show that an agreement existed between it and the employee and that this agreement was breached. The onus then shifts to the other party to prove on a balance of probabilities that the restraint is unreasonable and as such should not be enforced. If this is done, the employer must then show that the agreement is reasonable and not contrary to public policy.

In showing this, the courts will consider the following:

- Is there a proprietary interest of one party which is deserving of protection at the termination of the employment agreement?
- Is such interest being prejudiced by the other party's breach of the restraint provision?
- If so, does such interest weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically active and should rather be unproductive?
- Is there another facet of public policy which has nothing to do with the relationship between the parties but which requires the restraint should either be maintained or rejected?

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

No, the employer merely needs to show that the agreement exists and has been breached by the employee. However, the terms of the agreement may differ depending on the position of the employee. The more senior an employee, the more likely the restraint of trade agreement will be enforced.

5. What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?

A court has the discretion to make an order on the enforceability of the restraint of trade agreement. It may find that the agreement is unenforceable due to unreasonableness or because the agreement is contrary to public policy. In this regard, it can set the agreement aside or vary the terms of a restraint of trade agreement. It can shorten the duration or reduce the restricted area as it deems reasonable.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes, in deciding whether a restraint is enforceable or not, courts have taken into account a host of policy considerations. These considerations are premised on the view that individuals should not be unreasonably deprived of their right to be economically active whilst also considering the sanctity of contract in that where contracts are validly concluded they should be upheld and enforced.

   The courts have held that whilst restraints are *prima facie* enforceable, they will not be enforceable if they are in conflict with public policy and considerations of reasonableness. The courts held that a restraint that prevents one party from participating freely in the commercial and professional world, without the presence of a protectable interest (i.e., a proprietary interest) by the employer, must be unreasonable and against public policy and therefore, unenforceable.

7. **Does it matter when the employee executed the non-competition agreement?**

   No, the execution date of the non-competition agreement is irrelevant with respect to its validity.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   Yes, subject to the employer establishing a protectable proprietary interest and reasonableness.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   No, the enforceability of a restraint is not dependent on the employee being paid in return for the undertakings given in terms of the restraint. A restraint is enforceable, provided that its enforcement would not be unreasonable or contrary to public policy, irrespective of whether or not an employee has been given monetary consideration for the restraint.

   However, the payment of compensation to an employee can carry weight when it comes to proving that the employer had a protectable proprietary interest.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    Yes, nothing stops an employer from formulating the terms of the restraint agreement to the effect that the restriction will be customer-based, provided these terms are reasonable and not contrary to public policy.

    However, restraint agreements typically restrict employees for a certain time period and within a certain geographical area.

11. Can an employer enforce a non-competition provision that the employee entered with the employer's predecessor?

Yes, provided the restraint agreement is transferred with the employee to the new employer in terms of section 197 of the Labour Relations Act 66 of 1995 (similar to TUPE) and the employee consents in the agreement to such transfer. If a new contract is entered into between the employee and the new employer, the terms of the new agreement will prevail if it supersedes the old agreement.

Where the new employer steps into the shoes of the old employer and employees are employed on the same terms and conditions, the terms of the restraint agreement between the employee and the old employer will remain in force.

While the restraint agreement may transfer to the new employer, it may not necessarily be enforceable if the restraint does not protect the proprietary interests of the new employer. This will depend on the nature of the business and the confidential information, client information, trade secrets etc. that the employee has knowledge of.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

Yes, the courts view enforcement of restraint of trade agreements as an urgent matter due to the time periods which apply. When courts determine a matter regarding restraint agreements, they do so on an urgent basis so that the employer does not suffer loss while the breach continues during the legal proceedings.

However, in instances where the court process does take a long period of time, the courts can extend the period due to the loss suffered by the employer by the employee's breach continuing while the court proceedings were ongoing. If the restraint provides for this, it falls within the court's discretion whether or not to enforce it. In this instance, courts can enforce the restraint agreement for the full restraint period but commencing on the date of the court order rather than the date of termination of the employee's employment. This has the effect of extending the date on which the employee ordinarily would have been released from the restraint agreement restrictions.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

Where commercial transactions are concerned, it is often the case that conditions precedent will require certain key employees of a company to enter into restraint agreements. In this instance, the usual restraint considerations will apply as they do in the employment context.

Where a shareholder is required to sign a non-compete when selling shares or equity, the same considerations of reasonableness of the duration and area of the non-compete will apply, although these will typically not be in the context of an employment relationship.

SPAIN

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

Section 21 of the Spanish Workers Statute Act ("WSA") and Spanish case law govern non-competition and other restrictive covenants.

The duty not to compete with one's employer during employment is a basic employment obligation under Spanish law (however, working for several non-competing companies during the employment is not necessarily limited). However, after termination of the contract, employees are free to compete or to work for a competing company, unless the individual has signed a valid post-contractual non-compete agreement. Of course, unfair competition restrictions apply to employees in any event.

A valid post-contractual non-compete agreement must meet the following requirements:

(i) It must be agreed and formalized in writing.

(ii) The duration of the duty is limited to a maximum of two years for highly qualified employees and to six months for other employees.

(iii) The employer must have a genuine industrial or commercial interest in limiting the employee's freedom to work, and the non-compete scope must be adjusted to such interest.

(iv) The employer must pay the employee appropriate compensation.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Employment-based non-competition agreements are fully enforceable as long as they comply with the legal requirements referred in Question 1 above.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

Provided the non-competition agreement is valid (please refer to Question 1 above), the employer must show evidence that the employee has breached the non-competition obligation in order to obtain enforcement. Please note that the burden of proof is on the employer, which entails a relevant difficulty, especially if we consider that the enforcement of the non-compete clause will take place in an employment court (which tend to be more employee-protective than civil courts).

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

To be valid and enforceable, one of the conditions of the non-competition covenant is that the employer must have a genuine industrial or commercial interest which requires protection (please refer to Question 1 above).

In practice, this industrial or commercial interest has been understood by Spanish case law as the possibility for the employee to use and/or to put in favor of a competitor company the skills, knowledge, business secrets, etc., gained during the former employment. Please note that when determining whether the restriction is adequate, the court will analyze the specific geographical, time, and industry scope of the restriction.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   If some scope of the clause is overly broad, judges have a genuine discretionary power in assessing the validity of the clause. They can either decide to (i) revise and declare the covenant applicable within narrower limitations (e.g., restriction of a broad geographical scope), or (ii) declare the covenant null and void (more likely).

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   As long as the company shows evidence of an industrial or commercial interest, and the non-compete covenant complies with the rest of legal requirements (please refer to Question 1 above), the non-compete restriction will be fully valid and enforceable.

7. **Does it matter when the employee executed the non-competition agreement?**

   The non-competition agreement can be executed anytime during the employment relationship. The date of the non-competition agreement is irrelevant with respect to its validity as long as it meets all requirements at the time of the enforcement of the clause.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   In general terms, once the parties agree to a non-competition clause, it will apply regardless of the reasons for the termination, and neither the company nor the employee will be able to unilaterally opt-out or unilaterally opt-in.

   Consequently, opt-out provisions allowing the company to unilaterally release the employee from the restrictions and allowing the company not to pay the employee the agreed compensation are considered null and void. As a result, the company may be required to pay the compensation established for the non-compete, regardless of whether it has released the employee from the restriction, and regardless of whether it has provided a reasonable notice period when releasing the employee. However, the parties may change the clause by mutual agreement at any time.

   Please note that the impossibility of opting out of the restriction is a strong deterrent for companies to set non-compete clauses in all employment contracts.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   Yes, payment of an adequate economic compensation is a legal requirement for a valid non-compete covenant (please refer to Question 1 above).

   WSA does not provide a rule defining what is adequate compensation. Recent case law requires that the compensation be reasonable, considering the length of time during which the non-compete obligation is in effect and the employee's former salary with the company. In practice, an amount in the region of 40% to 100% of the employee's salary is a safe rule of thumb for adequate compensation; however, if the employee had a very high remuneration, a lower percentage could also be acceptable. Also, the court will take into account the scope of the restriction.

The compensation can be paid during or after employment. Courts have accepted these two payments systems. If payment takes place during employment, it is of utmost importance to separate this payment from other concepts in the employee's pay slip as non-compete consideration. Else, courts could deem that the restriction is void due to lack of compensation.

