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Published on 1 November 2009

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Non-competition clauses and non-solicitation of clientele clauses: companies must now treat them identically

In July 2002, case law was reversed and non-competition clauses were required to have financial counterparts. Consequently, companies turned towards other more restrictive clauses prohibiting employees from soliciting the existing and possibly future clients of his former employer at the end of the employment contract.

For a long time, these non-solicitation of clientele clauses were acceptable without financial counterparts, and the employee had all the latitude to work where he chose, even in a company competing with his former employer. It appeared therefore that the employee's liberty to work had not been hindered by such a clause.

However, it could have been expected that case law would evolve and go a little further. On October 27, 2009 (case no. 08-4501), the *Cour de cassation* (French Supreme Court) confirmed its position on non-solicitation of clientele clauses: they are completely assimilated to non-competition clauses.

1. Reminder of the conditions of validity of a non-competition clause:

The French Labor Code is silent with regard to non-competition clauses, the validity of which is determined by case law. Article L.1121-1 of the French Labor Code is perhaps the only clause we may be able to bring forth on the issue. It is a very general provision that states: *"A person's rights as well as individual and collective*

liberties cannot be restricted unless justified by the nature of the task to be carried out and unless proportionate to the goal that is sought".

The *Cour de cassation* referred to and completed these two conditions, reasoning, in particular, that the restriction on an employee's liberty necessarily has a price.

To date, for a non-competition clause to be valid, the four following conditions must be met:

- The company's legitimate interest must justify the clause,
- The particularities of the employee's job must be taken into account,
- The clause must be limited in duration and scope, and
- The clause must have a financial counterpart for the employee.

Since the birth of this financial counterpart obligation in July 2002, few branch agreements were entered into addressing this issue. Consequently, the financial counterpart must be negotiated before the signing of an employment contract or an amendment creating a non-compete obligation. In practice, this counterpart amount ranges from 1/4 and 2/3 of the employee's average gross monthly salary. Please note that as of the initial drafting of this clause, the terms of calculation concerning this counterpart must be very specific. For example, an employee may be hired with a fixed, base salary, but later may be given a bonus based on targets, exceptional bonuses, other financial incentives, etc. It is therefore advisable that the company mention that the gross base salary or the gross fixed salary shall be used in the calculation of the counterpart. Further, the company should specify the time period that will be taken into account in order to limit it, for example, to the base or fixed salary of the last full month of work performed, instead of the average of the last 3 or 12 months within the company.

1. The nature of the non-solicitation of clientele clause:

Please be reminded that an employee has a general obligation of loyalty to his employer:

- by virtue of Article 1134 of the French Civil Code that states: *"Agreements legally entered into serve as the force of law between the parties thereto (…) They must be performed in good faith"*, and
- by virtue of Article L.1222-1 of the French Labor Code that states: *"The employment contract is performed in good faith"*.

Yet, this obligation of loyalty only applies during the performance of the employment contract and not after its end.

Non-competition and non-solicitation of clientele clauses, however, become effective only after the end of the employment contract.

The non-solicitation of clientele clauses, which are completely legitimate for the employer that wishes only to safeguard its portfolio of clients and even future clients registered as such, could appear as a mere extension

of this obligation of loyalty, with no real restrictions on the employee who is completely free to occupy another job in any (competing) company or even free to create his own company to compete with his former employer. The employee's only obligation is therefore not to solicit the employer's clients.

The *Cour de cassation* does not see it this way….

On December 20, 2006 (case no. 05-45365), the Labor Chamber of the *Cour de cassation* held that a "competition" clause, prohibiting an employee from *"involving himself, directly or indirectly (…), in any operation where [he] had been employed or in one of the operations managed by the group on the date of (…) his departure from the company, constituted* ***a certain and significant attack on the employee's liberty to work****".*

On May 30, 2007 (case no. 06-40655), the Labor Chamber specified, with regard to a "protection of clientele" clause, that *"a clause in which an employee is prohibited, for a defined duration, from entering into contact, directly or indirectly, in any manner whatsoever, with clientele he had canvassed while employed with his former employer,* ***is*** *a non-competition clause".* Consequently, it is governed by the same conditions of validity. This reasoning was reiterated very specifically in a decision rendered on May 19, 2009 (case no. 07-40222) concerning no-poaching of clientele clause.

The aforementioned October 27, 2009 decision is distinctive in that the clause in question prohibits the employee to contract, directly or indirectly, with clients of her former employer, even at the unsolicited request of such clients, even she did not solicit or canvass them. The conclusion is nevertheless the same: this clause is a non-competition clause and is null and void because it is not limited in duration and scope and lacks a financial counterpart.

The *Cour de cassation's* main argument is that the employee is limited in the performance of his professional activities. Once a clause results in such a restriction, even if it appears minimal at best, it now must meet the requirements applicable to non-competition clauses.

3. Practical consequences:

We strongly advise companies with non-solicitation of clientele clauses to modify them by amendments to limit them in duration and scope and to negotiate a corresponding financial counterpart.

What is considered a reasonable financial counterpart remains to be seen. Can it be reduced in relation to the standards practiced for "total" non-competition clauses that purely and simply prohibit the employee from working for a competitor?

If the company dominates its market, the courts would probably assimilate it purely and simply to a non-competition clause: the counterpart of a clause prohibiting an employee to be in contact with the clients of his former employer, when such clients represent a major part of the market, would therefore be viewed as a "total" non-competition clause, whose financial counterpart must be proportionate to the actual impediment

for the employee. On the other hand, if the company's clients are not particularly significant on the local market and the employee is not really restricted, would a low counterpart, e.g. 10% of his gross salary for the duration of enforcement of the clause, be sufficient? This amount has been considered as quite insufficient for a "total" non-competition clause. Decisions rendered on this issue in the near future should provide guidance on this point.

In the meantime, in our opinion, each clause should be analyzed on a case-by-case basis with regard to a financial counterpart that may be considered perfectly proportionate to the constraints that such clause places on the employee. The fact remains that the duration of this clause may continue long after the initial financial estimate and consequently, it should be updated during the course of the employment contract to maintain the proportionality following several years of evolution of the employee as well as the company.

Further, if a non-solicitation of clientele clause is completely assimilated to a non-competition clause, a company with a collective bargaining agreement that sets forth a high percentage for the non-compete financial counterpart (often 1/2 or 2/3 of the average gross salary) may face the following risk: former employees who have been subject to past non-solicitation of clientele clauses may request very high amounts as reparation for the harm suffered resulting from their compliance with an illegal clause.

Case law evolution concerning non-solicitation of clientele clauses logically begs the question of non-solicitation of employee clauses, as seen in certain commercial or employment contracts. In this regard, please note that the Court of Appeals of Versailles rendered a decision on December 4, 2008 in which it awarded EUR 15,000 in damages to an employee as reparation because a potential employer bound by such a clause could not hire him. Specifically, this reparation was awarded because *"the employee's liberty to work had been severed without a financial counterpart"*.

If companies wish to reduce their risk of exposure to damages requested by employees indirectly hindered in the choice of employer, it is advisable to be careful with such clauses until case law clarifies its position on the issue. The Commercial Chamber of the *Cour de cassation,* for its part, held that, with regard to such a clause, *"only the employee may raise a claim for the problems he is likely to encounter due to a non-solicitation clause that does not contain a financial counterpart"*.