Legal Update Article

Brazilian Labor Courts Continue to Emphasize Importance of Non-Compete Clause Limitations

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A recent Brazilian labor court ruling clarified the procedural requirements for employers drafting non-compete clauses in employment agreements.

Although the Brazilian Federal Constitution establishes "freedom of work," and the Brazilian Industrial Property Law (Law 9.279/1996) prevents an employee from disclosing an employer's confidential information without prior authorization for an indefinite period, there is no regulation formally addressing non-compete clauses. Thus, procedural requirements for valid non-compete clauses have been established entirely through case law.

According to Brazilian labor court precedent, a valid non-compete agreement must include the following four elements:

1. Time limitation (up to 24 months);
2. Geographic limitation;
3. Subject limitation; and
4. Compensation for the restriction.

In *Omar de Carvalho Paiva Neto v. Vallourec Tubos do Brasil S/A,* no. 1000588-51.2016.5.02.0065, the plaintiff, a sales manager with his former employer for 18 years, found that, upon leaving the job, he was subject to a non-compete clause preventing him from working in the same sector for two years. The company, however, did not compensate the former employee for the work restriction, as required by case law.

The plaintiff's attorney argued the validity of a non-compete agreement requires that "the worker must be compensated in some manner so that he can maintain his standard of living."

The company argued that upon termination the employee was released from the non-compete obligation and, consequently, he had no restriction to work and no compensation was due.

The labor court held in favor of the plaintiff, ordering the company to pay the former employee at his previous salary for the full period of the 24-month restriction. The court also found there was no formal release of the non-compete obligation; thus, the non-compete restriction was in force and the former employee must comply with the restriction.

In addition, another recent Brazilian labor court ruling invalidated a non-compete clause on grounds that the geographic limitation was overly broad. *Pedro Silveira Junior v. Trading Importação e Exportação Ltda,* no. 1066-03.2014.5.12.0022.

Takeaway

Although the recent Brazilian labor court rulings do not alter the court's approach to non-

compete clauses, they remind employers that valid non-compete clauses require inclusion of the four elements: time limit, geographic limit, subject limit, and compensation for the restriction.

The four elements must be reasonable when considering the activities performed by the employee and the employee's impact if he or she works for a competitor.

On the compensation for the restriction, courts tend to consider a reasonable amount as one equivalent to the last monthly remuneration received by the employee for each month of the restriction. A lower remuneration is considered reasonable only if the restriction as to subject and location are very limited.

Our colleague Gabriela Lima Arantes at the Brazil law firm Tozzini Freire, a member of the L&E Global alliance, co-authored this article.