In our view, it is more advisable to pay the non-compete compensation during the execution of the restriction. This avoids the issue of whether there is compensation, and it makes it easier for companies to stop payment if there is any indication of the breach of the clause.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

Enforcement of non-compete obligations is subject to the employer having an actual (commercial or industrial) business interest in preventing the employee from competing. Courts have interpreted this as the possibility for the employer to prevent his or her former employee from working in the same market and with the same group of potential clients.

This requirement could prevent enforcement of a non-compete obligation by a former employee in an area where the employer does not operate; in the same sense, if the employee has not had any contact with certain geographical region, the clause could be deemed void.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

The non-compete clause is part of a contract. Thus, in case of transfer of undertakings (where the transferee steps in the transferor's shoes), this clause also remains in force.

Please note that in some transfers of undertakings, and other mergers and acquisitions, the scope of operations of the new shareholder may be different. Therefore, it is sometimes imperative to renegotiate non-compete clauses and adjust them, if possible, to the new interest of the employer.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

No, the non-competition restriction cannot be extended by a court ruling.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

Spanish courts have not yet clearly ruled on non-compete restrictions in connection with equity plans and corporate contracts. The main question about these contracts is whether compensation (which is not clearly quantifiable at the time of the signature of the equity plan, for example) can be deemed adequate.

In general terms, however, it is becoming more and more common to set a compensation linked to those elements (equity, turnover of the company, etc.), which probably entails that the analysis of whether all requirements are met will need to be made at the time of the enforceability of the clause.

Finally, there is a very recent ruling on non-compete clause set for some employees of a company who were also shareholders of the company. The non-compete was set in the share purchase agreement of the company under corporate laws. However, this ruling stated that a share purchase agreement can set a non-compete clause for employees, but such non-compete (despite being in a corporate contract) must meet all employment non-compete conditions to be valid if it applies to an employee, and employment courts are competent to examine it.

SWEDEN

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   Non-competition and other restrictive covenants are governed by the Swedish Contracts Act, Collective Bargaining Agreements and Swedish case law. Companies that are bound by collective bargaining agreements are in general also bound by a specific collective bargaining agreement on the use of non-competition clauses in employment agreements, and said agreement also serves as a general guideline for all non-competition clauses, according to law.

   Pursuant to case law, a post-employment non-competition covenant may only be used where the company has a need for protection. This means that there has to be trade secrets which the employee in question has, or will have, access to and which the employee would potentially be able to use.

   Further, the restrictive period has to be limited in time and the employee shall be financially compensated during the time. Between 6-18 months is normally considered a reasonable restrictive period, however what is reasonable in each case depends on the employee's position, the nature of the trade secrets, and the need for its protection. The compensation to the employee during the restrictive period shall not be less than 60 percent of the employee's monthly salary from the company at the time of cessation of employment.

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   Employment-based non-competition agreements/provisions are enforceable within the limits set forth by law, Swedish case law and the applicable collective bargaining agreement, if any.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   Provided that the parties have entered into a valid non-competition agreement/provision and the employee has been in breach of it, the employer can obtain enforcement. It is the employer who has the burden of proof to show that the employee is in breach of the agreement/provision. Enforcement is ultimately obtained in courts or, if the employer is bound by the collective bargaining agreement on the use of non-competition clauses in employment agreements, in a special arbitral tribunal. An employer may also seek an injunction, which in general requires a bank guarantee, and a court can decide that any continued breach from the employee will result in (additional, i.e., non-contractual) liquidated damages, that shall be paid to the state.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   The employer may have to show that the employee in question has access to and is able to use the company's trade secrets. Non-competition restrictions shall not be used in employment agreements by default, the employer must make an assessment in each individual case.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   Should a court determine that the restricted area of business or the duration are overly broad the non-competition would most likely be deemed void and hence unenforceable.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Provided that the non-competition is valid, in accordance with what is said under Question 1 above, the court will not make any additional assessments on the impact on the employee.

7. **Does it matter when the employee executed the non-competition agreement?**

   The non-competition agreement can be executed by the employee at any time during the employment. The specific collective bargaining agreement on the use of non-competition clauses in employment agreements (please refer to Question 1 above) was amended and new rules entered into force on December 1, 2015. Non-competition agreements/provisions entered into prior to December 1, 2015 shall be assessed on the former wording of the agreement, and the most significant difference is that the reasonable length of the restrictive period was up to 24 months under the former wording.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   No, there are three situations in which the non-competition agreement/provision is not enforceable:

   (i) if the employer has terminated the employment agreement due to redundancy,

   (ii) if the employer has significantly neglected its obligations towards the employee with the result that the employee had substantial grounds to revoke the employment, and

   (iii) if the employer has decided to dissolve the employment according to law (meaning that a court has declared a dismissal invalid, and the employer has dissolved the employment by paying a penalty fee set out in the law).

   Further, the employer can, during the term of the employment, unilaterally waive, or limit in time, the non-competition clause and thereby release itself from the obligation to pay the financial compensation.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   Yes, in order for the agreement/provision to be valid and enforceable it must entitle the employee to compensation. The compensation shall be no less than 60 percent of the employee's monthly salary from the company at the time of cessation of employment. The monthly salary shall be calculated as the average of the amounts received by the employee in the form of salary, commission, bonus etc. during the last year of employment.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

Yes. The non-competition does not need to be limited to a specific geographic area. However there is nothing hindering the parties to agree to limit the restriction to only include certain customers and/or a geographic areas.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Yes, the non-competition agreement/clause is enforceable regardless of a change of employer.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

No, however a court or the special arbitral tribunal may give an injunction and decide that the employee shall pay liquidated damages if the breach continues. If the employer is bound by the abovementioned collective bargaining agreement on the use of non-competition clauses in employment agreements, the special arbitral tribunal may also decide on recurring liquidated damages per each day, week or month the breach goes on.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

No, there are different rules for non-competition restrictions outside the employment context, as they are considered commercial contracts and are not subject to the same restrictions.

SWITZERLAND

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   Non-competition and other restrictive covenants are governed by the Swiss Code of Obligations ("**CO**"), the wording of the individual employment contract and Swiss case law.

   According to the CO, a post-contractual restrictive covenant requires the written form. It is only binding where the employment relationship allows the employee to have knowledge of the employer's clientele or manufacturing and trade secrets, and where the use of such knowledge may cause the employer substantial harm. Furthermore, the prohibition must be appropriately restricted with regard to place, time and scope and shall not unfairly compromise the employee's future economic activity.

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   Employment-based non-competition agreements are enforceable within the limits set forth by the CO and Swiss case law.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   Provided that the non-competition agreement is valid (see Question 1 above), the employer would need (i) to bring proof/evidence that the non-competition clause has been breached, and (ii) in case of a damage claim, prove the specific damage caused by the breach (including the causal nexus between the breach and the damage), and/or (iii) in case of a claim for specific enforcement, that specific enforcement is justified by the injury or threat to the employer's interest and by the conduct of the employee.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   A non-competition restriction is only binding where the employment relationship allows the employee to have knowledge of the employer's clientele or manufacturing and trade secrets, and where the use of such knowledge may cause the employer substantial harm.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   The excessive undertaking is not void but can be narrowed down by the judge to what he/she still considers reasonable. The same principle applies to an excessive contractual penalty.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes. The non-competition prohibition shall not unfairly compromise the employee's future economic activity.

7. **Does it matter when the employee executed the non-competition agreement?**

   This is not absolutely clear; according to parts of the legal literature, a non-competition undertaking contained only in a termination agreement would not be enforceable.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   According to mandatory Swiss law, a post-contractual, non-competition undertaking lapses if the employer gives notice of termination for a reason not set by the employee (e.g., restructuring, redundancy).

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   No, this is not a condition of validity of the post-employment non-competition clause. Payment of such waiting allowance is neither legally required nor usual in Switzerland.

   However, the payment of a waiting allowance substantially increases the probability that the restrictive covenant is indeed enforceable (i.e., does not unfairly compromise the employee's future economic activity).

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    As a general rule, this is possible.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    Yes, the non-competition provision is transferred to the new employer in case of a change of employer (e.g., due to a merger or transfer of a business undertaking).

