

Phuoc & Associates Legal Newsletter – October 2019



Part 1 – Concerned issues

DEALING WITH THE AGREEMENT NOT TO WORK FOR COMPETITORS

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No matter what country it is, for several reasons, the general mentality of employers is that they do not desire their employees moving on to work for the company's competitors.

Nonetheless, this mentality, and implementing specific acts to prevent the former employee from coming to a "new employer" are entirely different things. Because the employers have no choice but to use one or several specific legal and economic tools. A popular method involves requesting the potential employee to sign a non-compete agreement, committing not to work for the employer's competitors after the labour contract is terminated (Non-Compete Agreement is referred to as NCA).

Remarkably, the usage of this Agreement becomes more and more common in not only foreign, invested enterprises, but also large enterprises of Vietnam as well as extending the applicable subjects not only to senior personnel but also to all personnel.



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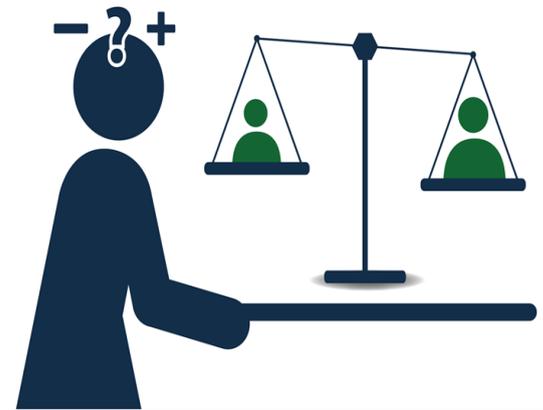
¹ (*) *Phuoc & Associates LLC*

In reality, NCAs are now a controversial matter in Vietnam regarding whether it might or should be recognised by the law. This poses the questions, are NCAs permitted or not, and how are NCAs being “treated” globally?

The truth is that the NCA isn't actually encouraged in most countries

One of the most discussed matters when the NCA is mentioned is that: is this Agreement in accordance with the law? This is the reality not only in Vietnam but also in other countries all over the world. Indeed, it is easily comprehensible that the NCA is directly relating to the limitation of the employees' freedom of right of choice to work or seek for employment, the right to pursue better opportunities in the career, and the elemental citizenship in many countries.

Various countries may have different or even contradictory perspectives on the NCA. Not to mention that the localities (known as the States) in the same country may have a distinction in approaching and handling legal issues arising from the commitment limiting the employees' freedom of right to work.



Nevertheless, it is noteworthy that in most countries having the developed judiciary backgrounds for which the author has researched, there is nowhere in which the laws recognise the fact that the signing and implementation of the NCA is entirely a matter of free agreement between the parties. In the other words, in most countries, although such agreements in which the employees commit not to working for the company's competitors after the termination of labour contracts are recognised, the laws of such countries do not consider these agreements as common commercial or civil transactions. Such agreements are instead deemed to be commitments arising from the employment relationship; this is between one party holding the means of production (business), and the other party who is employed (dependent). Accordingly, the judging perspective of the jurisdiction body that is learnt by heart when accessing any dispute with respect to the NCA is that: (i) the priority to protect the labour right (pro-labour); and (ii) the judgment recognising prevention of the employee from working in their professional field is always “reluctant”.²

For instance, in Germany, the NCA cannot prevent the employee from working for the employer's competitors more than 24 months as from the employment termination. Simultaneously, the employer is obliged to pay at least 50% of the salary for the period of non-competition commitment. In addition, the geographical scope in which the employee can opt to work for employer's competitors is limited in such a way. For example, “throughout the territory of Germany” or “throughout the territory of the European Union” is considered irrelevant (too large) and the agreement, correspondingly, may be declared to be void.³

In the United Kingdom, although the prohibition is not explicit, the government does not desire to “touch” such sensitive issues and thus there is no specific frame for legal regulations. The consideration to recognise the validity of Agreement is carefully considered by the court based on the specific case; precedents always begin with the awareness that this is clearly a restraint of trade.⁴

The NCA will be declared to be void if the scope of protected interests of the employees is not specified and only reasonable. Accordingly, the popular and ambiguous terms which are commonly used in these agreements such as “including but not limited to” or “directly or indirectly”, even “be concerned or be interested”, may lead to the result that this agreement is not recognised. Due to the fact that the court judged such terms to be too broad and overcome the rational and reserved language necessary to protect each legitimate interest of the employer.

