A global guide to ‘restrictive covenants’

Americas
Introduction

There are few areas of employment law which differ as significantly between countries as the laws relating to post-termination restrictions. The increasing trend for key employees to have international responsibilities, be globally mobile, and for post-termination restrictions to apply across many different jurisdictions is a challenge. In reality when enforcement issues arise the decisions taken in the early stages of action may determine the outcome weeks or months later.

This is why the Guide to Restrictive Covenants was created, serving over 40 key countries. Within are discussions on non-compete covenants, non-solicitation covenants and non-solicitation of employees’ clauses, issues relating to employee benefits, pension, stock plans and more...

An essential publication for anyone involved in employment law, it has been compiled by lawyers from a major international law firm, as well as partner companies based in other jurisdictions.
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A. OVERVIEW:

In Argentina, employees’ fidelity duties are regulated by Section 85 of Law No. 20,744 (Labour Contract Law), while non-compete duties are regulated by Section 88 thereof. These regulations establish employees’ obligations to:

(1) maintain confidentiality as regards any information brought to their attention that should be protected in accordance with local legislation and regulations; and to

(2) abstain from executing, on their own account or on the account of third parties, any negotiations that could affect employers’ legitimate interests.

All the above-mentioned duties are applicable during the term of the employment relationship.
Furthermore, according to Argentine legislation, fidelity duties also involve confidentiality duties. This issue has been regulated by Law No. 24,766 (Confidentiality Law), which protects information from dishonest use, so long as that information:

(i) is secret and can not easily be accessed;

(ii) has commercial value;

(iii) has been reasonably protected against disclosure by the person in control of it.

In this context, post-termination restrictive covenants have become normal employment contract practice in recent years, especially where senior employees or other personnel in possession of valuable or confidential information are involved.

Such covenants have their raison d’être in the type of tasks performed by the employees, the responsibility that such tasks generate and the need to avoid the disclosure of this information when the result of investigations, products, formulas or important commercial data might be affected. Thus, the restrictive covenants do not aim to prevent the employee from using the knowledge or expertise acquired in connection with their job, but to protect the employer’s important trade secrets and other sensitive information.

In that regard and in accordance with Argentine labour legislation, it is valid for employers and employees to sign post-termination restrictive covenants.

However, certain conditions must be met in order for these covenants to be enforceable:

1. Agreements shall only be valid within a specified – and reasonable – scope and period of time; and
2. Employees shall only assume non-competition obligations in exchange for a reasonable financial compensation; and
3. The object of protection must be confidential information or a legitimate business interest; and
4. An employee’s right to work must not be affected.

Whether restrictions are reasonable and enforceable is judged at the time the restriction is entered into. Relevant considerations might be the employee’s role, duties and seniority, as well as the nature of the employer’s business, the temporal and spatial scope of the restriction and the reasonableness of the compensation amount agreed.

**B. NON-COMPETE CLAUSES:** Can an employer require a post-termination non-competition covenant from an employee?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The general principles at a. above apply.

Regarding drafting, it is particularly important to ensure the scope and term are reasonably limited. The scope limits should not be excessive to the extent that the employee’s right to work should remain unaffected. A typical term is one to two years from the termination of the employment relationship. Last, but not least, the financial compensation agreed should be reasonable in relation to the post-termination obligations assumed by the employee.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes. As mentioned at a. above, payments are considered compulsory in order for non-competition covenants to be enforceable. This is not a legislated requirement, but is the unanimous opinion of the Argentine labour courts.
Argentina

Financial compensation must be reasonable, in accordance with the restrictions required of the employee. It is normal practice to negotiate, approximately, a financial compensation equal to 50% of the employee’s annual remuneration.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The general principles at a. above apply both to non-solicitation restrictions and to non-dealing with customers/clients restrictions clauses. The aim of such clauses is to protect the employer’s commercial information and prevent dishonest behaviour. Thus, this type of clauses generally establish a prohibition for the employee to contact current customers of the employer or access prospective clients by using commercial information which belongs to the employer.

In comparison, though valid, non-solicitation covenants are usually harder to enforce, since evidence of solicitation is generally harder to establish. Nevertheless, both types of clause require legitimate interest affectation to be proved The validity of both type of clauses will depend on whether a legitimate business interest exists.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes. Please see b. (iii) above.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment); and

Yes.

i. Are they capable of being valid?

Yes, depending on the content of the clause and the particular circumstances of the case.

ii. What does it take to show they are valid?

The general principles at a. above apply.

However, these type of clauses are less common, mainly because of the difficulties establishing and proving breach. This means that, despite the existence of the clause, it will be difficult for the employer to prove that the solicitation of a current employee by a former employee has occurred.

This type of clause not only restricts the employee’s right to hire or not to hire, but might also affect some other employees’ right to work. For this reason, the labor courts can sometimes be restrictive when judging the validity of these clauses.

In summary, the validity will always be a matter of judgement and the courts’ decisions depend upon the specific circumstances of the case. Conditions like seniority, role, responsibility, level of contact or level of knowledge of the employee will be relevant when determining validity.
Argentina

iii. Is it necessary to pay an employee during the period of the covenant?

Yes. Please see b (iii) above.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

No. In principal, the covenants already discussed at a.-d. above are the most common in Argentina. However, the extent and terms of covenants vary, depending on whether the agreements apply during the term of the employment relationship or post-termination.

Due to the existence of Argentine legislation that regulates confidentiality and non-competition duties during the employment relationship, it is easier to enforce these covenants while relationships are still in force, since the employee’s obligations are not only part of the covenant, but also legal duties that must be fulfilled.

As regards post-termination covenants, restrictions usually tend to restrain:

(1) competition, to greater or lesser extent; and

(2) the disclosure of sensitive, valuable or secret information of the employer (both, in general or limited to certain information); and

(3) the solicitation of current employees by a former employee.

Ultimately, in a direct or indirect way, all these covenants aim to limit the former employee’s ability to compete with his former employer.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

According to Argentine law, labour agreements must be subject to Argentine labour law so choice of law does not apply in Argentina. This means that, if a restrictive covenant is entered into in Argentina or abroad, but it is executed in Argentina, then Argentinean law will be the governing law. This also means that restrictive covenants entered into, or executed, in Argentina will be interpreted and enforced in Argentina, in accordance with Section 3 of Law No. 20,744 (Labour Contract Law) and Section 1209 of the Argentinean Civil Code.

i. Can an employer impose a dispute resolution method on the employee?

No. Imposing alternative dispute resolution methods for labour matters is not permissible in Argentina.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

The most common remedy for the breach of a restrictive covenant in Argentina is the filing of a lawsuit against the contracting employee, generally before a Labour Court.

Such lawsuits can sometimes include the request for interim injunctions to restrain further breaches or unlawful activity from occurring and protect possibly affected information from being disclosed, until the Labour Court reaches a decision regarding the covenant’s validity and, consequently, whether the agreement is enforceable.
Argentina

In case the covenant is found to be valid, the employer could file a claim for a final injunction, plus financial compensation.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

No. Restrictive covenants are not relevant to, or enforceable against an employee’s pension benefits.

On the other hand, in relation to long term incentive awards, if forfeiture or claw back were agreed as part of a restrictive covenant, such clauses could be void or unenforceable.

However, forfeiture of the award, or claw back of the amounts already paid could apply in the context of, or as part of a claim for, the breach of a restrictive covenant.

ii. Which covenants are typically imposed?

Please see h (i) above.

iii. What sanctions are/can be imposed by the employer for non-compliance?

Please see h (i) above. Also, forfeiture can apply directly to unvested incentive awards if the participant engages in the relevant, prohibited behaviour.

On the other hand, where shares have already been delivered, it is possible to prohibit selling the shares until after the expiry of any relevant covenant period.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

In addition to that, in principle, there are no specific limits in relation to long term incentive arrangements. However, all arrangements should meet the criteria outlined above in (a) in order to be valid and enforceable.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Restrictive covenants are unenforceable, when declared invalid by a Court.

The Court cannot modify or “re-write” any piece of the original wording.

If a specific clause in a restrictive covenant is declared invalid, the remaining part of the restrictive covenant can be upheld as valid, provided the remainder is valid and capable of standing on its own.

Contributed by Joaquín Emilio Zappa
Bolivia

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Contributed by: Ferrere

A. OVERVIEW:
Post-termination restrictive covenants are valid and enforceable in Bolivia so long as their scope is not overly restrictive. Enforcement is primarily by injunction with civil courts.

The most common restrictive covenants include trade secrets, confidentiality and non-solicitation.

Bolivian legislation is highly protective of employees’ rights. The relationship between the employee and employer is regulated by the Labour Law and its applicable regulations.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?
Yes, an employer may require a post-termination non-competition covenant so long as the covenant’s scope is not overly restrictive.
Bolivia

i. Are they capable of being valid?
Yes. As long as the covenant is specific as to the applicable period and area involved.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?
Provided the employer can show a legitimate interest is being protected and the covenant does not affect the employee’s inherent labour rights, it should be valid and enforceable.

iii. Is it necessary to pay an employee during the period of the covenant?
It is not mandatory to pay employees during the period of a post-termination restrictive covenant.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes, so long the covenant is not overly restrictive.

   i. Are they capable of being valid?
      Yes.

   ii. What does it take to show they are valid?
      The employer must demonstrate that the employee’s contact with customers/clients may harm the employer’s business.

   iii. Is it necessary to pay an employee during the period of the covenant?
      No.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes. It is possible to impose a clause of non-solicitation.

   i. Are they capable of being valid?
      Yes.

   ii. What does it take to show they are valid?
      The employer must demonstrate legitimate interest and harm.

   iii. Is it necessary to pay an employee during the period of the covenant?
      No.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Non-disclosure covenants are the most common provisions incorporated in labour agreements.
Bolivia

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?
If the work is performed in Bolivia for a period exceeding 90 days, Bolivian Law will apply to the agreement regardless of the parties’ choice.

   i. Can an employer impose a dispute resolution method on the employee?
   No, an employer cannot impose a dispute resolution method. In Bolivia, the labour law does not allow a dispute resolution method other than labour courts and the Ministry of Labour.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?
Covenants such as those described above (non-compete and non-solicitation) must be enforced in the Civil and Commercial Courts.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:
   i. Do the same principles of enforcement outlined above at g. apply?
   Issues relating to employee benefits and pensions must be enforced through labour courts, exclusively.
   
   ii. Which covenants are typically imposed?
   Non-compete and non-solicitation covenants may be enforced.

   iii. What sanctions are/can be imposed by the employer for non-compliance?
   The employer may not impose sanctions directly. It would have to seek damages through civil courts.

   iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)
   There is no limitation on what an employer may forfeit.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?
Typically, if a covenant is found invalid it will not render the entire agreement void. The court may not re-write the annulled covenant.