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    No, the non-competition restriction cannot be extended.

13. **Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?**

    Yes, for sellers who are in an employment relationship with the target company at the time of the sale (at least if they only hold a small percentage of the shares of the target company).

    For sellers who are not in an employment relationship with the target company at the time of the sale, the only applicable restrictions result from antitrust laws and regulations and related case law.

TAIWAN

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

Employment related non-competition and other restrictive covenants are governed by the Taiwan Labor Standards Act and its Enforcement Rules. In order for a non-competition covenant to be valid and enforceable, the following requirements shall have been met:

1. The employer has proper business interests that require being protected.
2. The position or job of the employee entitles him/her to have access to or be able to use the employer's trade secrets.
3. The period, area, scope of occupational activities and prospective employers with respect to the non-competition shall not exceed a reasonable range.
4. The employer shall reasonably compensate the employee concerned who does not engage in competition for the losses incurred by him/her.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Employment-based non-competition agreements are valid and enforceable within the limits as strictly set forth by the law.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

In order for the non-competition agreement to be enforced, the employer will have to (i) show that there is a valid and enforceable non-competition agreement, and (ii) prove that there has been a breach of the non-competition obligation.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

Yes, one of the requirements for valid and enforceable non-competition covenant is that the position or job of the employee entitles him/her to have access to or be able to use the employer's trade secrets.

5. What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?

According to the law, an agreement in violation of any of the requirements shall be null and void. The court will have no discretion to make any adaption.

6. Will a court consider the impact of enforcement of the non-competition restriction on the employee?

Yes. In order to be valid and enforceable, it is required that the period, area, scope of occupational activities and prospective employers shall not exceed a reasonable range (for example, the restricted occupational activities shall be limited to the same as or similar to the job of the employee), and the employee shall be reasonably compensated for the non-competition (considering, for example, his/her living cost and loss, etc.).

7. Does it matter when the employee executed the non-competition agreement?

It does not matter when the employee executed the agreement. However, the period of non-competition shall not exceed a maximum of two years after the termination of employment. Theoretically speaking, the non-competition agreement would be executed before the end of such a restricted period.

8. Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?

The non-competition agreement applies to all cases of termination unless otherwise agreed upon by the employer and the employee. However, some argue that if the termination of employment is attributable to the employer, the non-competition agreement shall lose its effect.

9. Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?

Yes, one of the requirements of the law is that the employer shall reasonably compensate the employee concerned who does not engage in competition for the losses incurred by him/her. In principle, the compensated monthly amount shall not be less than 50% of his/her average monthly salary.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

The law requires that the period, area, scope of occupational activities and prospective employers with respect to the non-competition shall not exceed a reasonable range. Therefore, as long as the restriction is within a reasonable range under the circumstances (for example, the employer shall have had the same or similar customers), an employer may use a customer-based restriction instead of a geographic restriction.

11. Can an employer enforce a non-competition provision that the employee entered with the employer's predecessor?

If the employer is a legal successor to the predecessor employer which executed the non-competition agreement with the employee, the employer may enforce such a non-competition provision.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

No. The restricted period cannot be extended.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

No. The non-competition covenant arising out of a sale of assets or equity shall be governed by the Civil Code (which admits the principle of party autonomy) but subject to the control of the competition law while the non-competition covenant arising out of an employment context shall be subject to the mandatory provision of the labor law.

THAILAND

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   The legislation concerning labor/employment (e.g., Labour Protection Act B.E. 2540, Labour Relations Act B.E. 2518 etc.), the Unfair Contract Term Act B.E. 2540 and the provisions of the Thai Civil and Commercial Code apply to the non-competition and other restrictive covenants.

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   Employment-based non-competition agreements are enforceable within the limits set forth by law.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   As a basic principle of civil procedure, a person can claim for the enforcement of their rights only when they can prove that their rights have been violated. In order to obtain enforcement of non-competition agreements/provisions, the employer would need to (i) prove to the court the validity of the non-competition agreement/provision and/or (ii) prove that there has been a breach of the non-competition obligation.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   No, an employee of any level can have a non-competition agreement with the employer. But, in terms of enforcement, according to the Labour Protection Act B.E. 2540, the more the employee is economically disadvantaged when compared to the employer, the more likely the court will deem that such non-competition agreement is unfair, and thus, may not be fully enforceable to the extent agreed.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope is overly broad?**

   The court has discretion over the degree of which a non-competition term can be enforced. If the court deems that such term is overly broad, the court has the power to adjust it to a degree it deems reasonable. The factors such as the parties' bargaining power, practice of that type of contract, the weight of the obligation of one party compared to the other, are normally taken into account.

6. **Will a court consider the impact of enforcement of a non-competition restriction on the employee?**

   Yes, in determining the enforceability of a non-competition clause, the court also takes into account the burden the employee has to bear as a result of such agreement (e.g., the scope of the restricted geographic area, the period of time of limitation, etc.). Terms which limit the right or freedom to work or to conduct business or to do a legal act relating to carrying on a business or profession that increases obligations more than normally expected on the party whose right or freedom is restricted are deemed enforceable only to the extent it is fair and reasonable in the circumstances.

7. **Does it matter when the employee executed the non-competition agreement?**

   No, the execution date of the non-competition agreement is irrelevant with respect to its validity.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   Yes, the agreement will still be valid. Whether such non-competition agreement is made pre-or post termination, the non-competition agreement will still be binding upon the terminated employee. However, same as the above, it will be subject to the Unfair Labour Protection Act B.E. 2540. Therefore, it shall be enforceable to the extent that the court deems reasonable and fair.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   No, there is no law that requires the employer to pay such money.

10. **Can an employer use a customer-based restriction instead of a geographic?**

    As long as the agreement of restriction does not pose a greater burden than that which can be reasonably expected by the employee and that it does not exploit the employee, it shall be enforceable.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    Yes, the law provides that if the employer transfers his right to a third person (granted the employee has given his/her consent), all rights and due of the employee from the previous employer shall continue to be due to the employee and the new employer (the predecessor) shall assume all rights and duties relating to such employee.

    A non-competition agreement, being one of the employee's dues to the previous employer, will continue to be binding upon such employee with the new employer (the employer's predecessor).

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    No, the non-competition restriction cannot be extended.

13. **Are the non-competition provision that arise out of a sale assets or equity treated the same as provisions that arise out of an employment context?**

    It is treated the same in some respects. They are both subject to the principle of civil law that imposes an agreement shall be void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals.

    However, a non-competition provision that arises out of a sale of assets or equity is also subject to other laws such as anti-competition law and related regulation.

TURKEY

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   Non-competition and related covenants in employment relationships are mainly governed by the Turkish Code of Obligations numbered 6098 ("TCO").

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   Employment based non-competition agreements are enforceable in the Turkish jurisdiction. The obligation concerning non-competition may be regulated under the employment contract itself or a separate written agreement. Regardless of the type of employment agreement (e.g. part time or full time, definite term or indefinite term), all employment agreements may contain a non-competition obligation if the parties so agree.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   In accordance with the general principles of law, the employer must prove the validity of the conditions set forth under Article 444 of TCO in order to enforce a non-competition agreement or provision. In this context, the employer must show that (i) the employee had the legal capacity to act when the agreement was signed, (ii) the agreement was concluded in writing, and (iii) the employee has been working in a position allowing access to information related to production secrets, clientele, or business realized by the employer and the usage of such information must cause serious detriment to the employer. However, a non-competition restriction must include certain limitations in terms of business, duration (max. two years except for certain circumstances), and geographic area to an extent not jeopardizing the economic freedom of the employee in the future.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   Yes. The employer must be able to show that the employee was at a particular position allowing access to information regarding the production secrets, clientele, or business/commercial activities of the employer. The employer must further show that usage of such information would be significantly harmful to the business and employer.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   A court has the right to modify the limits of non-competition terms. In the absence of any limitation on the area of business, duration, or geographic scope, a non-competition restriction would be deemed invalid. In cases of overly broad restrictions, the judge has the authority to narrow the scope of the prohibition and amend the restriction for it not to hinder an employee's economic freedom and right to work. The judge may also decide on invalidity of non-competition terms in whole.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes, a court may amend or decide upon invalidity of overly restrictive prohibitions jeopardizing economic freedom and right to work of the employee.

