NEW DEVELOPMENTS CONCERNING THE NON-COMPETITION CLAUSE

On 17/18 March 2006, new regulations governing the non-competition clause in employment contracts entered into force (Federal Law Gazette I 2006/35 and 36). Heatedly discussed in public, they introduce novelties in the form of an earnings ceiling for its effectiveness and a non competition clause applicable for wage earners.

A **non-competition clause** limits employees in their choice of gainful employment **after** they have terminated their current employment relationship. Such a clause is effective only if the employee was of age at the date of the agreement, and if the restriction relates to working within the employer's line of business, does not exceed the period of one year and does not unfairly aggravate the employee's occupational career prospects. This rule has already been applied to salaried employees under Section 36 of the Salaried Employees Act (AngG) and, on the basis of court rulings, analogously to wage earners. Section 2c of the Arbeitsvertragsrechts-Anpassungsgesetz (AVRAG, Act Governing Adjustments to Employment Law) now provides an individual regulation specifically for wage earners which reflects the principles of Section 36ff AngG.

Previously it was possible to agree non-competition clauses without considering the employee's earnings situation. In actual practice this meant that such a clause was quite frequently agreed with employees of lower qualifications and lower earnings, which then noticeably and disproportionately (also in financial terms) impaired such workers' occupational mobility.

With the amendment, legislators specified an **earnings ceiling** below which a non-competition clause cannot be agreed: in order for such a clause to be effective, the above conditions now need to be supplemented by another prerequisite, i.e. that the employee's before-tax earnings in the last month of employment exceed, by **17-fold, the day-based ceiling on insurable earnings** as provided in Section 45 of the General Social Insurance Act (ASVG) (in 2006: € 125.– x 17 = € 2,125.–). The Act fails to specify whether this calculation needs to include all benefits granted to the employee for providing his/her labour, such as, i.a., overtime pay, Christmas and holiday bonus and other bonuses, or whether the basic pay is to be considered on its own. Some legal authors draw their conclusions on the basis of a

wider labour-law concept of pay, while others prefer the definition as provided in social security law which excludes bonus payments (but includes in-kind benefits and overtime pay). Certainly not included are claims due upon termination, such as severance pay, compensation for dismissal or for leave not taken. The decisive criterion is to be the pay last received rather than the pay received at the date the non-competition clause was agreed: if the monthly before-tax pay is lower than € 2,125.– at the date the employment relationship is terminated, the non-competition clause will be **absolutely ineffective**. What is still open to dispute is whether or not, in computing the last monthly pay, an average pay (e.g. across the last twelve months) is to be used for an employee with variable earnings (e.g. due to differences in overtime put in or in commissions received).

As before, assertion of the non-competition clause depends on the way an employment relationship is **terminated**: if the employer has, through his/her own fault, given the employee cause to immediate resignation or ordinary termination, or if the employer terminates the relationship without the employee's fault, such employer cannot invoke the non-competition clause, except when s/he continues to pay the employee's salary/wages for the duration of the agreed limitation period.

If **liquidated damages** have been agreed in the event the non-competition clause is contravened, the employer is, as a rule, entitled only to such liquidated damages from the infringing employee but cannot require the employee to refrain from engaging in the incriminated competitive activity. The employer is not permitted to assert any damage beyond what is provided for by way of the liquidated damages. Upon the employee's request, the sum of liquidated damages may be reduced by the court on the grounds of equity.

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inside

OUTSTANDING YOUNG BLOOD FOR THE LAW

Once again we stand proud: In April 2006, our associate Bernhard Wieczorek, LL.M., graduated engineer and magister juris, passed his lawyer's examination with honours.

Looking at the 2005 results of the judicial district of the Vienna Regional Court of Appeal, his performance would have placed him among the top 18 of altogether 222 candidates for the lawyer's examination.

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