Contributed by Carlos Pinto Meyer
A. OVERVIEW:

In Brazil, there is no legislation which regulates post-termination restrictive covenants. In the same way, there are no legal prohibitions against these clauses. In this sense, these clauses are permitted, since they do not violate any employee rights under the Brazilian Labour Code (CLT).

According to article 444 of the CLT, the employment relationship could be a matter of mutual agreement between the parties, holding harmless principles which protect the labour relationship. In view of that, restrictive covenant disputes can be brought before the labour courts because some labour rights are not capable of being negotiated by employees, even when they are assisted by unions.

On the other hand, the same principle does not apply in relation to non-compete covenants or confidentiality agreements since these are provided for under specific legal provisions.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes.
Brazil

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?
It is essential that non-compete clauses are limited not only by term but also in space. In other words, it is necessary to have a geographical limitation on the extent of their reach. Furthermore, non-compete clauses cannot entirely deprive an employee from earning his or her livelihood. Finally, the former employee must be paid a reasonable sum during the term of the non-complete clause.

It is important to emphasize that non-compete clauses are only valid if they protect a legitimate business interest of the employer. In this sense, it is necessary to analyze the professional practice, the acquired knowledge and the potential damages of using this knowledge with competitors, in order to verify that there are lawful business interests to be protected.

iii. Is it necessary to pay an employee during the period of the covenant?
Yes. While there is no specific legislation on this point, case law precedents require that the former employee should be paid during the period of the non-compete agreement.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?
Yes.

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?
See b.ii above.

iii. Is it necessary to pay an employee during the period of the covenant?
Yes, for the reasons noted in b.iii above.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?
Yes.

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?
See b. ii above.

iii. Is it necessary to pay an employee during the period of the covenant?
Yes, for the reasons noted in b. iii above.
Brazil

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Yes, non-disclosure covenants.

These clauses seek to protect the employer’s confidential information. They do not prohibit an employee from working in competition, but rather seek to prevent the departing employee from revealing to the market any secret data acquired during the course of their employment with the former employer. For example, commercial secrets, patents pending, customers’ lists, or any other confidential information. These clauses can also prohibit employees from withdrawing documents without authorization. These clauses are effective even after termination of the employment contract.

It is not necessary to pay the employee during the period in which the non-disclosure clause is effective, because keeping trade secrets confidential is an ethical and professional duty of the former employee.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Restrictive covenants are commonly entered into in the employment contract, and remain effective even after the termination of the employment relationship.

Where the employment contract is entered into in Brazil and that the provision of services is in Brazil, Brazilian laws will apply.

Where services are provided outside Brazil, it is possible for foreign laws to apply.

Previously, Precedent nº. 207 (effective 2012) of the Superior Labour Court, provided that the law governing an employment contract is the one in effect in the place where the services are provided.

Subsequently, the above precedent was overturned with the effect that even if the employee provides his or her services in a foreign, non-Brazilian territory, the applicable law applicable will be Brazilian law.

Of note in connection with the above is that under the Principle of Protection, which is deemed inherent in employment contracts, if the law under which services are provided is more beneficial to the employee than Brazilian law, then that law must be adopted.

i. Can an employer impose a dispute resolution method on the employee?

No. The imposition of a dispute resolution method by the employer violates one of the fundamental principle of the Brazilian system of laws, the Principle of Unrestricted Access to the Judiciary Branch.

Provided both parties consent, the employer and employee can resort to plea bargaining to resolve their dispute.

In relation to the reference of employment-related cases to arbitration, the situation is unclear. At the time of writing, the view of the Superior Labour Court is that arbitration is not appropriate in individual labour-related cases. This area of the law is still developing.

G. ENFORCEMENT: How are covenants typically enforced in your jurisdiction?

Typically, the former employer first sends an extrajudicial notification to both the former employee and the employee’s new employer to notify them about the post-termination restrictive covenants obligations the former employee is subject to.

If the former employee commits an act in breach of the restrictive covenant, the former employer can file a negative covenant claim asking the judge to set a time frame for rectification and compliance with the covenants. If the former employee refuses or is in default, the employer can apply to the judge for an order that the former employee rectifies the breach and complies with the covenant at his or her own expense.
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Brazil

In this last type of claim, the judge can order specific performance or, if the claim is considered with grounds, can make an order which sets out the step-by-step actions required to ensure compliance.

If specific performance is not possible, an award for damages can be made. The making of an order for payment of damages does not diminish the court’s ability to impose a fine.

The court is also empowered to make protective awards.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

In relation to employee benefits, pensions and stock plans it is the Labour Court which protects the enforceability of restrictive covenants. In this sense, if employer does not comply with the provision of former employee benefits concession, pensions and stock plans, the former employee can go to Court. It is the most common remedy.

Parties can also elect plea bargaining, provided both agree.

The amounts being claimed need to be specified very clearly, failing which the Labour Court may not recognize each specific payment.

Generally speaking, arbitration will also not be appropriate for these claims for similar reasons as discussed at f. i above.

ii. Which covenants are typically imposed?

It is common to negotiate the extension of the time of health insurance plan, releasing the amount deposited by the company in pension fund and anticipation the vesting period of SOP.

iii. What sanctions are/can be imposed by the employer for non-compliance?

The Labour Court can order payment of the corresponding indemnity for non-compliant behaviour by the former employee, using the economic value of the benefit as the basis for calculation.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

In this context, the employer can just be ordered to retroactively forfeit for non compliance during the previous five years. In relation to the amount involved for the indemnity or penalty, there is no limitation provided by law, but the main reference is related to monthly salary and the former decisions of the Labour Court. In severe cases, damages have been awarded of as much as between 40 to 50 times the employee’s monthly salary.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

A Court can not re-write the covenant. Restrictive covenants that are invalid are unenforceable. However, the existence of an invalid clause does not adversely affect a valid clause.

Contributed by Mauricio Mitsuru Tanabe
A. OVERVIEW:

Post-termination restrictive covenants are difficult to enforce in Canada, and are generally only recommended for employees who perform significant relationship management in their roles or who have access to valuable confidential information. There are two main types of post-termination restrictive covenants in Canada: non-competition and non-solicitation covenants.

Post-termination restrictive covenants are prima facie unenforceable as a restraint on trade in Canada unless an employer can establish that the provisions are reasonable as between the parties and with regards to public interest. The factors that a court will consider to determine the validity of a post-termination restrictive covenant are: (1) the nature of the employer’s business and the employee’s position; (2) whether the employer has a proprietary right to the information or relationship that it seeks to protect; (3) whether the restriction is sufficiently limited in temporal scope; (4) whether the restriction is sufficiently limited to an ascertainable geographical area; and (5) whether the nature of the restricted activity is sufficiently clear and whether the degree of restriction is warranted.

Provided a post-termination restrictive covenant is enforceable, an employer may be able to obtain an injunction against the restricted activity and damages for breach of contract.
B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The factors mentioned in (a), above, apply to non-competition covenants.

With regard to the nature of the employer’s business and the employee’s position, if an employer’s business is heavily based on confidential information and the employee was in fact in a position to have had access to such information, there will be a greater justification for a non-compete covenant.

A court will also consider whether the employer has a proprietary right in the information or relationships it seeks to protect.

With regard to whether a non-compete clause is sufficiently limited and specific in its temporal scope, a non-compete covenant in excess of 6 months may be more difficult to justify on the basis of what is reasonably necessary to safeguard the employer’s interests.

Similarly, a non-compete covenant should be clearly limited to an ascertainable geographical area and should not unduly prohibit the employee from finding employment following termination. A restrictive covenant which covers a geographical area which is not ascertainable will likely be void for ambiguity. A restrictive covenant which covers a geographic area that extends beyond what is reasonably necessary to safeguard the employer’s interests will likely be void for unreasonableness.

Finally, a court will consider whether the nature of the activity that is prohibited under the non-compete covenant is sufficiently clear, as well as whether the degree of restriction is warranted. For example, a non-compete covenant which prohibits a prior employee from providing specific services in competition with the employer may be appropriate for high-level employees with significant access to confidential information or key client relationships. Non-compete covenants which are over broad and which restrict activity that does not in fact interfere with the employer’s business will likely be considered unreasonable.

In Quebec, an employer may not avail itself of a non-compete clause if it has terminated an employee’s employment without cause or if it has given the employee reason to terminate the employment relationship.

iii. Is it necessary to pay an employee during the period of the covenant?

While there is no legal requirement to pay an employee during a post-termination restrictive covenant, if the former employee is effectively prevented from finding employment during the period of the covenant, the failure to pay an employee during the same period will likely render the covenant unreasonable.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

i. Are they capable of being valid?

Such clauses may be valid in the form of non-solicitation, non-dealing and non-interference clauses.

ii. What does it take to show they are valid?

The general principles mentioned in (a) and elaborated upon in (b)(ii), above, apply. In particular, a non-dealing or non-interference clause should be specifically tailored to cover relationships for which the former employee had responsibility or involvement with and for which the business can show a legitimate interest in enforcing for the defined period.
Canada

If the purpose of the restriction is to protect a client relationship, the duration of the restriction should be no longer than is reasonably required in order for the employer to send a replacement to re-establish and protect the relationship on behalf of the company. Limitation of contact should also be with regard to clients or individuals that are within the knowledge of the employee or which can otherwise be ascertainable by the former employee.

In Quebec, non-dealing clauses may be assimilated to non-compete clauses and be subject to the same conditions of enforceability as described at (b)(ii), above, including the principle that an employer may not avail itself of such clause if it has terminated an employee’s employment without cause or if it has given the employee reason to terminate the employment relationship.

