

Mexico Non-Compete and Trade Secrets Law: A Primer for U.S. In-House Counsel

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On paper, the restrictive covenant law in Mexico looks a bit like California, but on closer examination it may be easier for a company to achieve certain goals in Mexico. For U.S. practitioners, Mexico offers an interesting example of just how different employment laws in general – and restrictive covenant law in particular – can be in a different legal system. In Mexico, the first principles from which all restrictive covenant law derives are found in the Mexican Constitution. The Constitution of the United Mexican States contains prohibitions and guarantees intended to protect all Mexican citizens and the Mexican economy.

Article 5 of the Mexican Constitution expressly prohibits enforcement of any contract by which a person renounces his or her right to exercise a given profession or industrial or commercial pursuit:

. . . The State cannot permit the execution of any contract, covenant, or agreement having for its object the restriction, loss or irrevocable sacrifice of the liberty of man, whether for work, education, or religious vows. . . . Likewise no person can legally agree to his own proscription or exile, or to the temporary or permanent renunciation of the exercise of a given profession or industrial or commercial pursuit. A labor contract shall be binding only to render the services agreed on for the time set by law and may never exceed one year to the detriment of the worker, and in no case may it embrace the waiver, loss, or restriction of any civil or political right. Non-compliance with such contract by the worker shall only render him civilly liable for damages, but in no case shall it imply coercion against his person.

Article 123(aa) of the Constitution guarantees employment rights:

The following conditions shall be considered null and void and not binding on the contracting parties, even if expressed in the contract:

h. stipulations that imply waiver of any right designed to favor the worker in the laws of protection and assistance for workmen. . . .

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In a more general way, Article 28 preserves business competition in Mexico. See Constitution of Mexico (Text translated from Constitución Política de los Estados Unidos Mexicanos, Trigésima Quinta Edición, 1967, Editorial Porrúa, S. A., México, D. F. Originally published by the Pan American Union, General Secretariat, Organization of American States, Washington, D.C., 1968).

In light of these constitutional pronouncements, the baseline rule in Mexico is that covenants not to compete are unenforceable. In addition, the courts have consistently held unenforceable even the lesser restraint of a covenant not to solicit customers. On the other hand, confidentiality and non-disclosure covenants that are designed to protect a company's confidential business information are enforceable. In addition, trade secrets are protected under Mexico's Industrial Property Law, which is similar in concept and structure to the Uniform Trade Secrets Act adopted by so many jurisdictions in the United States. In all of these ways, the law in Mexico resembles the regime that exists in California.

There is, however, an approach that some companies have taken in Mexico that allows them to create financial incentives for a former employee to abide by bargained-for post-employment restrictions. Some employers have included post-termination covenants in employment agreements, and then assigned a specific and separately enumerated payment of lump sum consideration in exchange for the employee's agreement to the restrictive covenant. This money must be paid ahead of time, and may not be deferred until termination or the post-employment restrictive period. If a departing employee competes or declares his intent to compete, the employer may be able to sue the former employee to seek return of the consideration previously provided for the restrictive covenant. Essentially, the employer goes to the court and seeks invalidation of the illegal covenant, which entails the former employee returning to the employer the money the company had previously paid for the covenant. Many employees will not wish to risk the possibility that a judge will order them to repay money previously received, and instead will react to these economic incentives and elect to comply with the post-termination covenant, even though it is a covenant that could not be enforced in court. This approach, of course, can be seen as a bit of an "end run" around the Mexican proscriptions against non-compete agreements, and although it may have worked at times in the past, there is no guarantee that courts in the future will not at some point reject the argument that the "illegal" covenant should be stricken down and the parties returned to the status quo ante.

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