

## Non-Compete Agreements in Vietnam:

### Legal Effect, Judicial Practice, and Solutions to Strengthen Their Enforceability

#### Legal Effect of Non-Compete Agreements

From labor law's perspective, the existence of a non-competes agreement ("NCA") can hinder an employee's right to work and the principle of "*freedom to work*". Article 10.1 of the Labor Code 2019 stipulates an employee's right "*to work for any employer and in any place not prohibited by law*", and Article 19.1 of the Labor Code 2019 also allows "*employees to enter into multiple labor contracts with multiple employers, but must ensure full performance of the agreed-upon contents*". If a NCA is signed, it means that the employee is bound by an obligation to give up their legal rights. The question arises as to whether an NCA is subject to labor laws?

The Labor Code 2019 primarily governs the relationship between employers and employees arising from labor contracts. Therefore, when a NCA is incorporated into a labor contract (either as a clause or an appendix), the content of the NCA may violate the principle of labor contract formation stipulated in Article 15.2 of this Code: "*Labor contracts are freely to be engaged but not contrary to laws, collective labor agreements, and social morality*".

While the legal status of a NCA under Vietnamese labor law remains ambiguous, a court in Duc Hoa District, Long An Province, has taken a civil law approach in a dispute involving such an agreement. The court considered the NCA to be a form of civil transaction, based on the principle of "*voluntariness*" – one of the three conditions for the validity of civil transactions as stipulated in Article 122.1 of the Civil Code 2005 (currently Article 117.1 of the Civil Code 2015).

Given the complexities surrounding NCAs in Vietnam, determining their enforceability hinges on the specific circumstances of each case and the legal interpretations of the presiding judges.

#### Judicial Practice in Vietnam

The adjudication of NCAs in Vietnam has witnessed divergent views among dispute resolution bodies. This highlights the complexities and evolving nature of this legal area.

In a notable arbitral award in 2018, the Vietnam International Arbitration Center (VIAC) upheld the validity of a non-disclosure agreement (NDA) that included a clause restricting an employee from working for a

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competitor for a specified period and imposed a compensation against such employee for non-compliance. The employee, dissatisfied with the VIAC's award, challenged it in the Ho Chi Minh City People's Court to request for canceling it, arguing that the NDA violated their right to work and that violated regulations of the Law on Employment 2013. However, the Court dismissed the employee's appeal, upholding the VIAC's award. The Court reasoned that the NDA, containing the NCA clause, was a separate agreement, voluntarily entered into by both parties, and did not fall under the purview of labor law<sup>1</sup>.

Nevertheless, in 2019, an appellate panel of the Ho Chi Minh City People's Court overturned the appeal of a company A, which had sought to restrain a former employee from working for another company B which was a direct competitor of the company A. The Court upheld the original verdict<sup>2</sup>, denying the company A's request, citing that it contravened the provisions of Labor Code 2012 and Law on Employment 2013. This decision stands in contrast to the earlier arbitral award and tribunal decision as aforementioned that upheld a NCA, and underscores the importance of considering the specific facts and circumstances of each case, as well as the applicable laws, when adjudicating NCA/NDA disputes.

### **Striking a Balance: Mitigating Risks and Enhancing Enforceability of Non-Compete Agreements in Vietnam**

Given the ongoing debate among dispute resolution bodies surrounding the potential infringement of employee rights by NCAs, a balanced approach when entering a NCA is crucial to protect both employer interests and employee rights. Here are some tailored strategies that businesses can consider to enhance the enforceability of a NCA while minimizing legal risks:

*First*, the NCA should be separated from the employment contract between the employer and employee, meaning a separate written agreement should be established instead of including the content of the NCA in the employment contract. This is because if the NCA is included in the employment contract, there is a high possibility that the court will consider the NCA under labor law rather than considering it as a civil agreement under civil law, and from there it can be concluded that the NCA has violated the provisions of labor law cited above to reject the validity of this agreement.

On the other hand, the Supreme People's Court has issued precedent No. 69/2023/AL on October 01, 2023, stipulating that NDAs/NCAs are

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<sup>1</sup> Decision No. 755/2018-QD-PQTT dated June 12, 2018 of the People's Court of Ho Chi Minh City

<sup>2</sup> Verdict No. 420/2019-LD-PT dated May 15, 2019 of the People's Court of Ho Chi Minh City

considered to be independent of the labor contract when not being included in such labor contract, and that a commercial arbitration has the authority to resolve disputes regarding NDA/NCA when there is a valid arbitration agreement in the NDA/NCA. This strengthens the feasibility of a NCA when considering it under the commercial and civil aspects of the agreement and when resolved by a commercial arbitration.

*Second*, the term and geographic scope of the NCA should be reasonable. Practically, 12 month period for a NCA after the employment termination is considered reasonable.

*Third*, there should be appropriate compensation in the form of financial support during the period of restriction on the employee's rights.

Given the reciprocal nature of the employment relationship (the rights of one party are the obligations of the other party, and vice versa), the employee's obligation to “*not work*” should be compensated with the right to receive a certain and reasonable benefit. The employer has the obligation to provide fair compensation to the employee in return for the right to protect its business secrets for a period of time. This helps to avoid the court viewing the NCA as a unilateral imposition of the employer's will on the employee (who is always considered the weaker party in a employment relationship). If a company does not want to incur the aforementioned expenses, it may face the risk of losing a lawsuit, at least in a court where judicial precedents tend to protect the weaker party, which is the employee.