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement to pay an employee during the period of a post-termination non-solicitation, non-dealing or non-interference restriction. However, if such restriction effectively amounts to a non-competition arrangement, the considerations in (c)(iii), above, apply.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment); and

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The general principles above apply. Non-solicitation and non-hire clauses regarding former colleagues are more likely to be valid if they are carefully tailored to target the solicitation or hiring of employees who have strong relationships with the employer’s clients or who would otherwise be able to compete with the former employer’s business.

iii. Is it necessary to pay an employee during the period of the covenant?

No.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Other covenants can apply during and after termination of employment to create employee obligations which are greater than the duties of good faith, loyalty and fidelity, which exist at common law. The common law duty of an employee to preserve confidential information of an employer continues after the termination of the employment relationship, to the extent that such information remains confidential to the employer’s business.

The other types of covenants may include restrictions on activities related to the preservation of the employer’s reputation or brand during employment, non-disparagement commitments after employment and non-dealing or non-solicitation provisions targeted at preserving the relationship between the employer and a third party.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Choice of law will be relevant to what law governs the contract (and therefore how the contract should be interpreted and enforced) and the jurisdiction which can hear any dispute in connection with that contract.
In summary, if Canadian law applies to the contract, then it is very likely that the legal principles discussed above will apply to the interpretation and enforcement of the restrictive covenants.

If another jurisdiction’s law applies to the contract but a Canadian court can and does assume jurisdiction over the dispute, then the court will generally apply that other jurisdiction’s law when interpreting the contract and determining its enforceability.

However, Canadian courts do not typically give effect to certain types of foreign law, such as blocking legislation, penal legislation, revenue legislation and foreign law which is contrary to fundamental Canadian public policy.

Further, mandatory Canadian law could override the interpretation or enforcement of the contract that would otherwise be available under the law of the other jurisdiction.

Finally, where the remedies available under the other jurisdiction’s law are not available under the law of the forum, the parties’ ability to obtain an effective remedy may be compromised.

In light of the foregoing principles, if a Canadian court is the preferred forum for enforcement of a covenant but another jurisdiction’s law is to apply, Canadian law should nonetheless be considered to ensure that the parties’ intentions and the remedies available to them can be given full effect in a Canadian court.

i. Can an employer impose a dispute resolution method on the employee?

It is unusual to see alternative dispute resolution procedures imposed in employment contracts.

Since the primary remedy for enforcing a restrictive covenant is an injunction, which is available via a court order, there is no obvious benefit in having a dispute resolution procedure which has the effect of preventing an employer from seeking an order for an injunction.

However, it is not illegal to include an alternative dispute resolution procedure in an employment contract.

Similarly, the parties may contract to bring claims regarding the contract in a particular jurisdiction through a forum selection clause.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Restrictive covenants may be enforced by means of injunction, an action for damages or both.

As the damages for breach of a restrictive covenant may be difficult to prove, an employer may choose to specify a liquidated damages remedy within the contract. (In Quebec, however, the inclusion of a reference to liquidated damages in the contract may be a bar to pursuing injunctive relief and is therefore not recommended.)

Liquidated damages provisions must be reasonable and not a penalty provision; in this determination, a court will consider whether the sum is extravagant such that it does not reflect a reasonable anticipation of the damages that will flow from the breach at the time that the agreement was made.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

   i. Do the same principles of enforcement outlined above at g. apply?

       Yes.

   ii. Which covenants are typically imposed?

       Note that, for the reasons at (iv) below, covenants may not generally be imposed in respect of certain registered retirement plans.
Otherwise, to the extent that there is no statutory basis to prevent a restrictive covenant in an employee benefit or compensation plan, it is becoming more common to see contractual claw back provisions in Canadian bonus, deferred compensation and equity-based plans, particularly among publicly-traded employers.

Most commonly, claw backs have been imposed to require the repayment of bonus payments tied to financial results that are later restated at a lower level. While less common in Canada to date, courts have upheld contractual claw backs to enforce non-competes, and there is no reason to conclude that courts would not in the right circumstances similarly uphold claw backs tied to other types of restrictive covenants.

Under stock option plans or other equity-based arrangements under which securities or units have already been awarded, the claw back may apply to require reimbursement from the proceeds of the underlying securities or units.

In some cases, claw back provisions have been limited to require repayment only of after-tax amounts, since, under the federal Income Tax Act, recipients of bonus payments are generally taxed in the year they are received, and can claim no corresponding deduction if a claw backs payments are required in a subsequent year.

Although less common, non-registered executive retirement plans and other employee benefit arrangements may also contain provisions requiring the plan member to forfeit some or all entitlements under the arrangement should he or she breach a non-compete, non-solicitation or other restrictive covenant. The enforcement of these provisions would generally be subject to the same qualifications generally described above.

iii. What sanctions are/can be imposed by the employer for non-compliance?

The most common types of sanction are claw backs and outright forfeitures of benefits. It is uncommon to impose other sanctions under a benefit plan contract that could be imposed more generally as a matter of the overall employment contract.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

Tax-assisted pension plans registered under federal and provincial pension minimum standards legislation and certain other tax-assisted savings vehicles (including “deferred profit sharing plans” under the federal Income Tax Act) are subject to minimum vesting rules under applicable legislation.

In the case of “registered pension plans”, accrued benefits must vest either immediately or within no later than two years, depending on the jurisdiction. In the case of deferred profit sharing plans, employer contributions must vest after no later than two years. Vested entitlements may not be forfeited, including for violation of a restrictive covenant.

Other than plans for which statutory vesting rules apply, there is no general limitation on retroactivity or retrospectivity of a forfeiture or claw back provision; however, provisions that are not tied to specified time periods are uncommon.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Restrictive covenants that are invalid are unenforceable in whole.

A court is not able to apply a “blue pencil test” to sever elements of a restrictive covenant which are unenforceable (e.g. the duration, geographical scope or nature of the restricted activity).

However, a severability provision in the agreement will increase the likelihood that, while one restrictive covenant may be considered unenforceable, a separate restrictive covenant in the same agreement will be enforceable.
A. OVERVIEW:

Restrictive covenants often apply to senior employees. Usually, they include non-compete clauses, non-solicitation clauses and confidentiality clauses.

Although confidentiality clauses are widely acceptable, even for an indefinite term, when they intend to protect a legitimate interest that may only be protected by this means, non-compete and non-solicitation clauses are more debateable, because the constitutional right of freedom of work is at stake.

Non-compete clauses have been accepted by labour courts only if they are reasonable in protecting a legitimate interest, which implies that they need to be restricted to a specific area or subject matter that is related to the business of the company seeking to impose it. Additionally, courts have established that these clauses may only be agreed for a reasonable period of time and must be somehow compensated for.
Chile

In relation to non-solicitation clauses, on the other hand, although usually agreed by the parties, the labour courts have not stated a criterion on them. In principle, they are valid in relation to contacting clients of the employer. But in relation to hiring former colleagues the validity of these clauses is debateable because it would imply an absolute prohibition of hiring a specific person, which means waiving a constitutional right –i.e. freedom of work- that is inalienable.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes, but it must be accepted by the employee. The clause must be included in the release agreement subscribed upon termination of the employment relationship.

   i. Are they capable of being valid?
   Yes, they are but only if they meet the requirements explained above at a.

   ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?
   They must be established for a reasonable and determined term, they must be reasonable in protecting a relevant employer’s interest and they have to contemplate a payment.

   iii. Is it necessary to pay an employee during the period of the covenant?
   Yes. Otherwise, the clause is not valid.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes, but it must be agreed by the employee when signing the corresponding release agreement upon termination of the employment relationship.

   i. Are they capable of being valid?
   Yes, but only if they meet the requirements above explained.

   ii. What does it take to show they are valid?
   They must be established for a reasonable and determined term, they must be reasonable in protecting a relevant employer’s interest and they have to contemplate a payment.

   iii. Is it necessary to pay an employee during the period of the covenant?
   Yes. As a general principle of all the obligations that somehow restrict competition, they need to contemplate a payment in order to be valid.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

A clause may only be imposed if agreed to by the employee. However, although these clauses are quite common within certain type of employees, the validity is debateable both during and after employment because, from the viewpoint of the employees who are not eligible for hiring as a consequence of these clauses, they not only affect the freedom of work of the party entering into the agreement but they also affect their constitutional rights. Be that as it may, there are no clear criteria established by the labour courts currently.
Chile

i. Are they capable of being valid?

As explained, their validity is arguable because they impede a party that has not entered into the agreement in exercising a constitutional right.

ii. What does it take to show they are valid?

From the viewpoint of the parties entering into the agreement they must be established for a reasonable and determined term, they must be reasonable in protecting a relevant employer’s interest and they have to contemplate a payment. However, from the viewpoint of the employees affected by the clause, the considerations explained above apply.

iii. Is it necessary to pay an employee during the period of the covenant?

Notwithstanding the above comments, yes. If these clauses were taken as valid by labour courts, as a general principle of all the obligations that somehow restrict competition, they need to contemplate a payment in order to be valid.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

It is common to agree a confidentiality clause when subscribing the corresponding release agreement. These are widely accepted and do not need to contemplate any payment.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

As all these clauses would be agreed as a consequence of an employment relationship, the only courts with jurisdiction to enforce them are the Chilean courts That jurisdiction cannot be waived.

i. Can an employer impose a dispute resolution method on the employee?

No.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Covenants are enforced as an action for breach of contract, claiming damages that are usually limited to payments involved in the obligation.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Yes.

ii. Which covenants are typically imposed?

Non-compete obligations during the term of the labor contract are typically imposed.

iii. What sanctions are/can be imposed by the employer for non-compliance?

From warning letters to termination for cause, depending on how serious is the breach.
Chile

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

As general rule, earned labour compensations and minor statutory rights cannot be forfeited.

