24 April 2015

BILL ON EMPLOYMENT CLAUSES SUBMITTED FOR CONSULTATION

Introduction

On 19 March 2015, the Danish Minister of Employment submitted a bill on employment clauses for consultation. The bill calls for significant changes to the current regulation of non-competition, non-solicitation and job clauses. Among other things, the new regulation means that the rules on non-competition, non-solicitation and job clauses are assembled in a new independent act, that job clauses are basically eliminated, that the clauses must be of a maximum duration of 12 months, and that the combined clauses must be of a maximum duration of six months and against the highest possible compensation. If the bill is adopted, all employees will be covered from 1 July 2015.

Background

The bill comes from a long lasted desire to improve the regulation of the business restrictive clauses, and this desire was expressly emerged by the government's growth package in June 2014 which stated that the use of non-competition, non-solicitation and job clauses would be limited. According to the growth package, this should mean that job clauses will be totally prohibited, only with the specific exceptions for mergers and acquisitions and temporary workers.

The proposed bill will replace the existing rules in this area in the Job Clause Act and the rules on non-competition and non-solicitation clauses in the Salaried Employees Act section 18 and 18 (a).

In addition, the stage is set for the repeal of Section 38 in the Contracts Act because the provision is considered to be contained in the Act on Employment Clauses section 12 (1).

Non-competition-, non-solicitation and job clauses that have been concluded before the Act comes into force on 1 July 2015 will remain in force and these clauses should be assessed under the previous rules in the Job Clause Act, the Salaried Employees Act and the Contracts Act, respectively.

Non-solicitation, Non-competition and Job Clauses pursuant to the Job Clause Act

The Job Clause Act includes job, non-competition and non-solicitation clauses. The bill does not apply to any other business restrictive clauses, such as education clauses, sign-on clauses and bonus agreements.

Non-competition Clauses
The current provisions of the Salaried Employees Act, Section 18 state that non-competition clauses

entered into with a salaried employee are only valid if the employee holds a "specially trusted" position. The bill strengthens the requirement for the employee's position in particular since non-competition clauses in future may only be imposed upon employees who occupy "a very specially trusted position". Pursuant to the stricter requirements, only employees who, for example, have access to confidential information, financial statements, supplier contracts, customer data, pricing agreements, and discounts which may be considered as occupying a "very specially trusted position".

In addition to a tightening of requirements regarding the job description, the bill provides that the employee cannot be obliged by a non-competition clause for more than 12 months from the date of termination and cannot be obliged for more than six months from the date of termination if the non-competition clause is combined with a non-solicitation clause.

Non-solicitation Clauses
The current rules of the Salaried Employees Act, Section 18 (a) regarding non-solicitation clauses states that non-solicitation clauses may only be applied if there has been a business relationship with the customer within the last 18 months before the date of termination. The bill limits the duration from 18 months to only 12 months before the date of termination. Further the employee has a right according to the bill to receive a list from the employer indicating which customers the clause covers.

Furthermore, it appears that the bill contemplates a prohibition of "list customers", meaning that going forward, it is only the customers to which the employee has been in connection.

Job Clauses
The bill completely prohibits the use of job clauses.

However, it will be possible to agree on job clauses with provisions for limiting the amount of the employee's opportunity to obtain employment with another company in connection with the negotiation of mergers and acquisitions just as it will be possible to agree on job clauses with temporary workers.

Compensation
The bill's provisions on compensation will result in a change of the existing provisions on compensation. The bill's compensation provisions for non-competition and non-solicitation clauses are as follows:

- By entering into a non-competition or non-solicitation clause of a duration of up to six months, the compensation must constitute at least 40% of the monthly pay as of the date of termination. In the event that the employee obtains other suitable work in the period from the third through the sixth month after termination, compensation will constitute at least 16% of the monthly pay as of the date of termination.
- By entering into a non-competition or non-solicitation clause of a duration of up to 12 months, the compensation must constitute at least 60% of the monthly pay as of the date of termination. In the event that the employee obtains other suitable work in the period from the third through the sixth month after the termination, compensation will constitute at least 24% of the monthly

pay as of the date of termination.

- The compensation in the first two months after the termination must in both of the cases above be paid upon the retirement as a lump sum, regardless of whether the employee has undertaken other work.
- The bill also states that if a combined non-competition and non-solicitation clause of a duration of up to six months has been entered into, the compensation must constitute at least 60% of the monthly pay as of the date of termination.

Our Opinion

The new changes result in a significant tightening of the rules in the area, and companies should be aware of this. To the extent that companies have existing employment contracts containing provisions for either non-competition, non-solicitation or job clauses, the amendment will not result in any changes since the new rules only apply to the clauses entered into after 1 July 2015. Standard contracts and standard provisions must, however, be updated so that the employment clauses entered into after 1 July 2015 may be exercised.

According to the wording of the provisions of the Job Clause Act, the Act applies to all employees. Directors will therefore not be covered by the bill's Section 12 which will replace the Contracts Act's Section 38(2). A consequence of this is that the non-competition clauses of directors will no longer be ineffective, regardless of the director's termination without the director having given any reason for this. This seems neither appropriate nor the intention as this is not mentioned in the bill. The bill therefore means that a non-competition clause may be invoked against any director regardless of the reasons for the termination, unless otherwise expressly agreed on in the executive contract.

Finally, it is noted in relation to job clauses and the use hereof in company transactions that the exemption is a continuation of the current Job Clause Act, Section 8. The provision will therefore only include restrictions imposed by the employer, which generally will only be the case in terms a of company transaction in the form of an asset transfer. On the other hand, in the stock transfer situation, the restricted agreement will be entered into by the owners of the employer, and the agreement would therefore fall outside of the scope of the Act and must be assessed by an ordinary contract law assessment.

Contacts

Pernille Nørkær, Partner

Tel. +45 33 77 90 40

Mob. +45 30 37 96 40

Email pno@mwblaw.dk

Thomas Dahl-Sørensen, Trainee

Tel. +45 33 77 90 06

Mob. +45 30 37 96 06

Email tds@mwblaw.dk