



Non competition clause in IT contracts

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Introduction

Information technologies market in Serbia has been significantly growing and developing in the past period, while the Ukrainian crises accelerated it, although the expectations were opposite. From the very beginning IT sector has been facing a work force deficit, while demand for highly qualified mediors and seniors exceeds the market offer, which taking into consideration big influence of the foreign companies to the Serbian market, makes a huge challenge for the employers to keep their employees.

Hence, the importance of the ban of competition, as one of the mechanisms on the employer's side to prevent loss of the clients, as well as employee outflow, increases.

On the other hand, it is completely understandable that the employees strive for freedom of choice and their career development in the way they consider the best for themselves, so it is of big importance to make a balance between the right to the employees' freedom of choice and the employer's interests.

In this text we will refer to the ban of competition in the employment relationship, with the special emphasize to the IT sector.

1. What is ban of competition and when it shall be contracted?

Ban of competition clause is defined by the Articles 161-162 of the Employment Law.

The ban of competition foreseen by the Employment contract considers that the employee, without employer's consent is not allowed to perform certain tasks in his/her own name and on his/her behalf, neither in the name and on behalf of third party.

Beside territorial validity, by the employment contract or the employer's general act, the validity period of the ban of competition shall be defined during the period of employment contract, so as upon its expiration/ ceasing of it.

Ban of competition shall be contracted by the employment contract, although it can be agreed later on too (annex to the employment contract).

Ban of competition can be contracted only if the employee by working with the employer can acquire:

1. new, particularly important technology knowledge,
2. wide circle of business partners or
3. to receive important business information and secrets.

For breaching of the ban of competition, the employer has the right to claim damage from the employee.

2. Duration of the ban of competition clause

Ban of competition can be agreed for the period:

1. during the employment relationship
2. upon expiration/ceasing of the employment relationship.

The employer can agree ban of competition for the period after expiration/ceasing of the employment relationship under the following terms:

- ban of competition cannot last more than 2 years upon ceasing of the employment relationship;
- the employer is obliged to pay separately agreed compensation to the employee.

The amount of the compensation paid by the employer to the employee whose employment agreement prescribes that the ban of competition shall be valid after ceasing of the employment relationship, is not determined by the law, but it shall consider the amount that provides decent life to the employee during the period of ban to perform certain tasks.

In case that the employer fails to pay the agreed compensation, ban of work engagement of the employee upon ceasing of the employment relationship does not take into force.

In case that the employee breaches the ban of competition, the employer shall be entitled to damage reparation.

3. Territorial validity of the ban of competition

The employer and the employee are free to agree territorial validity of the ban of competition clause, and it is recommendable to agree it for the countries/ territory of the employer's business operations.

4. Tasks which the ban of competition shall refer to- tasks which cannot be performed by the employee

It is necessary to clearly state the tasks which the employee is not allowed to perform in the employment contract, which tasks on the first place relate to the tasks performed by the employee according to his/her employment contract, as well as the tasks for which the employee acquires specific knowledge and experience.

5. Ban of competition and confidentiality

Considering that the employee has the access to numerous data and information which, according to the employer's decision or its nature represent business secret and by which disclosing the employer could suffer damage, the ban of competition is closely associated to the business secret protection and confidential information the employee can access to while performing his/her working tasks.

According to the Law on Protection of Business Secret which took into force in 2021 in Serbia, business secret considers the information that meets the following conditions:

- (1) represent a secret because they are not generally known or easily accessible to persons who normally come into contact with this type of information in the course of their activities, in terms of the structure and set of their constituent parts,
- (2) have commercial value because they constitute a secret,
- (3) the person who legally controls them has, under the circumstances, taken reasonable measures to preserve their

secrecy.

On the other hand, confidential information as a term is a subject to the employer's internal acts definition.

Hence, beside precisely defined ban of competition clause, it is of utmost importance to have NDA signed with the employee, drafted in accordance with the positive regulations of the Republic of Serbia, signed with your employees.

6. Ban of taking over of the employees

One of the problems in IT sector which the employers often face is taking over of the employees by the employee who leaves the company and who "withdraws" other employees on the same time or later, employing them in his/her company. Therefore it is very important to define ban of competition clause in a proper way in the employment contract, by which the said situation would be appropriately regulated.

On the other side, confidential information shall be defined by the internal acts of the employer. For that reason, our recommendation is to have appropriately drafted NDA agreement according to the positive regulations of the Republic of Serbia, aside the employment contract with ban of competition clause.

Conclusion

Having in mind above said as well as protection of the employer's interests, it is of utmost importance to have ban of competition clause implemented in the employment contract in the way which does not consider rewriting of the legal provisions, but to have it adjusted to the employer's needs, as well as the to the Serbian regulations.

It is very important to outline NDA agreement in a proper way, which alongside the ban of competition clause in the employment contract makes a significant part in preventing of damage causing to the employer.

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