[Note: it will be important to distinguish between (in the UK Remuneration Code provisions requiring forfeiture e.g. if there is a material adverse trading event or misconduct comes to light after monies had been paid – nothing to do with anti-competitive provisions and so excluded from this book) and anti-competition provisions such as restrictive covenants]

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

If a covenant is found to be invalid the Court will declare it void and the effect is that parties will have to be put in the same position as they were before subscribing to the obligation, including restitution of anything paid or delivered.

Contributed by Ricardo Tisi
A. OVERVIEW:

In Colombia any kind of restrictive covenant is strictly and expressly prohibited by labour law, since it notoriously opposes the fundamental right to work. The covenant cannot be enforced before any judicial or governmental authority.

Although restrictive covenants are used as contractual instruments intended to protect employers’ legitimate interests, their implementation is prohibited in Colombia. Therefore, even if it is possible to provision said clauses in the employment agreement, or even if the agreement is executed and governed by a foreign law, the stipulation will not be enforceable before any local judicial or governmental authority.

The special safeguard granted by the Constitution, regarding the fundamental right to work, the right of association, the freedom to pursue a profession or office and the impossibility of prohibiting an employee from carrying out their customary work, prevent the enforcement of post termination, non-compete and non-solicitation clauses. Furthermore, it is not only a fundamental principle, but also an express and legally established prohibition, i.e. article 44 of the Substantive Labour Code, which translates as:
Colombia

“The stipulation by which an employee undertakes the obligation not to work in a certain activity or not to render services for the competitors of the employer, once their employment agreement has concluded is of no effect whatsoever.”

Notwithstanding the above, it is possible to agree with the leaving employee, that in case he/she does not deploy a certain kind of activity or work with certain employers, for a certain period of time, he/she will be granted a monetary sum at the end of the convened term. In this sense, the parties are not stipulating that the former employee is restricted from working, but rather agreeing that in case he/she voluntarily decides not to work for that certain period of time or for a certain industry, he/she will receive a determined money amount. Therefore, it is at the former employee’s discretion as to whether to comply, or not, with the covenant; if he/she does, he/she will be entitled to receive an agreed sum, and even enforce its payment if necessary; in case he/she does not agree to the covenant, the ex-employer cannot judicially enforce compliance, but the ex-employer will no longer need to pay the agreed amount.

In addition to the above, stipulations to irrevocably remain employed for a fixed period are also null, since the employee is entitled to resign at any time. Nonetheless, it is viable that the employer rewards the employee’s seniority through bonuses, or offers him/her loans (i.e. for housing of education) on more advantageous terms than those available in the wider market (i.e. lower interest rates, payment facilities etc.), thus motivating him/her to remain engaged. It is also to be noted that the fundamental and legal restrictions are equally applicable, regardless of the particular quality of the individual (employee, independent contractor, shareholder, etc.)

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes.

i. Are they capable of being valid?

No.

Any stipulation of this sort is deemed to be ineffective, that is, it is not binding or legally enforceable. However, as explained above, while it is not possible to prohibit the ex-employee from working, it is possible to reward or encourage him/her to decide voluntarily not to do so in exchange for payment.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

Not applicable

iii. Is it necessary to pay an employee during the period of the covenant?

Not applicable

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes.

i. Are they capable of being valid?

As a general rule, no

If the former employee wants to contact the ex-employer’s customers and clients to carry out independent business of his/her own (in good faith), the mentioned restriction would restrain his fundamental right to work, just as a non-compete clause does as discussed above; therefore, the same legal principles apply in this case as in b above and these clauses are also unenforceable.
Colombia

In this case, however, it is also possible not to proscribe the ex-employee from contacting these client and customers people, but instead to award or encourage him/her to decide voluntarily not to do so for a set duration instead.

Alternatively, (the exception to the general rule) parties can agree that the former employee will refrain, whilst carrying out his/her own businesses, to perform acts of unfair competition or act in bad faith, including clientele deviation. This stipulation would be valid and enforceable. Furthermore, even if the parties do not agree upon it, if the former employee carries out this kind of act in bad faith, the ex-employer is entitled to take legal action and to claim damages.

ii. What does it take to show they are valid?

The wording of the clause has to refer clearly and solely to clientele deviation as consequence of the former employee’s bad faith. In ordinary terms, and without the bad faith element, the provision would not be valid.

iii. Is it necessary to pay an employee during the period of the covenant?

No

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes

i. Are they capable of being valid?

No.

Non-solicitation clauses may not be enforceable, since those restrictions may be considered to infringe on or at least threaten to breach legal and constitutional rights of the individuals, set forth in Colombia’s Political Constitution, such as the fundamental right to work, right of association, and the freedom to choose one’s profession or occupation.

ii. What does it take to show they are valid?

Not applicable. These clauses are invalid.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Usually parties agree that any and all confidential information known by the employee throughout the execution of the employment agreement is reserved, and cannot be disclosed to third parties or be used by the former employee for his/her own benefit. This kind of clause can eventually be enforceable, whenever the confidentiality obligation is backed up by the existence of intellectual property; but not so much with information that is not protected under those regulations.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Any and all employment agreements performed in Colombia, are ruled by Colombian law based on the principle of territoriality. Therefore, even if the agreement was executed abroad, or it was expressly provisioned in it that it would be governed by a law other than Colombian law, if the services of the employee will be rendered in Colombia, Colombian law will apply.

Therefore, a choice of law clause has no impact.
Colombia

i. Can an employer impose a dispute resolution method on the employee?

Partially. Since employment matters are considered public matters, the employer cannot prohibit the employee from making a claim before the Labour Courts, regardless of any alternative resolution method agreed.

G. ENFORCEMENT: How are covenants typically enforced in your jurisdiction?

Please bear in mind that post-employment contract stipulations are unenforceable. The above mentioned agreements are not of a labour nature, nor should they be taken as an extension of labour contract obligations. Any clause of this sort is automatically ineffective. Thus, it does not produce any legal effects and neither can it be executed before legal authorities.

Non-solicitation, contract prohibition and non-compete clauses can be agreed but their execution does not occur as a consequence of a labour agreement. Once the labour agreement terminates, the employee is not obliged to obey the convened terms. Therefore post-termination stipulations can and may be enforced under commercial regulations (such as non-disclosure obligations).

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Restrictive covenants are prima facie ineffective, therefore unenforceable. See comments g. above regarding enforcement.

ii. Which covenants are typically imposed?

The employee can be incentivised by contributions or bonuses of any kind, employee benefits, stock plans or health insurance. However, such rewards cannot be legally taken as covenants. These rewards are intended to merge the employee’s and employer’s interests, guaranteeing no competition, soliciting employees, client deviation and confidentiality violation, among others.

iii. What sanctions are/can be imposed by the employer for non-compliance?

None.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

No.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Covenants are essentially invalid in Colombia. The Constitution and the Substantive Code expressly prohibit restrictions of the fundamental right to work, banning every Court from tolerating restrictive covenants linked to labour agreements.

Re-writing these clauses is not possible given their inherent and constitutional invalidity in Columbia.

Contributed by Alvaro Cala, Catalina Santos and Lina Gattás
A global guide to ‘restrictive covenants’

Ecuador

A. OVERVIEW:
Ecuadorian legislation does not establish any direct regulation regarding restrictive covenants. The Constitution establishes basic principles to be respected and applied regarding freedom of work. In general terms, it is possible to convene between parties issues related to restrictive covenants as an exception to regular covenants only if those covenants are not against constitutional and law principles.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?
Only insofar as they do not violate constitutional and legal regulations.

i. Are they capable of being valid?
Yes, if parties have accepted them and they do not violate any regulations What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?
Ecuador

They need to be in writing, signed and accepted by the parties. This reflects that the parties agree, according to the principle of autonomy of will and according to the freedom of recruitment as stated in Art. 66 number 16 of the Constitution.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

Remuneration for restrictive covenants is not regulated by legislation and so an employer may choose to pay the employee during this period as compensation for the restriction.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Such a clause is prohibited because it infringes principles of equality of rights: the right to take free decisions, and the right to be involved in economic activities.

   i. Are they capable of being valid?
      No.

   ii. What does it take to show they are valid?
       Not applicable.

   iii. Is it necessary to pay an employee during the period of the covenant?
       Not applicable.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

It is not possible because it infringes the constitutional right of free solicitation.

   i. Are they capable of being valid?
      No

   ii. What does it take to show they are valid?
      It is not necessary to show anything because there is specific regulation which prohibits these clauses.

   iii. Is it necessary to pay an employee during the period of the covenant?
      Not applicable.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

The most common clause used in covenants is the clause of confidentiality, which determines that the employee will not perform similar activities to those of the employer. Usually, this clause has an indemnification fee in case of breach.
Ecuador

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Usually, the parties may apply any choice of law: courts, national or international arbitration with Ecuadorian or foreign law application. However, in labour issues, the only applicable law is that of Ecuador and the only applicable venue is that of the labour courts of Ecuador; arbitration is not applicable in accordance with the principle that an “employee’s rights cannot be waived.”

i. Can an employer impose a dispute resolution method on the employee?

Labour law establishes that labour courts will solve any dispute between individual conflicts and that only collective conflicts could be solved by mediation and arbitration.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Covenants are enforced according to law and pursuant to the provisions in the covenants signed and willingly entered into by both parties. If one of the parties alleges breach of covenant, he/she must file a lawsuit and demonstrate the alleged breach with evidence.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

There are laws regulating these principles. Additional benefits could be agreed additionally.

ii. Which covenants are typically imposed?

As mentioned above, it is not common to have restrictive covenants but below is a generic example of a clause:

iii. What sanctions are/can be imposed by the employer for non-compliance?

Indemnification or any economic sanction provided that sanction is provided for in the covenant.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

Legislation is silent on this. However, everything will depend on what the parties agree in the covenant, taking into account that the covenant takes effect from the moment it is signed and not retroactively, provided that it does not violate the principles of the Constitution of the Republic of Ecuador, concerning freedoms in general.

[Note: it will be important to distinguish between (in the UK Remuneration Code provisions requiring forfeiture e.g. if there is a material adverse trading event or misconduct comes to light after monies had been paid – nothing to do with anti-competitive provisions and so excluded from this book) and anti-competition provisions such as restrictive covenants]

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

It is void and cannot be re-written.