7. **Does it matter when the employee executed the non-competition agreement?**

   Timing does not matter; a non-competition agreement may be executed at any time throughout the employment relationship or after termination thereof.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   An employer may not enforce a non-competition agreement in the event of unjust termination by the employer or just termination by the employee.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   Although the TCO does not explicitly require reciprocity of non-competition agreements, this is an issue taken into consideration by the court in determining the boundaries of the non-competition restriction. In their latest decisions, courts have tended to pay regard to reciprocity of such clauses (i.e. payment of the employer during the non-competition period) while using their right to modify the limits of non-competition restrictions.

10. **Can an employer use a customer-based restriction instead of a geographic?**

    Article 445 of the TCO imposes determination of three main restrictions regarding geographical area, area of business, and duration of such restriction. The article itself does not, however, explicitly provide for a customer-based restriction. On the other hand, in a potential dispute, it is likely courts would accept the validity of a customer-based restriction instead of a geographic restriction given the location of restricted customers may be broadly interpreted as a geographic restriction. However, in any case, such restriction must also comply with other validity requirements stated above to be enforceable.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    In the event of a transfer of the company, if the successor employer maintains business transactions with the trade secrets being protected by a non-competition restriction and resumes communications with clientele of the former employer, the non-competition agreement that was in place by the predecessor can be enforced by the successor.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

Although the judge has discretionary authority to modify non-competition agreements to a certain extent, the term of an agreement may not be extended by the court to the detriment of the employee. In the event of breach of the non-competition agreement, certain remedies are offered to the employer. An employer, in any case, can claim damages arising from a breach of a non-competition agreement. Furthermore, if included in a non-competition agreement, an employer may claim compensation based on a penalty clause. It may also request a court order to cease the infringement if the injury to the employer is so significant that it cannot be fully compensated through the penalty clause and damages.

13. Are non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment contract?

No, there are certain other regulations such as TCO provisions relating to assets/business transfer and the Turkish Commercial Code or the Turkish Competition Code that regulate non-competition obligations in commercial relationships.

UNITED ARAB EMIRATES (excluding DIFC and ADGM)

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

The provisions of law dealing with non-compete clauses can be found in:

- Article (127) of the UAE Federal Law No. (8) of 1980 ("Labour Law"); and
- Articles (909) and (910) of the UAE Federal Law No. (5) of 1985 concerning Civil Transactions ("Civil Code").

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

As a threshold test, in order to be enforceable, a post termination restriction must be reasonable, and should only restrain conduct to the extent necessary to protect the company's legitimate business and legal interests. It should therefore be limited in:

- Time/duration,
- Place/geographical scope; and
- Nature/ business sought to be restricted.

It is generally accepted in this jurisdiction that a post termination restriction with a duration of up to six months with a geographic scope limited to the Emirate within which the employee has been working – for example, Abu Dhabi – is reasonable and would be enforceable.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

The employer would be required to adduce evidence to quantify the financial loss sustained, as a direct result of the employee's breach, which is often difficult to prove. A more effective approach is by enforcement of a genuine pre-estimate of loss, where a liquidated damages provision has been expressly included in the employment contract.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

No. The employee does not have to be at a particular level but must have been in a position to acquire knowledge of the trade secrets of the business, which are confidential to the business and not in the public domain, and which would enable the employee to compete with the business.

5. What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?

The court may amend the agreement to reduce the restricted period.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes. If the provision is in accordance with Labour Law, the court's decision will be based on the evidence provided by the employer on a breach of non-compete restriction and consider all relevant factors, including but without limitation the effect of the restriction on the employee and damage suffered to the employer's business.

7. **Does it matter when the employee executed the non-competition agreement?**

   No

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   If a contract is terminated according to the contractual provisions (i.e., adequate notice is given and the correct procedure used), any reasonable restraint clauses may continue to be effective post-employment. However, Article 909 (3) of the Civil Code states that the employer cannot rely or enforce a non-compete clause if the employer terminates employment contract for an unjustifiable cause.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   No.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    Yes, provided that the restriction still satisfies the requirements described in the Labour Law and the Civil Code (i.e., must demonstrate that the non-compete restriction is reasonable and necessary to protect its legitimate interests.).

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    If the employing entity has not changed (only the shareholders) then yes; otherwise no.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    No – the courts will not extend the period of non-competition.

13. **Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?**

    No – the sale of assets would not be in the scope of the UAE Labour Law or the Civil Code.

UNITED STATES (Alaska)

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

Non-competition and other restrictive covenants are governed by Alaska case law. Depending on the circumstance of a particular situation, the provision of Alaska's Uniform Trade Secrets Act (AS 45.50.910-945) may come into play.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

The general rule in Alaska is that covenants not to compete are enforceable, as long as the enforcing party has a protectable interest, had given the restrained party consideration and has imposed reasonable restraints (e.g., as to time, geographical area, and activities). *See Data Management, Inc. v. Greene*, 757 P.2d 62 (Alaska 1988). Restraints on the seller of a business or departed owner may be greater than on a former employee. *See Wirum & Cash Architects v. Cash*, 837 P.2d 692 (Alaska 1992), *National Bank of Alaska v. J.B.L. & K., Inc.*, 546 P.2d 579 (Alaska 1976), and *Barber v. Northern Heating Oil, Inc.*, 447 P.2d 72 (Alaska 1968).

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

If the court determines a covenant was drafted in good faith, it can be enforced. If it is overbroad as to duration, geographical area, or activities prohibited, the court can alter terms so as to make the covenant reasonable so long as the employer acted in good faith. *Data Management v. Greene*, 757 P. 2d 62 (Alaska 1988).

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

No.

5. What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?

Alaska courts will rewrite an overly broad provision in a non-competition covenant to make it valid as long as it is determined the employer did not act in bad faith. *Data Management v. Greene*, 757 P. 2d 62 (Alaska 1988).

6. Will a court consider the impact of enforcement of the non-competition restriction on the employee?

Yes, the court will consider the impact on the employee's ability to obtain employment and as well as the impact on the public. *Data Management v. Greene*, 757 P. 2d 62 (Alaska 1988); *Metcalfe Investments, Inc. v Garrison*, 919 P. 2d 1356 (Alaska 1996).

7. Does it matter when the employee executed the non-competition agreement?

Generally the covenant is more likely to be enforced if it is part of the original employment agreement. If the employer seeks to add a covenant to not compete after employment has commenced, additional consideration for the covenant may be required, and it is an open issue whether the continuation of employment is itself adequate consideration.

8. Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?

Yes, particularly if the access to and use of trade secrets is involved. However, if the termination is viewed as a breach of the employment contract, the covenant may not be enforceable. Also the measure of damages may change where termination is based on action of the employer rather than the employee's voluntary resignation.

9. Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?

No.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

Yes, to protect the employer's goodwill and trade secrets. *Metcalfe Investments, Inc. v Garrison*, 919 P. 2d 1356 (Alaska 1996).

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Yes. *National Bank of Alaska v. J.B.L. & K. of Alaska, Inc.* 546 P.2d 579, 590 (Alaska 1976) (involves sale of a business).

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

This issue has not been addressed by a court of record in Alaska. However, it the non-breaching party fails to act promptly, it is less likely that the covenant will be enforced. If misappropriation of trade secrets as defined in Alaska Trade Secrets Act are involved, the ban on the use of those trade secrets can be enforced as long as the information in question remain trade secrets and the action is brought within years of discovery or when discovery would have occurred with reasonable diligence of the misappropriation. AS 45.50.925.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

Alaska law treats covenants-not-to-compete which are ancillary to a sales agreement more liberally than employer-employee covenants. Compare *Wirum & Cash Architects v. Cash*, 837 P.2d 692 (Alaska 1992) (involving a partner's withdrawal from a partnership), *National Bank of Alaska v. J.B.L. & K., Inc.*, 546 P.2d 579 (Alaska 1976), and *Barber v. Northern Heating Oil, Inc.*, 447 P.2d 72 (Alaska 1968) with *Data Management v. Greene*, 757 P.2d 62 (Alaska 1988) and *DeCristofaro v. Security National Bank*, 664 P.2d 167 (Alaska 1983).

