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Non-competition clause in employment contracts

Non-competition clauses have been at the center of several landmark decisions, including the decision rendered on July 10, 2002 by the *Cour de Cassation* (French Supreme Court) which established that any and all non-competition obligations imposed on an employee must have a financial counterpart.

Another landmark decision was rendered on November 15, 2006, which led us to address this subject and make a status report on this issue.

Non-competition clauses are aimed at prohibiting an employee, after his/her departure from the company, from engaging in a business competing with that of his/her former employer and likely to jeopardize the latter's interests.

To be valid, a non-competition clause must:

- Be essential to protect the company's legitimate interests,
- Have a limited duration,
- Apply to a limited territory,
- Take into account the specificities of the employee's job,
- Have a financial counterpart.

The limitations and conditions for implementing a non-competition clause are sometimes set forth in the collective bargaining agreement applicable to the company.

However, collective bargaining agreements do not exist in all sectors of activity. In the absence of such an agreement, the terms and conditions of the non-competition clause must be contractually defined and agreed upon in the employment contract between the company and the employee, subject to review by the courts.

It is important to keep in mind that the non-competition clause may not prevent the employee from exercising a professional activity. To ensure compliance with this requirement, the employee's educational background and professional expertise must be taken into account to assess his/her opportunities to find a new job after his/her departure from the company.

Regarding the financial counterpart to be provided for in return for the non-competition obligation, the *Cour de Cassation* ruled in judgment dated November 15, 2006 that, a financial counterpart amounting to 10% of the gross monthly salary in return for the obligation imposed on a sales engineer not to conduct a competing

activity in the *département* (geographical subdivision) where the company was located as well as in three neighboring departments was “derisory”. The Court held that this derisory financial counterpart was to be considered as an absence of counterpart. Consequently, the non-competition clause was declared null and void and the employee was automatically granted the right to be compensated for the loss suffered.