Contributed by Gabriela Villagómez and Marcelo Proaño
A. OVERVIEW:

Post-termination restrictive covenants in Mexico are generally unenforceable if they are not properly drafted to secure confidential information after termination of the employment relationship.

Most companies engaging in business in Mexico, with a need to hire employees, are likely to set out post termination restrictions in their employment agreements, and even ask employees to sign an employment termination agreement, aiming to protect their business interests and information assets.

However, such provisions are usually drafted as a restriction on the employee’s ability to engage in business with, or work for competitors. In practice, these restrictions are not enforceable since it is a constitutional right for individuals to carry out any occupation or professional activity, as long as it is legal, regardless of whether or not it competes with the employee’s previous work.

In this sense, instead of prohibiting employees to enter into a relationship with a competitor, it is fundamental to set out post-termination restrictions in a way that obliges employees to avoid the use of confidential information for unfair competition activities against the former employer.
Mexico

Breach of post-termination restrictions must be claimed before civil courts, not labour. The plaintiff employer must demonstrate not only that the restrictions were known and accepted by the employee, but also that the employee had a privileged position with regard to the employer’s confidential information which made possible the breach, and that the breach is not a natural consequence of the employee’s professional development and knowledge.

In addition, if any person or company hires an employee with the aim of obtaining a trade secret, such person or company will be responsible for all damages and loss caused to the trade secret’s owner.

The unauthorized disclosure of a trade secret is also considered a federal crime, which is punishable with a considerable fine and prison for up to 6 years.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes, but just prohibiting the employee to render services for a competitor will not be enough.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

Express acknowledgement and consent from employee. Restrictions must be drafted to limit the use and disclosure of employer’s confidential information.

iii. Is it necessary to pay an employee during the period of the covenant?

No.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes, under the terms described above relating to confidential information.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

Express acknowledgement and consent from employee. Restrictions must be drafted to limit the use and disclosure of the employer’s confidential information in connection with possible contact with clients, as an act of unfair competition.

iii. Is it necessary to pay an employee during the period of the covenant?

No.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes,
Mexico

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?
Express acknowledgement and consent from the employee. Restrictions must be drafted to limit the use and disclosure of the employer’s confidential information in connection with possible solicitation.

iii. Is it necessary to pay an employee during the period of the covenant?
No.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?
No.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?
In general, if an employee is hired in Mexico under Mexican law standards, Mexican courts should decide on the enforcement of restrictive covenants.
If choice of law is applicable, then restrictive covenants would be interpreted under the jurisdiction chosen.

i. Can an employer impose a dispute resolution method on the employee?
No.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?
Before the civil courts. The Labour Courts do not have jurisdiction.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?
The statute of limitations requires an employee to make benefits’ claims within one year. Therefore, any unpaid benefit will not expire until a year as of the moment the employee was entitled to receive such benefit. With regard to private pensions and stock options, traditionally in Mexico, it is agreed that if the employment relationship is concluded, then the employee will only be entitled to what he/she has earned or has vested as at the date on which the employment terminates.

ii. Which covenants are typically imposed?
The payment of non-mandatory benefits, private pensions or stock options can, depending upon the termination reason, be made conditional upon the performance of covenants. Mandatory benefits should be paid at termination.
iii. What sanctions are can be imposed by the employer for non-compliance?

Typical sanctions include termination, with full severance for employee. With regard to non-payment of benefits, it can also have sanctions by the Labour Secretariat that could range from 50 to 5,000 daily minimum wages (approximately USD$250.00 to USD$2,500.00) per affected employee.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

In Mexico, discounts to salaries are very strict. Once the payment of a bonus has been made, it is hard to recover it. Employers are only entitled to collect from employees a month of salary (even if the wrongful payment was higher), and the mechanism for deduction is that only 30% of the difference between the employee’s salary and the daily minimum wage can be done per day. Likewise, the employee has to recognize that he/she has a debt with the employer and agrees to its deduction.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

If a covenant is found to be invalid by the competent Mexican court, then the plaintiff employer will not be entitled to claim breach and, consequently, no damages will be payable.

Contributed by Sánchez-DeVanny Eseverri, S.C.
Paraguay

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Contributed by: Ferrere

A. OVERVIEW:
Post-termination restrictive covenants are not common in Paraguayan employment contracts. There is little, if indeed, any case law. The only provision in Paraguayan labour law that establishes a post-termination restriction is related to the obligation of confidentiality. There are no specific rules relating to restrictive covenants. Paraguayan legislation is highly protective of employees’ right. Also, and pursuant to an interpretation of the constitutional right that grants the right to choose work and the provisions of Section 10 of the Labour Code, post-termination covenants would be difficult to enforce.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?
Yes.
Paraguay

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?
They should be drafted so as not to exceed 12 months’ duration, competitors should be clearly identified, and employee’s rights should be balanced with the non-compete prohibition, for example, a lump sum payment if the employee does not breach this agreement, and an equal penalty payment if he or she does.

iii. Is it necessary to pay an employee during the period of the covenant?
No.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?
Yes.

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?
It must be demonstrated that the obligation was clearly drafted and customers/clients identified when possible, that the employer did everything it could to protect that information, and that the employee was in a position to access and make use of that information. Also, the Court may consider the seniority of the employee.

iii. Is it necessary to pay an employee during the period of the covenant?
No.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?
It is possible during employment to have such a covenant contained in the employment contract or as part of the company work regulations. After employment, such clauses would not be possible since they go against the constitutional right to choose work mentioned at a. above.

i. Are they capable of being valid?
Yes

ii. What does it take to show they are valid?
Including them as part of the employee’s contractual obligations.

iii. Is it necessary to pay an employee during the period of the covenant?
Not applicable.
Paraguay

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

The only other post-employment covenant common in Paraguay is the obligation of confidentiality regarding trade secrets and this will bind employees even after termination.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Labour matters are considered matters of public order and choice of law other than Paraguayan law is not an option

i. Can an employer impose a dispute resolution method on the employee?

No.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Not applicable.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Not applicable.

ii. Which covenants are typically imposed?

Not applicable.

iii. What sanctions are/can be imposed by the employer for non-compliance?

Not applicable.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

Not applicable.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

The covenant would be void and the Court will not re-write it.

Contributed by Ferrere
Peru

A. OVERVIEW:

Post-termination restrictive covenants are fairly common in Peruvian employment contracts, particularly for senior employees or those with valuable connections, relationships or access to confidential information. However, post-termination restrictive covenants are unenforceable unless an employer can establish that (1) it has a legitimate business interest to protect and (2) that the restriction goes no further than reasonably necessary (in scope and duration) to protect that interest and 3) provided that the employer pays the former employee some money for the duration of the non-compete clause.

Legitimate business interests include trade secrets and confidential information, trade connections such as customers or suppliers and maintaining the stability of the workforce.

Whether a restriction is reasonable is judged at the time the restriction is entered into. Relevant considerations will be the employee’s role, duties and seniority, the nature of the employer’s business, the scope of the restriction (such as what type of activity, trade connections or employees it covers, its geographical scope) and its duration (how long the restriction lasts). To a lesser extent, a court may also consider the length of the employee’s notice period and, in some cases (but this not an established principle), what consideration the employee received.
Peru

The most common remedy for breach of a restrictive covenant is an injunction using the civil courts, to restrain the employee’s or the new or prospective employer’s activities but other forms of injunction available. Other remedies include damages for breach of contract and other forms of financial compensation.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes.

i. Are they capable of being valid?

Yes, provided that the employer pays the employee some money for the duration of the non-compete clause.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

Non-compete clauses are not regulated by Peruvian legislation; however non-compete clauses are commonly used. In case of these clauses being challenged, typically the employer will not be able to enforce the clauses unless the employer pays some money for the non-competition. It is important to note that the Peruvian Constitution establishes the right of freedom to work, free from restriction.

iii. Is it necessary to pay an employee during the period of the covenant?

Generally yes. While there is no legal requirement as such to pay former employees during the period of a post-termination restrictive covenant, doing is recommended to ensure the compliance of the non compete clause.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients; and

Yes. Employers can establish post-termination clauses in order to prevent contact between the terminated employee and the customer/client. However, clients/customers are free to choose to contact terminated employees for the rendering of services or any kind of business. The obligation will be binding for the employee if he/she receives a compensation for this obligation.

i. Are they capable of being valid?

Yes, if the employee receives some compensation

ii. What does it take to show they are valid?

It is necessary to show that the former employee instigated or developed the contact with the client or customer themselves. Quite often, the client or customer instigates or develops the contact or relationship with the former employee because they have seen, and like, how the employee operated while working at the former employer. In practice, it is difficult for former employers to prove that their customer or client contracts with an ex-employee at the ex-employee’s instigation.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes, if not the clause will not be enforceable.
D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

It is possible to impose non-solicitation of employee’s clauses but, in practice, it will be difficult to enforce even before a labour court. Maybe the company can set forth a clause for damages if the employee hires former colleagues but such a requirement would need to be based on civil legislation, not labour legislation. In Peru people have the right to sign contracts and hire personnel without restriction and these rights cannot be restricted unless the person restricted receives a compensation in exchange for agreeing to that obligation.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

In practice, it is difficult for employers to prove that a non-solicitation of employees’ clause has been breached, because proving that the employee has been hired by a former colleague is not necessarily a breach of a non-solicitation clause.

iii. Is it necessary to pay an employee during the period of the covenant?

Not necessarily. The former employer can pay but that payment does not guarantee validity or enforceability. In the event of a dispute, the former employer can seek enforce the clause via the courts.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

There are a variety of restrictions that can apply during or after termination of employment.

A common clause is to restrict the use or disclosure of confidential information and company property, during employment. These tend to be confined to particular types of information or property, although those definitions are often much wider than in other types of restrictions. The former employer can set time limits on the effectiveness of these clauses after termination but this is not common. These clauses are difficult to maintain after the employment relationship terminates.

Other post-termination restrictions can cover non-solicitation of, or non-dealing with, suppliers, distributors or intermediaries such as brokers, depending on the employer’s business. These are similar to the customer/client restrictions mentioned above. Employees can be advised from interfering with the ex-employer’s business or connections, although this also tends to require some kind of active attempt or intention to damage the ex-employer’s business in order to be actionable.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Choice of law is not an option in Peru. The Peruvian labour law applies to all employment relationships.

i. Can an employer impose a dispute resolution method on the employee?