UNITED STATES (California)

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   Non-competition and other restrictive covenants are governed by California Business and Professions Code Sections 16600, 16601, 16602, and 16602.5.

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   The general rule in California is that covenants not to compete are unenforceable. While the statute prescribes narrow exceptions for covenants not to compete made in conjunction with the sale of a business, sale of a shareholder stock, or dissolution of a partnership (*see* response to Question 13, below), in the employment context, agreements limiting an employee's right to work will generally be void.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   While non-competition agreements are generally unenforceable in California, courts may, in narrow circumstances, enforce certain types of clauses that limit, but do not prohibit, competition. For example, non-solicitation covenants preventing a former employee from actively soliciting former customers may be enforceable where information regarding those customers is a demonstrably protectable trade secret. Additionally, an employee's promise not to actively solicit former coworkers to join a new business appears to be enforceable, even if no trade secret or unfair competition is involved, so long as reasonably limited in time and scope.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   No.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   The burden is on the employer to draft a permissible non-competition provision. California courts will not rewrite an overly broad provision in a non-competition covenant to make it valid.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   While non-competition restrictions are generally void in California, any potentially permissible non-solicitation covenant must be reasonably limited in time and scope, and restrictions must be evaluated in terms of reasonableness to the employee (as well as the employer and the public).

7. Does it matter when the employee executed the non-competition agreement?

The critical distinction in California relates to when the restraints limiting competition intend to apply. California law invalidates only those restraints that apply after the termination of employment. By contrast, during the term of employment, employees owe a common-law duty of loyalty to their employers, which precludes employees from competing with their employer. (An employer may, therefore, enact policies prohibiting employees from performing work for competitors during an employee's term of employment).

8. Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?

As discussed above, non-competition agreements are generally unenforceable in California. However, other restrictive covenants, such as non-solicitation agreements, may still be enforceable (see response to Question 3, above). In this context, though not entirely settled, employer termination does not appear to preclude enforcement, at least where the covenant is necessary to protect trade secrets or other confidential information.

9. Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?

Non-competition agreements are generally void in California, and tethering them to payments for an express term does not change that outcome.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

A covenant not to solicit the former employer's customers is treated as a covenant not to compete and is therefore generally invalid in California. However, clauses providing for the non-solicitation of customers may be permissible if the information is a demonstrably protectable trade secret.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

California courts have not squarely addressed the issue of assignability of non-competition provisions with respect to a successor employer. However, non-compete agreements not to engage in a similar business made in conjunction with the sale of the goodwill of a business may be assigned, under certain circumstances.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

This issue appears undecided in California courts.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

Although stringent restrictions apply to non-competition provisions in the employment context, California has narrowly drawn exceptions for covenants not to compete made in conjunction with the sale of a business, sale of a shareholder stock, or dissolution of a partnership. Non-compete agreements under these circumstances may be legal and enforceable if reasonable in time and scope.

UNITED STATES (Georgia)

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   Georgia common law governs restrictive covenants entered into prior to May 11, 2011. O.C.G.A. § 13-8-50 *et seq*. governs restrictive covenants entered into after May 11, 2011.

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   Employment-based non-competition agreements are enforceable under Georgia law if such agreements meet certain criteria.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   To demonstrate the existence of a valid non-competition provision under the common law, the employer must show that the non-competition provision is supported by valuable consideration, is reasonably necessary to protect one or more legitimate business interests of the employer, is reasonable as to duration, geographic scope, and scope of prohibited activities, and does not unduly prejudice the interests of the public. Under the above-referenced statute, the employer must also demonstrate that the employee in question falls within the class of employees with whom a non-competition provision can be entered into (see Question 4 below).

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   Under the common law, there is no bright-line test as to what type of an employee can enter into a valid non-competition provision. Under the above-referenced statute, however, a non-competition provision (as opposed to a non-solicitation of customers provision) can only be entered into with an employee who meets the criteria of O.C.G.A. § 13-8-53(a).

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   Under the common law, a court finding that a non-competition provision in the employment context is overly broad lacks the authority to modify or "blue pencil" the provision, and it will simply refuse to enforce the provision. Under the above-referenced statute, however, a court finding that a non-competition provision in the employment context is overly broad has the discretion to modify the provision to render it reasonable.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Under the above-referenced statute, a court may consider the economic hardship imposed upon an employee by the enforcement of a non-competition provision.

7. Does it matter when the employee executed the non-competition agreement?

A non-competition provision can be entered into at the beginning of the employment relationship or during the relationship with respect to an employee who has no defined term of employment (*i.e.*, an "at will" employee). In the case of such an employee, continued employment is sufficient consideration to support the non-competition provision. However, a current employee who does have a defined term of employment must be provided consideration above and beyond continued employment to support a non-competition provision.

8. Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?

Yes.

9. Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?

No.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

It is common for employers in Georgia to use a non-solicitation of customers provision, either in lieu of, or in addition to, a non-competition provision. Under the common law, such a non-solicitation provision must be limited in terms of its duration; it must be limited to either (a) a reasonable geographic area or (b) customers of the employer with whom the employee had material contact during the employment relationship; it must be limited to solicitation for a competitive purpose; it must be limited to current customers of the employer; and it must not prohibit the acceptance of unsolicited business. Under the above-referenced statute, the analysis of a non-solicitation of customers provision is similar, except that the term "material contact" is defined much more broadly under the statute than it is under the common law.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

A non-competition provision can be enforced by a successor entity if there is a properly drafted assignment clause in the agreement in which the non-competition provision is found.

12. Can the restrictive period in a non-competition agreement be extended in the event a court determines that a breach occurred?

Generally, no. However, Georgia courts have upheld tolling provisions under certain limited circumstances.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

Non-competition provisions in the sale of business context are viewed with less scrutiny than non-competition provisions in the employment context. For example, non-competition provisions may have a longer duration in the sale of business context. Also, under the common law, an overly broad non-competition provision in the sale of business context can be modified or "blue penciled" by a court.

UNITED STATES (Illinois)

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

In Illinois, the enforceability of non-competition and other restrictive covenants is determined by state common law for most employees. However, the Illinois Freedom to Work Act, 820 ILCS 90/1 to 90/10, governs the enforceability of non-competition agreements with low wage workers.

2. Does your jurisdiction not enforce an employment-based non-competition agreements at all?

For most employees, Illinois will enforce employment-based non-competition agreements if the restriction is reasonable and supported by adequate consideration. However, the Illinois Freedom to Work Act prohibits non-competition agreements with low wage workers (i.e., employees who earn an hourly rate equal to the required minimum wage under federal, state, or local law, or $13.00 per hour, whichever is greater).

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

First, any non-competition agreement must be ancillary to a valid employment relationship. Second, the restriction placed on the employee must be no greater than what is required to protect the employer's legitimate business interest. "Whether a legitimate business interest exists is based on the totality of the facts and circumstances of the individual case. Factors to be considered in this analysis include, but are not limited to, the near-permanence of customer relationships, the employee's acquisition of confidential information through his employment, and time and place restrictions. No factor carries any more weight than any other, but rather its importance will depend on the specific facts and circumstances of the individual case." *Reliable Fire Equip. Co. v. Arrendondo*, 965 N.E.2d 393, 403 (Ill. 2011). Third, the employer must show that restriction does not impose undue hardship on the employee. Finally, the employer must show that the restriction is not injurious to the public.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

No, except that employers cannot enforce non-competition agreements against any low wage worker covered by the Illinois Freedom to Work Act. However, the more senior the employee, or if the employee works in a sales and technical function, the better the chance for enforcement given the likelihood that the employee acquired the employer's confidential or trade secret information and/or had substantial contact with its customers.

5. What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?

Unless the overbreadth is particularly offensive, Illinois courts will judicially modify the provision so as to make the provision at issue enforceable or strike (i.e., "blue pencil") the offending words, leaving the remainder intact.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes, Illinois courts will consider whether the restriction places an undue burden on the employee because Illinois courts generally disfavor non-competition agreements.

