NON-COMPETITION CLAUSES UNDER TAIWAN LAW

Date: 9 November 2017

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It is a common practice for employers to impose non-competition obligations on employees both during and after termination of employment. The long standing issue is whether these obligations violate the right to work under Constitutional Law and to what extent such obligations will be enforced against the employee after his or her departure. In 2015 and 2016, the Taiwan Labor Standards Law ("LSA") and its Enforcement Rules were amended to provide specific criteria to enforce a non-competition obligation.

In general, the non-competition obligation during employment is enforceable. The issue with enforceability lies in the post-employment non-competition obligation. In accordance with Article 9-1 of the LSA and Article 7-1, 7-2 and 7-3 of the Enforcement Rules, where an employer has proper business interests to protect, and the employee has access to or the right to use the employer's trade secrets, the employer is allowed to enter into a post-employment non-competition agreement with that employee. However there are certain requirements that must be met to avoid non-competition clauses being null or void:

Format:

The post-employment non-competition agreement must be in writing, and must specify in detail the scope of restrictions. A copy (signed by both parties) must be provided to the employee.

Content:

The restrictions regarding the non-competition period, geographic area, scope of prohibited competing activities and prospective employers must be reasonable. What is 'reasonable' will be determined having regard to:

- Period: the post-employment period cannot exceed the life cycle of the trade secrets or technological information that the employer intends to protect. Additionally, the period should not exceed a maximum of two years. If such a period is more than two years, then it will be shortened to two years.
- Geographical area: the geographic area will be limited to the area in which the employer engages in business. This means a "worldwide" geographic area will be deemed too broad and not acceptable by the courts.
- Scope: the scope of non-competing business should be specified in detailed terms and be identical or similar to the activities carried out by the employee during his or her employment.
- Competition: restrictions should apply to any prohibited prospective employer who engages in business activities that are identical or similar to and competitive with those of the employer.

Compensation:

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The employer must reasonably compensate the employee concerned for the losses incurred by him or her by complying with the non-competition obligations. The remuneration received by the employee during employment cannot qualify for such compensation. The amount of compensation per month shall be no less than 50% of one month's average wage of the employee at the time of resignation, and shall be sufficient to support the former employee during the non-competition period. The employer should also consider whether the amount of compensation will be comparable with the loss incurred by the employee in compliance with the non-competition obligations. Lastly, the compensation can be paid to the employee in a lump sum upon resignation or by a monthly instalment to the employee after resignation.

Given these requirements, employers need to consider the following:

- the non-competition obligation cannot be imposed on all employees without regard to their position and proprietary information relevant to that position. Each position must be considered on its merits.
- the non-competing area and business activities cannot extend to any potential area or business activities that the employer may engage in the future but which does not apply at the time the restraint is entered in to.
- given the requirement for compensation, it is advisable to ensure that any non-competition agreement provides flexibility for the employer to decide whether to enforce a non-competition obligation when an employee resigns. The employer will only pay such compensation if the employer decides to enforce the non-competition obligation.

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