It is not common to see alternative dispute resolution procedures imposed by the employer in labour contracts. Both parts could agree in the contract that in case of disagreements these can be solved through alternative dispute resolution procedures. However, the Peruvian Courts have ruled that the use of arbitration clauses to resolve labor disputes is not appropriate and these clauses are unenforceable.
Peru

However, in a collective bargaining scenario, if one of the parties to the negotiation wants to solve the disagreement because the parties are not able to reach an agreement and finish the negotiation, then one of the parties is able to request arbitration with a view to help bring the collective bargaining negotiations to a close.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

The employee or the union could sue the employer for the non compliance with the covenants and the labour judge could order the employee to comply with their obligations.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

It depends. The labour benefits established by law (such as vacations, bonuses in July and December, compensation for time served Among Others) cannot be negotiated, except if the employer and employee negotiate the benefit and the employee receives more than the legal benefit established. If the benefit is not established by the law, then the parties can agree the terms and conditions to apply.

ii. Which covenants are typically imposed?

In Peru it is not common to grant more benefits than the benefits established by the law except some special covenants; house allowance, car allowance; food allowance, but those are no relevant and the others that the unions could negotiated with the employers.

See h. (i) in relation to pension benefits.

Peruvian legislation establishes certain benefits in favor of the employees, with which the employers must comply:

If an employee is in the private pension system (AFP), the employer must withhold from the employee’s gross monthly remuneration an amount equal to 12.50%.

If the employee is in the public system (ONP), the employer must withhold from the employee’s gross monthly remuneration an amount equal of 13%.

At the age of 65 years the employees who have contributed to the private system are able to retire and get a pension.

Those who have contributed to the public system must be 65 years old and must have paid to the ONP for 20 years to receive a pension.

The pension can not be seized by any person.

iii. What sanctions are/can be imposed by the employer for non-compliance?

For non compliance, the employer has to start a legal process in order for a judge to determine whether or not if the employer has complied with the obligations. If the employer has not complied with its obligations, then the judge will order compliance and payment of all the amounts due, plus the legal interest plus the cost of the trial. In some case the employer could claim an indemnity for the non-compliance. In that event the employer has to prove that the conduct of the former employee caused damage. In this circumstance the employee will argue that he/she has the constitutional right to work in order to pay all his/her expenses.
iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

There are no limits.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Restrictive covenants that are invalid are unenforceable. The court cannot re-write the covenant, but it is important to note that the Peruvian Constitution establishes the right of freedom to work and that restrictions are not applicable. This means that all restrictive covenants that are found to be in breach of principles of the Constitution are essentially invalid, subject then to the exceptions set out earlier in this chapter.

Contributed by Jose Antonio Valdez
Uruguay

There are no labour regulations in Uruguay regarding restrictive covenants. Nevertheless, it is common to include post-termination restrictive covenants (for example, non-competition or non-solicitation clauses) in senior employees’ employment contracts. However, in order for these clauses to be enforceable, doctrine and jurisprudence provides that certain requirements must be met: (i) the prohibition must be justified, for example, there must be a legitimate business interest that the Company is seeking to protect and relevant to the employee’s role; and (ii) the prohibition must be limited regarding scope and duration.

Relevant aspects that will be taken into consideration by a Judge when analysing the reasonableness of a restrictive covenants are, among others: (i) employee’s role, duties and seniority; (ii) the nature of the business; and (iii) the scope and duration of the restriction.

Although these covenants are capable of being enforced using the civil courts, we are not aware of any cases where a company has brought a civil claim against a former employee regarding non-compliance with the agreed covenants. In general these clauses are agreed in order to prevent/discourage employees from competing, disclosing confidential information, soliciting employees, etc.
B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes. Please note that there are no labor regulations in Uruguay regarding non-competition clauses.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

In Uruguay, “freedom of work” is a constitutionally recognized right. The non-compete obligation is a limit to this freedom. However, it is understood that the employee can undertake the obligation not to compete, thereby limiting his or her freedom of work, for a certain consideration, as long as the following requirements are met:

a) The non-compete obligation must be agreed in writing; and

b) There must be a reason that justifies the non-compete obligation. This justification is generally found in the position that the employee has in the company. The higher the position and remuneration, the more justified the obligation not to compete after termination of the labor relationship; and

c) The scope of the non-compete provision must be limited regarding:

• Term: The term of the obligation must be reasonable. There is no rule establishing what a reasonable term is but we believe it is reasonable to agree a term between 3 or 6 months, otherwise the employee must receive a payment in exchange for not competing; and

• Scope: The obligation is not valid if contracted on such general terms that it prevents the employee from performing activities unrelated to the ones performed in the company, for companies that are not competitors.

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement although it is advisable to pay the employee compensation in exchange for the non-competition obligation provision when the same supersedes, for example, the reasonable term of 3 to 6 months after termination. The latter takes into account that the non-competition provisions limit the above-mentioned constitutional freedom of work.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes. Please note that there are no labor regulations in Uruguay regarding contact prohibition clauses.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The general principles mentioned above apply regarding, for example, scope, duration and justification.

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement to pay employees during the contact prohibition period.
Uruguay

**D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?**

Yes. Please note that there are no labor regulations in Uruguay regarding non-solicitation prohibition clauses.

  i. Are they capable of being valid?

  Yes.

  ii. What does it take to show they are valid?

  The general principles mentioned above apply regarding, for example, scope, duration and justification.

  iii. Is it necessary to pay an employee during the period of the covenant?

  There is no legal requirement to pay employees during the solicitation prohibition period.

**E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?**

Yes, a common clause generally included in the employment contracts is that relating to the prohibition of disclosing confidential information regarding the company, its employees, clients or suppliers both during the labor relationship and after termination. This type of covenant often does not have a set time limit after termination and can apply for so long as the information retains its confidential nature.

Clauses preventing employees from making disparaging statements about their ex-employer or its personnel can also be included.

**F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?**

The selection of an applicable law different from the Uruguayan one will be considered null and void by a Uruguayan Judge.

  i. Can an employer impose a dispute resolution method on the employee?

  Under Uruguayan labor regulations and conflict of law provisions, it is forbidden for parties to a labor contract to agree on a law that is not Uruguayan law. Choice of law under these circumstances could be declared null by a Court in Uruguay.

  Case law and jurisprudence in Uruguay have held that an employee cannot be prevented from the right to have access to their country of origin justice by agreeing on the application of the law of a different country.

  Therefore, in case of a lawsuit brought by the employee against the company, Uruguayan labour law will apply and Uruguayan Courts will be competent to hear the case.

**G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?**

Although these covenants can be enforced using the civil courts, we are not aware of any case were a company has brought a civil claim against a former employee regarding non-compliance with the agreed covenants. In general these type of clauses are agreed in order to prevent/discourage employees from competing, disclosing confidential information, soliciting employees, etc.
H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

In general, restrictive covenants are not relevant to, or enforceable against, an employee’s pension benefit or stock plan. Note that there are no specific regulations in Uruguay regarding this type of benefits; it will depend on what the parties agree. It is common to agree that the employee will be eligible for receiving the benefit, as long as he/she remains employed when the benefit becomes payable.

ii. Which covenants are typically imposed?

See answer to question above.

iii. What sanctions are/can be imposed by the employer for non-compliance?

It will depend on what the parties have agreed to. Generally, in case of employee’s non-compliance, he/she will not be entitled to receive the benefit.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

No, as there are no regulations in Uruguay regarding this issue, it will depend on what the parties agree to.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

If a covenant is found to be invalid, the same will be null and void and the Judge will not be able to re-write the covenant.

Contributed by Maria Jose Fernandez
A. OVERVIEW:

In looking at restrictive covenants in the United States, one generally has to look at how most of the 50 states treat restrictive covenants, and then look at how a minority of states, led by California, treat them. This chapter will present an overview of both approaches to the degree that they vary.

Most states look at the reasonableness of the restriction, focusing primarily on its duration, its geographic scope and the substantive nature of the activity being restricted. If the term of a restrictive covenant is too long, say five years or beyond, the covenant will likely not be enforced. If the geographic scope is overly broad, i.e., broader than the geographic scope of the employer’s business, it will not be enforced. And if the substantive nature of the business activity being restricted is broader than the one in which the employer operates, it will likely not be enforced.

A similar reasonableness approach is used for covenants not to solicit employees.

The California-like minority takes a much more limiting approach. California, for example, deems covenants not to compete contrary to the state’s public policy and refuses to enforce them, with only two very narrow exceptions. California views covenants not to solicit customers the same way but views covenants not to solicit employees less restrictively.
Finally, there is one overarching exception to all limitations on restrictive covenants in the United States: an employer is entitled to protect its confidential information/trade secrets. Some employers have tried to take advantage of this exception by designating a broad range of information that the employee might come into contact with confidential/trade secret information. However, when put to the test, such broad designations are largely ignored in favour of a rigorous analysis of whether the particular information that the departed employee is accused of having misappropriated is in fact a trade secret. For example, with regard to customer lists, even if such lists are designated confidential/trade secret information in a covenant, the court will ultimately want to be shown that they meet the definition of a trade secret, in particular that customer identities are not generally available in the public domain.

Restrictive covenants are most commonly enforced by way of injunctive relief.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes, but see comments at b. ii. below.

i. Are they capable of being valid?

Yes, but see comments at b. ii. below.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

In most U.S. jurisdictions:

Most United States jurisdictions look at the reasonableness of the restriction – sometimes framed as a “legitimate business interest” inquiry - in terms of three elements:

• The duration of the restriction;
• The geographic scope of the restriction; and
• The substantive scope of the restriction.

With regard to the duration of the restriction, the shorter the restriction, the more likely it will be found reasonable. With regard to geography, if the employer carries on the type of activity being restricted in a particular geographic region, then the restriction is expected to be coextensive with that geographic region, but not broader. Finally, courts will likely only enforce a covenant that seeks to limit competition in the same aspect or segment of the business as the one in which the employer operates.