7. **Does it matter when the employee executed the non-competition agreement?**

   Yes, it can matter. Under Illinois law, a non-competition agreement is not enforceable unless the agreement is supported by adequate consideration, which in the case of an at-will employee requires that the employee be employed with the employer for a "substantial period" of time. The Illinois Supreme Court has not defined what qualifies as a "substantial period" of time, instead taking a fact-specific approach to determine the adequacy of consideration. However, some lower state courts have opined that anything less than two years of continued employment is not a "substantial period" to support a non-competition agreement. But other state and federal courts in Illinois have refused to apply a bright-line rule, and instead have engaged in a fact-specific analysis to determine whether adequate consideration exists, finding that something less than two years (possibly even 12 months) of employment could be sufficient depending on the circumstances, including whether the employee resigned and whether some other form of consideration was offered.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   Yes, Illinois courts often consider the circumstances surrounding an employee's termination, but have not adopted any bright-line rule that involuntary termination makes a non-competition agreement unenforceable.

9. **Must the employer have to pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   No, although the fact that an employer is paying the employee is considered a factor that favors enforcement, because it reduces or eliminates any employee claim of hardship.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    Yes, it is common for a non-competition restriction to be in the form of a customer restriction, or both a customer and geographic restriction, depending on the employee's role. Under certain circumstances, it can be easier to enforce a customer-based restriction. However, in Illinois, courts will not enforce a customer-based restriction unless the employee had contact with the customer or solicited the customer, and the restriction is reasonably related to protecting that customer relationship.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    Yes, a predecessor or subsidiary may assign a non-competition agreement. Best practice is to include a provision in the non-competition agreement that the agreement is assignable.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

Yes, although most courts require that a provision providing for such an extension be included in the non-competition agreement in order to extend the restricted period.

13. Are non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

No. Non-competition and other forms of restrictive covenants arising from a sale of business context are much easier to enforce, and on a broader basis. A non-competition agreement arising out of the sale of a business only needs to be reasonable in its duration, geographic area, and scope.

UNITED STATES (Massachusetts)

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

Non-competition covenants executed on or after October 1, 2018 are governed by M.G.L. ch. 23A § 68, entitled the Massachusetts Non-competition Agreement Act (the "2018 Act"). The 2018 Act establishes minimum requirements for a non-competition covenant to be enforceable:

- Non-competes entered into *in connection with the commencement of employment* must be signed by both the employer and the employee, expressly state an employee's right to counsel before signing, and be provided to the employee upon the earlier of the date of the offer of employment or 10 days before the commencement of employment.
- Non-competes entered into *after the commencement of employment (but not in connection with a separation from employment)* must be supported by fair and reasonable consideration independent from continued employment, must be signed by both the employer and the employee, must expressly state the employee's right to counsel before signing, and must take effect no sooner than 10 days after the agreement is provided to the employee.
- Consistent with existing law in Massachusetts, non-competes must be "no broader than necessary" to protect an employer's legitimate business interest. The 2018 Act defines legitimate business interests as an employer's trade secrets, confidential information, or goodwill.
- To be enforceable, non-competes must provide for "garden leave" pay during the entirety of the restricted period or some "other mutually agreed-upon consideration," which must be specified in the agreement.

The 2018 Act restricts the scope of enforceable non-competes in terms of duration, geography, and prohibited activities:

- Non-competes cannot be enforced for more than 12 months from the date of termination of employment, unless an employee has breached a fiduciary duty to an employer or unlawfully taken the employer's property, in which case the non-compete can be enforced for two years from the date of termination of employment.
- Non-competes must be "reasonable in geographic reach;" the geographic areas where the employee provided services or had a material presence or influence during the last two years of employment is presumptively reasonable.
- Non-competes must reasonably prohibit activities in relation to the employer's protected interests; a restriction that protects a legitimate business interest and is limited to the specific types of services provided by the employee during the last two years of employment is presumptively reasonable.

The 2018 Act does not apply to the following:

- Existing non-competes—the 2018 Act only restricts agreements entered into on or after October 1, 2018;

- Non-competes entered into in connection with the sale of a business entity or an ownership interest in such an entity, when the restricted party is a "significant" owner who receives "significant consideration or benefit" from the sale;
- Non-competes entered into in connection with a separation from employment if the employee is given seven days to rescind acceptance;
- Non-solicitation agreements—including covenants not to solicit employees, customers, clients, or vendors;
- Confidentiality and non-disclosure agreements;
- Invention assignment agreements; and
- Agreements not to reapply for employment.

Non-competition agreements entered into prior to October 1, 2018 and the other excluded covenants referenced above will continue to be evaluated under current Massachusetts common law. Such covenants may only be enforced under Massachusetts law to the extent necessary to protect the employer's legitimate business interests—which include guarding against the release or use of trade secrets or other confidential information, or other harm to the employer's goodwill, but do not include merely avoiding lawful competition—and to the extent it is reasonable in scope in terms of the activities it restricts, the geographic limitations it imposes on those activities, and the length of time it is in effect.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Employment-based non-competition agreements are enforceable within the limits set forth by the 2018 Act and Massachusetts case law (please refer to Question 1 above).

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

Provided the non-competition agreement is valid (please refer to Question 1 above), the employer must (i) show the existence of a non-competition agreement and (ii) bring evidence there has been a breach of the non-competition obligation in order to obtain enforcement. In order to obtain an injunction, the employer must also show that it will likely suffer irreparable harm in the absence of an injunction.

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

Under the common law, to be valid and enforceable, one of the conditions of the non-competition covenant is that such obligation must be necessary to protect the employer's legitimate business interests. In practice, this condition implies the employee who is subject to the covenant is likely to compete with his/her former employer because of his/her functions and qualifications (e.g.: a sales manager with a direct contact with the clients and with a deep knowledge of the organization and methods of the company, an engineer entrusted with significant business secrets or important know-how, etc.).

The 2018 Act, meanwhile, limits the type of employees that may be subject to a non-competition covenant. The 2018 Act provides that "A non-competition agreement shall not be enforceable against: (i) an employee who is classified as non-exempt under the Fair Labor Standards Act, 29 U.S.C. 201-219, inclusive; (ii) an undergraduate or graduate student that partakes in an internship or otherwise enters a short-term employment relationship with an employer, whether paid or unpaid, while enrolled in a full-time or part-time undergraduate or graduate educational institution; (iii) an employee that has been terminated without cause or laid off; or (iv) an employee that is 18 years old or younger."

5. What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?

Under the common law, a Massachusetts court may, in its discretion, reform or otherwise revise a non-competition agreement so as to render it valid and enforceable to the extent necessary to protect the applicable legitimate business interests. The 2018 Act provides similarly.

6. Will a court consider the impact of enforcement of the non-competition restriction on the employee?

Under the common law, Massachusetts courts have sought to balance the reasonable needs of the employer with the reasonableness of the restraint imposed on the former employee.

The 2018 Act does not explicitly provide for this factor to be a consideration. However, a court will look at the general structure of the covenant to identify whether or not the restriction is reasonable.

7. Does it matter when the employee executed the non-competition agreement?

Yes. The 2018 Act applies only to agreements entered into on or after October 1, 2018. Non-competition agreements entered into prior to that date will be evaluated under Massachusetts common law.

Additionally, the 2018 Act provides for different standards of review for agreements entered into in connection with the commencement of employment and those entered into after the commencement of employment (please refer to Question 1 above).

Under the common law, Massachusetts courts have looked with greater skepticism upon non-competition agreements entered into after the commencement of employment. While the weight of authority holds that continued employment is sufficient consideration for the enforcement of a non-competition agreement, the Massachusetts Supreme Judicial Court has not resolved the issue. Therefore, depending on the circumstances, some courts may require additional consideration, beyond continued employment, in order to render a non-competition agreement enforceable.

8. Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?

Under the common law, whether an employee was terminated or voluntarily resigned is irrelevant when enforcing non-competition agreements, unless the agreement provides otherwise. However, if the discharge is inequitable, an otherwise reasonable restraint may not be enforced.

Under the 2018 Act, non-competition obligations will not apply to those who are terminated without cause or laid off.

9. Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?

Under the common law, no.

Under the 2018 Act, yes in the case of post-employment non-competition agreements (please refer to Question 1 above). Such agreements must be supported by a "garden leave clause" or "other mutually-agreed upon consideration between the employer and the employee, provided that such consideration is specified in the non-competition agreement."

