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News from the Federal Labor Court on the (In)Effectiveness of Post-Contractual Non-Disclosure Clauses

Dear Reader,

Today we would like to inform you about a recently published decision of the Federal Labor Court (judgment of October 17, 2024 - 8 AZR 172/23), which will have an impact on the future drafting of employment contracts and is also likely to be of considerable practical and economic importance for employers.

I. Background

In the course of their employment, employees are often entrusted with sensitive information about their employer's business model and its business strategies, products and customer base. Understandably, employers have a great interest in ensuring that such information remains as protected as possible from third parties, even beyond the end of the respective employment relationship.

In an ongoing employment relationship, the duty of confidentiality and the prohibition on the use of sensitive business-related data outside the company already arise from the employee's duty of loyalty under the employment contract and from the statutory provisions of the German Trade Secrets Protection Act ("GeschGehG"), even without an express agreement.

However, the legal situation after termination of the employment relationship is less clear.

In principle, an employee may be obliged to treat trade and business secrets of their previous employer confidentially even after leaving the company and not to use it for their own or third party benefit, for example in accordance with the GeschGehG or on the basis of a separate post-contractual non-disclosure agreement.

However, the legal obligation to post-contractual confidentiality under the GeschGehG only applies to a limited extent and under strict conditions. First of all, the data to be protected must be business secrets as defined in the GeschGehG, and the employer must have already taken appropriate measures to protect them. In addition, some possible uses are excluded from the scope of protection of the GeschGehG from the outset - for example, the use of memorized (empirical) knowledge is generally considered permitted.

A balance must then always be struck on a case-by-case basis between the constitutionally protected interests of the former employer in the protection of its business secrets and the employee in his or her professional advancement. Only insofar as the employer's interest in the continued protection of secrets - in terms of content and time - exists, does the statutory duty of confidentiality also apply after termination of the employment relationship

Due to this limited legal protection, most employers resort to separate non-disclosure clauses to ensure the protection of sensitive data even after the end of the respective employment.

The Federal Labor Court (BAG) has now ruled on the conditions for the validity of such clauses.

II. Decision of the Lower Courts

The subject of the proceedings was a legal dispute between an employee and his former employer regarding the extent to which the disclosure of specific performance and production data, quality information and process parameters to a then potentially competing company while the employment relationship was still ongoing constituted a breach of the confidentiality obligations arising from the employment relationship. The facts of the case occurred in 2015. The employee

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subsequently terminated the employment relationship with effect from 31.12.2016 and took up a new position with a third-party company on 01.01.2017.

The now former employer then sent him a warning and demanded that he submit a cease-and-desist declaration with a penalty clause regarding the disclosure of business or trade secrets. After the employee refused to make the required cease-and-desist declaration, the former employer filed an application for a temporary injunction, which was unsuccessful.

An action for an injunction against the disclosure of business or trade secrets and a subsequent appeal were also rejected by the courts of first instance.

The plaintiff based her request both on the statutory injunctive relief under Section 6 GeschGehG and on an employment contract confidentiality clause with the following content:

> *"11 Secrecy*
> *Mr. D shall maintain confidentiality regarding all trade and business secrets as well as all other matters and processes of the company that come to his knowledge in the course of his work. He will ensure that third parties do not gain unauthorized knowledge.*
>
> *The obligation to maintain confidentiality shall survive the termination of the employment relationship and also includes the contents of this contract."*

III. Decision of the Federal Labor Court

The Federal Labor Court dismissed the plaintiff's appeal as unfounded and argued this decision as follows:

Irrespective of whether the GeschGehG, which only came into force on April 26, 2019, would even be applicable to the subject matter of the dispute as an old case from 2015, the requirements of the statutory injunctive relief under Section 6 GeschGehG were not met in the specific case anyway. In order for a trade secret to be protected under the GeschGehG, it is necessary for the owner to have taken appropriate confidentiality measures. In the specific case, however, the plaintiff was unable to prove that it had taken such protective measures in advance.

However, BAG's comments on the effectiveness of the specific post-contractual non-disclosure clause are much more important in practice:

A post-contractual non-disclosure clause could at most relate to individual, specifically defined business secrets if the employer has a predominant interest in the silence of the former employee and should be limited in its effect in terms of time.

Post-contractual non-disclosure clauses, on the other hand, which oblige employees to maintain confidentiality without restriction and for an unlimited period of time, are ineffective as they disproportionately restrict freedom of occupation in accordance with Art. 12 Para. 1 of the German Constitution. Such clauses, also known as "catch-all clauses", are comparable to a post-contractual non-competition clause due to their restrictive effect with regard to possible continued employment and must therefore meet the strict legal requirements for effectiveness of Sections 74 et seq. German Commercial Code. These include, in particular, a time limit and the payment of compensation for the duration of the obligation.

Catch-all clauses that do not meet these requirements unreasonably disadvantage the employee concerned and are ineffective - both as a form clause within the meaning of Section 305 (1)

sentence 1 German Civil Code and as a so-called one-off condition within the meaning of Section 310 (3) no. 2 German Civil Code. In this case, an employee may - despite such a clause - continue to use his knowledge and experience from the previous employment relationship without restriction after termination of the employment relationship, even if this is done in competition with the former employer.

VI Practical Consequences

With its decision, the Federal Labor Court places high demands on the effectiveness of contractual confidentiality clauses, which are often difficult to achieve in practice. Against this background, it is in any case advisable to review the employment contract provisions used to date and adapt them where necessary.

If no agreement (subject to compensation) on the post-contractual restriction of the employee's commercial activity is desired, it is advisable to agree specifically and in individual contracts which of the employer's business secrets must be kept secret and for how long.

Feel free to contact us! Our employment law team will be happy to answer any questions you may have about drafting employment contracts.

Your employment law team

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