In California and the minority jurisdictions:

California is a good example of the minority view. It generally prohibits all manner of restrictions on one’s ability to carry on a business or vocation (Cal. Bus. & Prof.Code § 16600), so covenants not to compete are largely unenforceable in California. The limited exceptions are when an individual sells all of his interest in a corporation or partnership, including the goodwill associated with that interest, and then enters into a covenant not to compete. In those limited situations, California courts will enforce a restrictive covenant, but only if it is reasonable in terms of duration, geographic scope and substantive scope.

iii. Is it necessary to pay an employee during the period of the covenant?

It is generally not necessary to pay an employee during the period of a covenant not to compete in the United States.
USA

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes.

i. Are they capable of being valid?

Rarely. The analysis applicable to covenants not to solicit customers is largely the same as it is for covenants not to compete discussed at b. above.

In most U.S. jurisdictions:

Most jurisdictions will view a covenant not to solicit customers/clients as what it is in practical effect: a covenant not to compete. Therefore, in those jurisdictions, courts will apply the same reasonableness analysis to these types of covenants as they would to a covenant not to compete.

In California and the minority jurisdictions:

In the minority of jurisdictions, like California, courts will likewise disregard the fact that something is labelled a covenant not to solicit customers and clients and will readily deem it a covenant not to compete and treat it as such.

ii. What does it take to show they are valid?

See i. above. Attempts to overcome a jurisdiction’s limitations on covenants not to compete by styling them “covenants not to solicit customers/clients” are largely unavailing in the United States.

iii. Is it necessary to pay an employee during the period of the covenant?

It is generally not necessary to pay an employee during the period of a covenant in the United States.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

In most U.S. jurisdictions:

With regard to covenants not to solicit other employees, most U.S. jurisdictions will consider some or all of the following factors:

• the duration of the restriction;

• whether there was in fact solicitation by the employee, as opposed to the target employee having initiated and completed the departure from his/her employer of his/her own volition;

• whether the restriction is required to protect the legitimate interests of the employer; and

• whether the restriction is unduly burdensome on the employee.
In California and the minority jurisdictions:
The California approach is typical of the minority view.

Generally, covenants not to solicit other employees are permitted in California, provided that the employer seeking to enforce the covenant can meet the reasonableness criteria above and can show that the solicitation caused business disruption or had other significant negative impacts on its business.

Where a departed employee solicits a single, low-level former colleague to leave, a covenant not to solicit will likely not be enforced against him or her.

However, where a departing employee attempts to take a significant number of employees or a significantly important group of employees with him or her and causes severe business disruption or other damage to the employer, the covenant will more likely be enforced. For example, leaving and taking an entire branch office of a company or an entire operating unit of a company would more readily lead to the former employer being able to show significant disruption/damage to the business.

iii. Is it necessary to pay an employee during the period of the covenant?
It is generally not necessary to pay an employee during the period of a covenant in the United States.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Yes. Employment-related covenants that are common in the United States are confidentiality/trade secret provisions, as well as non-disparagement provisions.

Non-disparagement covenants:
To the extent employees throughout the United States use defamation/disparagement to gain an unfair advantage to compete with their former employer, those covenants will likely be enforced.

Confidentiality and trade secret covenants:
As noted at a. above, some employers try to overcome the limitations on their ability to restrict their employees from competing by creating confidentiality provisions that broadly designate a wide variety of information that the employee might come into contact with as confidential/trade secret information and then try to prohibit the use of such confidential information in any future employment.

These attempts to broadly designate may give employers comfort, but courts will ultimately look at whether the particular information that is alleged to have been misappropriated is in fact confidential. Provisions that over-designate confidential information may therefore ultimately prove to be of little value, since courts will tend to look at whether the information does in fact meet the definition of a protectable trade secret. (See Uniform Trade Secrets Act).

In addition to showing that the information at issue is confidential, employers seeking to enforce confidentiality provisions must show that the information was improperly used by the departing employee in his/her new employment. That can be an even more challenging aspect of seeking to enjoin the use of confidential information.

In some jurisdictions, this element of a claim can be aided by the “Inevitable Disclosure Doctrine”, which allows an enforcing party to argue that the confidential information would inevitably be disclosed to the new employer. However, other jurisdictions, including California, have rejected the Inevitable Disclosure Doctrine and require a showing of actual use of the confidential information in the new employment environment.
F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Choice of law in the US legal context is complex, and a detailed analysis is beyond the scope of this summary. The key point to note is that a choice of law question can be more complicated than it initially appears based on what is written in an employment contract, related agreement(s) and/or documentation.

In most U.S. jurisdictions:
The majority of jurisdictions tend to follow the choice of law provisions set forth in the restrictive covenant, with at least two significant exceptions: to the extent courts look upon the choice of law as being contrary to that state’s public policy or where the chosen state has no substantial relationship to the parties, it will not be followed. For example, if a New York employer seeks to restrict a New York employee from competing with it, and provides that the laws of another state which has a very pro-enforcement stance on covenants not to compete will govern, the New York court may ignore the choice of law provision.

In California and the minority jurisdictions:
California, representing the minority view, goes several steps further. It considers its laws regarding restrictive covenants to embody an important public policy of the state. California courts are therefore aggressive about not allowing attempts to sidestep the restrictive covenant provisions of California law.

For example, if a California-based employee is involved, California courts are likely to apply California law, irrespective of whether the employee is also employed in another state and irrespective of whether the covenant provides for another state’s law to be applied.

California courts have even been known to exercise jurisdiction over employees based elsewhere who spend only part of their work time in California. Importantly also, an employee who was employed entirely outside of California during the term of his employment but then moves to California and begins to work there will likely fall under the protective umbrella of California law, particularly if the restrictive covenant at issue is adjudicated in a California court.

i. Can an employer impose a dispute resolution method on the employee?

At the time of writing, this area of the law is being actively litigated in the United States generally, and in California in particular.

A major United States Supreme Court decision on this subject, Concepcion vs. AT&T Mobile, was issued in 2011, and it ruled that arbitration provisions in certain consumer contracts were enforceable, which suggests that those in employment agreements would be enforceable as well.

The Concepcion case has given rise to a number of subsequent decisions that have wrestled with the issue whether, and to what extent, arbitration agreements in other contexts, with or without jury trial waivers and/or class action waivers, are enforceable. This is particularly the case in California where prior precedents in that state largely took a contrary view on the enforceability of arbitration provisions.

This summary discussion does not permit an in depth discussion, but suffice to say this area of the law is active and is being closely watched by employment law practitioners as well as business lawyers generally.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Restrictive covenants are most commonly enforced by way of suits seeking injunctive relief.

Often, the harm caused by breaches of a covenant not to compete, a covenant not to solicit or a confidentiality agreement is immediate and ongoing and can be difficult to fully remedy through a complaint for damages.
Injunctive relief and other equitable remedies like disgorgement remain the primary means of enforcing restrictive covenants and confidentiality provisions.

Whilst damages are also recoverable in connection with enforcing a restrictive covenant, employees will at times pursue counterclaims for damages based on an assertion that the covenant is not enforceable. For example, a departed employee who believes his/her covenant is unenforceable, and whom the former employer seeks to prevent from going to work for a competitor could pursue counterclaims of interference with contract and/or interference with prospective business advantage.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

As noted above, injunctive relief is generally the primary means of enforcing restrictive covenants and confidentiality provisions. Because the direct enforcement of such provisions, particularly non-competition clauses, may impair an individual’s ability to earn a livelihood, courts may invalidate, or limit the scope of, such provisions if they are unreasonable.

Further, as discussed above, some states have statutes which render non-competition provisions invalid. So, as an alternative, or as an adjunct, to traditional non-competition provisions, employers may condition the provision of compensation and benefits on compliance with various types of restrictive covenant, such as non-compete and confidentiality covenants.

For example, an employment agreement or benefit plan may provide for the forfeiture of an executive’s compensation or benefits, or even the claw back of amounts already paid to the executive, in the event of violation by the employee of a post-termination restrictive covenant.

The enforceability of these provisions will vary with the type of restriction, the type of compensation or benefit, and with applicable law.

Benefits Subject to ERISA:

In the US, pension and welfare plans are subject to the Employee Retirement Security Act of 1974 (ERISA), a federal statute which pre-empts state laws that relate to benefit plans.

The term “pension plan” under ERISA generally includes both traditional defined benefit plans, as well as various types of defined contribution, “account type” retirement plans that defer compensation until termination of employment, such as Section 401(k) plans, profit-sharing plans, ESOPs, and money purchase plans. Certain statutory vesting and anti-alienation rules in ERISA generally preclude the forfeiture or claw back of an individual’s benefits under a pension plan.

A. Top Hat Plans:

Top hat plans and excess plans are not subject to the same protections. A top hat plan is a plan maintained primarily for management and highly compensated employees. Though subject to ERISA, a top hat plan is not subject to the vesting and anti-alienation rules of ERISA. Top hat plans and excess plans will generally be considered as being contracts between the employer and one or more employees.

Whether a contractual forfeiture provision is enforceable with respect to top hat benefits will depend on federal principles of contract law. While, as noted above, ERISA pre-empts state law, courts applying federal principles of contract law will sometimes treat those principles as informed by state law that would apply in the absence of pre-emption.
USA

For this reason, the discussion of state law principles below, which applies to benefits not subject to ERISA is relevant even to top hat plans.

B. Excess Plans:

Excess plans are plans that provide benefits in excess of certain limits under the Internal Revenue Code. Excess plans are not subject to ERISA and thus a contractual provision for forfeiture or claw back in the event of violation of a restrictive covenant will be determined under relevant state law.

C. Welfare Plans:

Finally, welfare plans (e.g. health, life and disability benefits) while subject to ERISA are not subject to ERISA’s statutory vesting and anti-alienation rules. Like top hat plans, the enforceability of forfeiture clauses with respect to these benefits will depend on the federal common law of contracts, which in turn is informed by the state law principles described below.

Compensation and Benefits not Subject to ERISA:

Salary, commissions, overtime, and bonuses, stock options, restricted stock, SARs, and other types of incentive compensation that do not defer compensation until termination of employment, are not subject to ERISA, absent special circumstances.