A garden leave clause must provide for paying the employee at the rate of at least 50% of his or her highest annual base salary rate in the last two years of employment. The 2018 Act does not define "other mutually-agreed upon consideration." It is not yet clear whether there is any minimum threshold of value that is necessary for consideration to qualify as "mutually-agreed upon consideration" as an alternative to garden leave. The promulgation of implementing regulations or litigation over the issue may be required before there is any clarity on this issue.

The employer may avoid paying the garden leave payments by waiving the post-employment restrictions of the non-competition agreement before employment terminates. Once employment terminates and the post-termination noncompetition obligation is in effect, the employer may not cease payment in the absence of a breach. However, if the non-competition restriction continues for a second year due to the employee's breach of fiduciary duty or unlawful taking of property, the payments need not continue for the second year.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

Massachusetts courts have not addressed the issue. However, Massachusetts courts have found nationwide and worldwide restrictions to be reasonable when they correspond with the scope of the employer's operations.

The 2018 Act requires that non-competition agreements be "reasonable in geographic reach."

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Generally, non-competition agreements are assignable to successor employers. However, the non-competition agreement must have explicit language allowing assignment. Additionally, a court may prohibit assignment if assignment significantly alters the scope of the non-competition agreement's restrictions.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

Under the common law, a court may toll a non-competition agreement in the event that an employee breaches their non-compete obligations. It does so by suspending the start date for the restrictive period until after the employee has stopped violating the contract or during litigation of the issue. However, a court may refuse to toll a former employee's non-compete period where the agreement does not include a tolling provision.

The 2018 Act is silent with respect to tolling in the case of a general breach. However, under the 2018 Act, where an employee is shown to have breached a fiduciary duty to the employer or has unlawfully taken (physically or electronically) property belonging to the employer, the restricted period may be tolled for up to two years from the date of cessation of employment.

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

No. Non-competition agreements that are negotiated as part of a sale of business are enforced more liberally, provided they are reasonable in substance, time, and geographical scope.

The 2018 Act does not apply to non-competition agreements that are "made in connection with the sale of a business entity or substantially all of the operating assets of a business entity or partnership, or otherwise disposing of the ownership interest of a business entity, partnership or division or subsidiary of a business entity or partnership, when the party restricted by the non-competition agreement is a significant owner of, or member or partner in, the business entity who will receive significant consideration or benefit from the sale of disposal."

UNITED STATES (Oregon)

1. What law applies to non-competition and other restrictive covenants in your jurisdiction?

Non-competition agreements between an employer and employee are governed by statute, ORS 653.295.

2. Does your jurisdiction not enforce employment-based non-competition agreements at all?

Oregon enforces employment-based non-competition agreements, but subject to an employer's compliance with statutory conditions.

3. If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?

A non-competition agreement "is voidable and may not be enforced" unless the employer has met criteria specified in the statute, ORS 653.295. The criteria include the nature of the employee's work and level of compensation, as defined by statute, and 14 days' notice of the agreement in a written offer of employment prior to employment or tying the agreement to a "bona fide advancement" of the employee (i.e., a promotion consisting of an increase in pay and greater responsibilities). Further, the employer must have a protectable interest such as giving the employee access to trade secrets or confidential competitive information or (in the case of on-air broadcasting talent) recently devoting resources to develop the employee's effectiveness, among other criteria.

These statutory requirements do not apply to a "bonus restriction agreement." ORS 653.295((4)(b) and (7). An employer may adopt a plan that meets the definition of a "bonus restriction agreement" in ORS 653.295(7) to take advantage of that exception. In the event of a breach, however, the employer's remedy of an injunction prohibiting competition is unavailable. The remedy is instead limited to forfeiture of profit sharing or other bonus compensation that has not yet been paid to the employee.

These statutory requirements also do not apply to a covenant not to solicit employees of the employer, or solicit or transact business with customers of the employer.

Special rules apply to employees who are "on air" talent in the broadcasting industry. See ORS 653.295(1)(c)(C)

4. Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?

By statute (ORS 653.295(1)(b), the employer must show that the employee was engaged in "administrative, executive or professional work." This means one who "performs predominantly intellectual, managerial or creative tasks, exercises discretion and independent judgment, and earns a salary and is paid on a salary basis." ORS 653.020. Employees must therefore be within the "white collar" exemptions under state overtime laws. Note that the Oregon "white collar" exemptions are narrower than under the federal Fair Labor Standards Act. Additionally, note that persons exempt as outside salespersons are not within the category of employees who may be subject to a valid non-compete, although a salesperson may be subject to a restriction on solicitation of customers, or may be subject to an agreement prohibiting competitive employment if the pay requirements discussed in Question 9 are met.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   Even if a non-competition agreement meets statutory requirements, courts will still scrutinize it for an exchange of consideration and reasonableness, particularly as to duration and geographic area, and may revise it to the minimum scope needed. The maximum restrictive period is 18 months, but a shorter restrictive period may yet be reduced if a court deems that period unreasonable.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes, restrictions must be evaluated in terms of reasonableness to the employee (as well as the employer and the public).

7. **Does it matter when the employee executed the non-competition agreement?**

   Yes. If upon initial hire, the employer must inform the employee in a written employment offer received by the employee at least two weeks before the first day of employment that a non-competition agreement is required as a condition of employment Some cases have required that the agreement be actually signed on, or within a few days of the commencement of employment. If the agreement is not entered into upon initial hire, the agreement must be entered into upon a "bona fide advancement."

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   Yes. However, the fact of an involuntary termination, particularly if the termination is in violation of the employment agreement, may be a factor that a court will consider in determining whether injunctive relief is granted.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   No, but that is an option. If an employer does not meet the statutory minimum compensation (compensation equal to the median income for an urban family of four, which may currently be about $70,000 annually) and nature of work requirements, the employer may still enforce the agreement by paying the greater of 50 percent of the employee's gross compensation or 50 percent of a median income figure for an urban family of four – for the period the employee is restricted from working.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    Yes, the Oregon statute governing non-competition agreements specifies that its terms do not apply to "a covenant... not to solicit or transact business with customers of the employer." ORS 653.295(4). Thus, the 18-month maximum restrictive period for a non-competition covenant would not apply to a covenant not to solicit customers.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Yes, when by operation of law, as in a merger, or by purchase of the employer's stock or equivalent acquisition of equity in a business in which the employer continues to exist notwithstanding a change of ownership. If an employer assigns a non-competition agreement to a new employer, the agreement may be enforced if its terms provided that it was assignable. A substantial change in the nature of the employer might prevent post-sale enforcementor restrict the scope of that enforcement.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

This issue appears undecided in Oregon courts. In one case, a federal Court of Appeals interpreting Oregon law held that it could equitably extend the temporal duration of a covenant, but the duration of the covenant in that case was less than 18 month. However, ORS 653.295(2) explicitly limits the duration of a non-competition agreement to 18 months "from the date of the employee's termination", and further provides that "[t]he remainder of a term of a noncompetition agreement in excess of 18 months is voidable and may not be enforced by a court of this state."

13. Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

No, the governing statute explicitly applies only to "noncompetition agreements made in the context of an employment relationship or contract and not otherwise." ORS 653.295(3). When a non-competition covenant is sought in the case of a sale, it is advisable that the covenant be included in the asset purchase agreement, although a separate covenant may also be included in an employment agreement if a person selling equity or assets will continue to be employed. Likewise, ORS 653.295(5) provides that the employer-employee non-competition statute does not prevent an employer from protecting trade secrets or other proprietary information from misappropriation by an employee. In other states, the enforceable scope in the sale of a business, sale of stock, or dissolution of a partnership is generally much broader than for a departed employee, especially as to the duration of the covenant. Oregon law would appear consistent.

UNITED STATES (Pennsylvania)

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   Non-competition and related covenants are governed by Pennsylvania common law. Pennsylvania does not have a general statute or regulation governing non-competition restrictions.

2. **Does your jurisdiction not enforce an employment-based non-competition agreements at all?**

   No. Courts applying Pennsylvania law will enforce non-competition restrictions if they meet certain criteria.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   Pennsylvania courts take the position that non-competition restrictions are disfavored. They nevertheless will enforce such restrictions if they are (a) incident to an employment relationship between the parties; (b) reasonably necessary to protect the employer; and (c) reasonably limited in length of time and geographic scope.

