TÖRNGREN MAGNELL

# Employment Law - Newsletter

**Dated: 7 May 2015**

## New case from the Swedish Labor Court regarding the reasonableness of non-compete clauses under Swedish law

### Introduction

The Swedish Labor Court (AD 2015 nr 8) has recently addressed the question of reasonableness of non-compete clauses under Swedish law. The starting point in Swedish law is that an employee, after termination of employment, is principally free to take employment with a competitor or start a business that competes with the former employer. Hence, it is common for employers to introduce a non-compete clause in the employment contracts. Non-compete clauses are allowed, but risk being declared invalid if they go beyond what is "reasonable" under section 38 of the Contracts Act (SFS 1915:218). When assessing the reasonableness of a non-compete clause the court considers the employer's right to protect trade secrets, technical information about process etc. verses the employee's right to be free to use their knowledge and experience elsewhere. The Swedish Labor Court has developed extensive case-law relating to non-compete clauses, which is characterized by a strong restrictive view.

### Facts

The issue in the case was whether a non-compete clause signed between an accountant and his former employer was unreasonable under section 38 of the Contracts Act, and therefore invalid. The clause stipulated that for a period of two years following termination of employment, the accountant must pay 35 percent of the revenues which he or his new employer gained from customer accounts that the accountant had been managing when working for the previous employer.

The dispute concerned approximately 80 clients who, after the accountant's employment had been terminated, ended their business with the former employer and followed the accountant to his new employer. The former employer argued that the accountant must compensate for the lost business income due to his liability according to the non-compete clause.

### Decisions

The Labor Court held that the clause aimed to protect the employer's existing customer relationships, and that this purpose is a legitimate interest justifying a non-compete clause.

Furthermore, the court held that the accountant had been employed for 23 years, and during that time had worked within the same geographic area. Thus, the non-compete clause

significantly limited the accountant's opportunities to pursue his work as an accountant in the same geographic area. It was emphasized that the accountant's salary and employment terms had not been determined with regard to this limitation, nor had he received any additional compensation.

The Labor Court further held that the non-compete clause had been based on a template drawn up by the employer and that its meaning had not been discussed between the parties, despite the fact that the wording was somewhat ambiguous. However, the Labor Court reasoned that the accountant must have understood the meaning of the non-compete clause with regards to his long professional experience.

After an overall assessment of the circumstances, the Labor Court concluded that the non-compete clause was unreasonable and therefore invalid.

## Comment

The ruling confirms and clarifies the principles behind the assessment of reasonableness. For example, the employer's trade secrets and lasting customer relationships, among others, are justified interests. However, a justified interest by itself is not sufficient to render a non-compete clause valid.

The case further illustrates that even though a non-compete clause does not explicitly prohibit competition, it can, nevertheless, be deemed unreasonable.

The Labor Court has, in the past approved of non-compete clauses even though no additional consideration was given to the employee (AD 2010 nr 27 and 2002 nr 115). In the present case, it was held that a non-compete clause may be reasonable even when no additional compensation is paid, if the clause does not limit the employee's opportunity to pursue professional activities more then marginally. In case AD 2002 nr 115 for example, the Labor Court considered the non-compete clause to constitute merely a minor restriction on the employee's professional opportunities since she still had the opportunity to pursue her accounting profession as an employee or independent business operator. In this instant case, however, the Labor Court considered the non-compete clause to significantly limit the accountant's professional opportunities since he had worked for many years, and, during that time worked in the same geographical area.

Also to be noted is that the Labor Court did not deem it relevant whether the employee can persuade his new employer to be liable to the previous employer.

Consequently, employers need to be aware not only when introducing a full non-compete clause but also before introducing a non-solicitation clause that if the effects for the employee is too far reaching the clause can be declared invalid.

Stockholm, 7 May 2015

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