The enforceability of a forfeiture or claw back for violation of a post-termination restriction will generally rely on principles of state law, and varies with the type of compensation, the type of covenant and the applicable state’s laws. (See also the discussion of Dodd-Frank below about the possible application of federal law in the event of restatement of corporate financial statements).

As in the case of actions to enforce directly post-termination restrictive covenants, actions to enforce forfeiture and claw back provisions under state law frequently entail difficult choice of law issues that may turn on a choice of law provision in the agreement, contacts of the various parties with different states, such as the place of employment and the place where the parties entered into the contract, as well as on the jurisdiction in which the action is brought and its public policy, if any, regarding non-competition clauses.

For example, assume an individual enters into an employment agreement with a corporation headquartered in Delaware, performs services in Illinois and after terminating employment, takes up residence in North Dakota where he is employed by a new employer. An action by his former employer to enforce a forfeiture clause for violation of a non-competition provision will entail difficult choice of law questions, which in turn may be critical to the outcome of the case on the merits. A discussion of these principles is beyond the scope of this chapter.

State wage protection laws generally preclude the forfeiture of earned but unpaid wages, and the claw back of wages already paid to an employee, at least absent employee consent. The specifics of the laws vary from state to state, but central issues in their application include:

(i) what constitutes “wages” for purposes of the statute, and

(ii) under what circumstances, if any, an employer may apply offsets, deductions or forfeitures to wages.

“Wages” will typically include salary, overtime and commissions that have been earned.

The treatment of incentive bonuses is often unclear and may depend on whether the obligation to pay, and the amount of the bonus, is fixed and determinable or entirely discretionary with the employer and whether it depends on factors other than the individual employee’s performance; further once paid, even a discretionary bonus may constitute wages and, if so, will not be subject to claw back. The treatment of equity compensation varies.

Finally, in many states prevailing plaintiffs in unpaid wage cases may be entitled to double or treble damages, and attorney’s fees.

Even if compensation or benefits are not protected by ERISA or state wage protection laws, a court may nevertheless refuse to uphold a forfeiture for violation of a restrictive covenant clause.
In some states, a provision for the forfeiture or claw back of compensation or benefits in the event of violation of a non-competition agreement is viewed as an indirect restraint on trade that will be analyzed under the traditional reasonableness analysis applicable to direct prohibitions on competition. The courts in such cases will uphold a forfeiture for competition clause only if the restraint on the employee is reasonable in temporal and geographic terms, as well as in the amount and severity of the forfeiture.

In some states, such as California, a forfeiture or claw back provision would be prohibited under judicial interpretations of statutes prohibiting non-competition provisions in contracts.

In other states, forfeiture for competition clauses has been distinguished from covenants not to compete, and held enforceable without regard to the reasonableness of the restraint. In states such as New York, the “employee choice doctrine” permits forfeiture for competition provisions to be enforced, without regard to the reasonableness of the restraint, provided that the employee has an effective choice between retaining the benefit, or competing and forfeiting the benefit; the doctrine does not apply to an employee who is involuntarily terminated.

Note that a provision for the forfeiture of compensation or benefits on account of violations of other types of restrictive covenants (e.g. a covenant not to solicit customers) which have the effect of a non-competition provision will generally be analyzed in the same manner as a forfeiture for competition clause.

ii. Which covenants are typically imposed?

Covenants imposed will tend to mirror the covenants contained in the standard form employment contracts, subject to the enforceability issues described above. As such, these covenants could range from non-competition covenants through non-dealing and non-solicitation of customers clauses and confidentiality clauses. In jurisdictions in which a competition clause is unlikely to be enforced, employers may instead attempt to condition compensation and benefits on confidentiality or other related covenants.

iii. What sanctions are/can be imposed by the employer for non-compliance?

The most common type of sanction with respect to compensation and benefits are forfeitures and claw backs. It is uncommon to impose other sanctions under a benefit plan contract that could be imposed more generally as a matter of the overall employment contract.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

Any such added provisions would be subject to the restrictions described in Section h. i. above.

In addition, even in the case of forms of compensation that are not protected ERISA benefits or state law protected wages, the addition of a forfeiture or claw back provision with respect to compensation already granted or earned, would generally be subject to the employee’s consent under principles of contract law.

Finally, the foregoing which describes provisions in employment contracts and benefit plans for the forfeiture and/or claw back of benefits and compensation in the event of violations of post-termination restrictive covenants are to be distinguished from the claw back provisions of the Sarbanes-Oxley Act and the Dodd Frank Wall Street Reform and Consumer Protection Act.

Under Dodd Frank, public companies will be required to adopt a policy to recover from current and former executives, in the event of an accounting restatement, any such compensation that would not have been awarded under the restated financials.

Under Section 304 of Sarbanes-Oxley, in the case of a public company that undertakes an accounting restatement, on account of material noncompliance with any financial reporting requirement under the securities laws due to misconduct, the SEC is empowered to require the CEO and CFO to return compensation received during the twelve month period following the noncompliant filing.

A discussion of such statutory claw back requirements is beyond the scope of this article.
I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

In most U.S. jurisdictions:
In some jurisdictions, courts will “blue pencil” an overly restrictive covenant, which means they will rewrite it to make it enforceable.

In California and the minority jurisdictions:
The more restrictive view typified by California generally prohibits covenants not to compete and requires additional showings to enforce covenants not to solicit employees, there is less occasion to “blue pencil” in those jurisdictions. In fact, the public policy against covenants not to compete is sufficiently strong that some courts have invalidated the entire agreement if it contains such a covenant.

Contributed by Maureen Gorman
A. OVERVIEW:

Venezuelan labour law is deemed a matter of public policy and, therefore, it is imperative (Article 2 of the Labour and Workers Organic Act). It sets basic standards to be met by workers and employers and it cannot be disregarded unless the parties provide for better terms and conditions for workers.

Because labour law is a matter of public order, there is very limited space for negotiation.

Such rigidity conflicts with the general principles of freedom of contract (Article 1160 of the Civil Code), right of property (Article 115 of the Constitution) and freedom of enterprise (Article 112 of the Constitution).

Because of the public policy qualification, disputes are to be settled by court, except that, once in court, the parties may agree to arbitration (Article 6 of the Labour Procedure Organic Act).

There is a general principle of in dubio pro operario whereby, in case of doubt the interpretation would favor the worker (Article 18 (5) of the Labour and Workers Organic Act).
Venezuela

The 2006 Organic Labour Act Regulations (the “Regulations”) contemplate the possibility of post-termination restrictive covenants for a limited time and upon appropriate consideration. Nonetheless, to the extent that the conduct of the ex-worker constitutes a violation of a legal obligation, there may be tortious liability and, if there is a non-labour agreement binding him or her, further covenants may be set, provided the covenants are lawful and proper consideration (money or money’s worth) is given.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

Article 20 of the Regulations establishes that the parties may agree to extend for six months after the termination of the employment, the effects of a clause prohibiting competition of the worker with the employer, provided that the worker is in a management position (direction), has secret industrial or commercial information and has links with the clientele. The non-competition covenant must be in writing and there must be payment of a consideration to the former employee in order for the clause to be effective and valid.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes, payment is necessary for the non-competition clause.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes, but it may be deemed unenforceable.

i. Are they capable of being valid?

Only within the context of the enforcement of a valid non-competition clause.

ii. What does it take to show they are valid?

The claimant would have to establish that such contact would result in a violation of the non-competition clause.

iii. Is it necessary to pay an employee during the period of the covenant?

Only when the payment corresponds to the non-competition consideration referred to in b (iii) above.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes, but it may be deemed unenforceable.

i. Are they capable of being valid?

Only within the context of the enforcement of a valid non-competition clause.
Venezuela

ii. What does it take to show they are valid?
It would have to be established that the solicitation or hiring was made with the purpose of competing with the former employer.

iii. Is it necessary to pay an employee during the period of the covenant?
The only payment that would be payable would be that owed under a valid non-competition clause, as mentioned in b (iii) above.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?
Confidentiality clauses are customary. However, there may be other covenants agreed to in the exercise of the freedom of contract rights established by Venezuelan law.

Such contract would be valid to the extent that the resulting obligation is not deemed illegal, which would include violating public policy (Article 1155 of the Civil Code) and there is proper consideration (Article 1157 of the Civil Code). The obligation may not imply the waiver of an inalienable right.

Such a valid post-employment covenant may be enforced by way of a liquidated damages clause, which may be built as a multiple of the consideration paid for accepting the covenant. The issue must be reviewed on a case-by-case basis.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?
Venezuelan law is the only possible governing law of employment relationships in Venezuela.

A foreign governing law could be selected for a non-employment contract, including post-employment agreements.

However, if the relationship is deemed a consequence of an employment relationship, Venezuelan law may displace the selected governing law, given its public policy nature. If the agreement is entered into after the employment has been terminated, and is stated to be governed by a foreign law and the enforcement is sought before a foreign court or arbitration tribunal, the chances of displacement may be lower.

i. Can an employer impose a dispute resolution method on the employee?

Labour law disputes must be brought to Venezuelan labour courts (Article 6 of the Labour Procedure Organic Act). However, the parties may agree to mediation or arbitration once the judicial procedure is initiated.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?
Enforcement may be done by way of an injunction or, more likely, by way of an action claiming damages, including liquidated damages clauses in the relevant agreements.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?
Yes.

ii. Which covenants are typically imposed?
Non-compete and confidentiality covenants. Also, benefits are structured as discretionary and conditional upon absence of any breach of contract or non-exempted early termination.
iii. What sanctions are/can be imposed by the employer for non-compliance?

Considering that the benefits are construed as discretionary and conditional, breach of a covenant may constitute a valid cause for revoking the possibility of vesting or paying the benefit.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

Benefits not paid could be forfeited, provided they were construed as discretionary and conditional, and the breach of the covenants eliminated the possibility of vesting or payment.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

In principle, the covenant would be void and no re-writing would occur. However, to the extent that the covenant is deemed to be excessive and in violation of the law, the court may limit the enforcement of the covenant to the extent it is legal.

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