   Courts have found non-competition provisions "reasonably necessary" when the employee at issue had access to and used confidential information and/or customer goodwill or received a meaningful amount of specialized training. Courts have considered non-competition provisions reasonable in terms of length when they are two years or less, although in certain circumstances courts have enforced longer restrictions. Courts typically deem geographic scope reasonably where it tracks the employer's business area (in cases where the employee's access to confidential information is the basis for enforcement) or where the employee conducted business activities (in cases where customer goodwill is the basis for enforcement).

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   No, although given the factors above, the more senior the employee, or if the employee works in a sales and technical function, the better the chance for enforcement.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   Unless the overbreadth is particularly egregious, courts applying Pennsylvania law will typically modify the offending provision so as to make the provision at issue enforceable. If the overbreadth is too great, the enforcing party runs the risk that the court will simply strike the provision altogether.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes, the court will balance the harm to the employee with the enforcing employer's interests.

7. Does it matter when the employee executed the non-competition agreement?

Yes, under Pennsylvania law, a non-competition agreement must be executed before or upon commencing employment, as a condition of that employment. If it is not, the employer must offer additional consideration (e.g., a promotion, equity, a bonus, increase in salary, etc.) to ensure enforcement.

8. Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?

Generally speaking, the fact that an employer terminated the employee's employment is a negative factor for purposes of enforcement. How negative depends on the reasons for the termination. For example, if the termination was due to the employee's poor performance, Pennsylvania law typically will not enforce the restriction. If the termination was due to the employee's misconduct, or he or she appears to have tried to induce termination, the employer may still be able to enforce the restriction, provided that it can satisfy the other elements.

9. Must the employer have to pay the employee during the non-competition period for the non-competition provision to be enforceable?

No, although the fact that an employer is paying the employee is considered a factor that favors enforcement, because it reduces or eliminates any employee claim of hardship.

10. Can an employer use a customer-based restriction instead of a geographic restriction?

Yes, it is common for a non-competition restriction to be in the form of a customer restriction, or both a customer and geographic restriction, depending on the employee's role. Under certain circumstances, it can be easier to enforce a customer-based restriction.

11. Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?

Yes, but only if the employee expressly agreed to assignment in the non-competition agreement.

12. Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?

Yes, if the non-competition agreement has a specific provision providing for such an extension.

13. Are non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?

No. Typically, non-competition and other forms of restrictive covenants arising from a sale of business context are much easier to enforce, and for a longer time period (up to five years) and on a broader basis.

UNITED STATES (Washington)

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   Non-competition and other restrictive covenants are governed by Washington case law.

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   The general rule in Washington is that covenants not to compete are enforceable, as long as the enforcing party has a protectable interest, had given the restrained party consideration and has imposed reasonable restraints. Restraints on the seller of a business or departed owner may be greater than on a former employee. Often, an employee's covenant not to compete will be enforced as a non-solicit covenant instead.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   An employer must show that (1) the restraint is necessary for the protection of the business or goodwill of the employer, (2) the restraint imposes upon the employee no greater restraint than is reasonably necessary to secure the employer's business or good will and (3) the degree of injury to the public through loss of the service and skill of the employee is not sufficient to override the covenant. The employer must also show it supplied consideration for the covenant at the time it was imposed, and continued employment without more will not suffice.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   No.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   Washington courts will rewrite an overly broad provision in a non-competition covenant to make it valid. It will be revised to the minimum scope needed.

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   Yes, restrictions must be evaluated in terms of reasonableness to the employee (as well as the employer and the public).

7. **Does it matter when the employee executed the non-competition agreement?**

   The critical distinction is when the restraints limiting competition apply. Washington law invalidates only those restraints that apply after the termination of employment. During the term of employment, employees owe a common-law duty of loyalty to their employers, which precludes employees from competing with their employer. (An employer may, therefore, enact policies prohibiting employees from performing work for competitors during an employee's term of employment).

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   Yes, but the employer's protectable interest will be more severely scrutinized if the employee was terminated involuntarily. By statute, there is an exception in the broadcasting industry, barring enforcement against an employee terminated without cause. RCW 49.44.190.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   No.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    Yes, to protect the employer's goodwill, Washington courts have enforced non-solicit covenants that were reasonable in scope and even revised employee non-compete covenants to operate as non-solicit covenants.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    Yes, when the employer has stepped into the position of its predecessor by operation of law, as in a merger. Non-compete agreements may also be enforced when assigned, their terms permit assignment and they are specifically included in a sale of assets.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    For purposes of an injunction, if the restricted party breached the covenant but the breach was not discovered for some time, a court could employ equity to extend the restrictive period to provide the benefit of the full duration, so long as the extended period was reasonable. There would be no extension for injunctive purposes if the breach was not discovered before the covenant's duration expired. The damages remedy would remain.

13. **Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?**

    Washington law protects sellers of assets or equity in a business. The enforceable scope in conjunction with the sale of a business, sale of stock, or dissolution of a partnership is generally much broader than for a departed employee, especially as to the duration of the covenant.

URUGUAY

1. **What law applies to non-competition and other restrictive covenants in your jurisdiction?**

   Non-competition and other restrictive covenants are not regulated by Uruguayan Law. However, they are admitted, according to scholars and court decisions. In order to be enforceable, a post-employment non-competition covenant must be in written and (i) necessary to protect the employer's business, reasonably limited (ii) in time, (iii) in space, (iv) and fairly remunerated by an adequate compensation.

2. **Does your jurisdiction not enforce employment-based non-competition agreements at all?**

   Employment-based non-competition agreements are enforceable within the limits set forth under Question 1.

3. **If your jurisdiction does enforce non-competition agreements/provisions, what must an employer show to obtain enforcement?**

   In addition to meeting the standards described above, the employer would need (i) to demonstrate the existence of a non-competition agreement and (ii) establish that there has been a breach of the non-competition obligation.

4. **Does the employer need to show that an employee was at a particular level to enforce a non-competition restriction?**

   No.

5. **What happens if a court determines that the restricted area of business, the duration, or the geographic scope are overly broad?**

   There is no regulation regarding this issue, nor Court decisions. In my opinion, the Judge will revise and declare the covenant applicable within narrower limitations (e.g., restriction of a broad geographical scope).

6. **Will a court consider the impact of enforcement of the non-competition restriction on the employee?**

   A Court would look at the general structure of the covenant in order to identify whether or not the restriction is balanced. (e.g., geographical scope; amount of compensation period to the employee).

7. **Does it matter when the employee executed the non-competition agreement?**

   The execution date of the non-competition agreement is irrelevant with respect to its validity. However, if the same is signed during employment relationship (after the employee begins to work and prior to termination date), a Judge may consider that the employee's consent was not valid and that he/she accepted the restriction just to maintain his/her job.

8. **Can an employer enforce a non-competition agreement if it involuntarily terminated the employee's employment?**

   It will depend on the drafting of the non-competition covenant.

   The employer can unilaterally decide to waive the non-competition clause and thereby release itself from the obligation to pay the financial compensation, if the covenant expressly provides for this possibility.

9. **Must the employer pay the employee during the non-competition period for the non-competition provision to be enforceable?**

   Yes, scholars understand that employee must receive a compensation and that this is required for the non-compete to be valid.

   The amount of financial compensation corresponds to a certain percentage (generally around 60%) of the average gross monthly remuneration. This amount may be paid on a monthly basis or all together at the termination date.

10. **Can an employer use a customer-based restriction instead of a geographic restriction?**

    Yes, terms of the non-compete, will be designated by the parties.

11. **Can an employer enforce a non-competition provision that the employee entered into with the employer's predecessor?**

    Yes, the non-competition provision is transferred to the new employer in case of change of employer.

12. **Can the restricted period in a non-competition agreement be extended in the event a court determines that a breach occurred?**

    No, the non-competition restriction cannot be extended, unless employee agrees to extend it.

13. **Are the non-competition provisions that arise out of a sale of assets or equity treated the same as provisions that arise out of an employment context?**

    Yes, for sellers who are in an employment relationship with the target company at the time of the sale.

    For sellers who are not in an employment relationship with the target company at the time of the sale, the applicable restrictions are those arising from agreement signed by sellers.

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