In Spain, the NCA is only acknowledged once such agreement is a reasonable and bilateral civil transaction. At that moment,

² <https://msigts.com/wp-content/uploads/2017/05/Global-Overview-of-Non-Compete-Clauses.pdf>

³ <https://www.crosschannellawyers.co.uk/post-contractual-non-compete-clauses-in-german-employment-agreements/>

⁴ <http://www.bailii.org/ew/cases/EWCA/Civ/2017/1054.html>

the employer who would like the employee to commit not to working for the employer's competitors has to pay an amount of money to the employee for such commitment.⁵ To prevent the employees from being forced to "sell" their labour right with an unreasonable price, if the amount of money compensated for the committed period is under 60% of the employee's salary, the NCA may be declared to be void.

In addition, for the employees, regardless of whether they hold business secrets, if they are not considered as senior personnel they cannot be bound by an agreement with a term lasting more than 6 months after terminating the labour contract. Furthermore, when the NCA is concluded but, the employer changes their mind, desire to cease the agreement which is to prevent the employee from working for the employer's competitors. But the employee does not approve, the employer shall be under the obligation to pay the amount of money as stated in the signed commitment as a kind of compensation. This serves to ensure employers consider carefully before entering into the NCA with an employee..

In the opposite direction, in some countries such as Mexico,⁶ the agreement restricting employees to work for competitors after employment termination is not recognised as this is considered as a violation of the Constitution, infringing upon the sovereignty of the human being known as the right to work and to seek employment. In particular, in California (USA), the legislature and judiciary authorities have shown their absolute determination not to accept the NCA.

"The paradox" of California

Although California is only a state of the United States of America, California's economy ranks as 5th in the world and has overtaken world economic powers such as the United Kingdom and France, while only ranking below the United States of America, China, Japan, and Germany.⁷ One of the reasons explaining such a rank is that California is the cradle of formation, development and headquarters for a series of leading technology enterprises in the world, especially the Silicon Valley containing large enterprises such as Google, Apple, Intel and Facebook.

Common sense would indicate that the demand for protecting business and technology secrets leading to the NCA shall be more evident in California than anywhere else in the world. Nevertheless, the truth is the opposite; legislators and court herein are fully aware of the perspective which is regulated in the State's Business and Professions Code: "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Accordingly, all agreements regarding restriction from working for the employer's competitors after the employment termination which is settled by the Court shall be declared void, even if the employees voluntarily entered into such agreements.

Dealing with this regulation, several enterprises have managed to negotiate with employees for the applicable laws of other States to govern the NCA, originally known as a legal option. To end up with this state of affairs, the legislators have amended the California Labour Code in which for agreements entered into dates after 1 January 2017, employees who primarily work and reside in California must have their relationship with employers be governed by the laws of California while disputes (if any) must be heard by a competent court in California.⁸ This provision is applied in case the labour contract is concluded in other states but the employer intends to move the employee to work in California in the coming time.

The above regulations of California's government are explained to establish the best conditions for employees to be free to seek opportunities in enterprises which are willing to appreciate their capabilities and offer higher pay. This encourages the progression of labour productivity and creativity for the labour force. Certainly, for a state in which its wealth is highly evaluated by technology firms and financial institutions whose survival depends crucially on the preservation of intellectual property and technology secrets, it is difficult to assert that the government is negligent in protecting the

⁵ <https://www.lexology.com/library/detail.aspx?g=a1c267de-6b76-4340-bac3-6ba73b12ce08>

⁶ <https://www.payrollmexico.com/non-compete-in-mexico.html> <https://www.lexology.com/library/detail.aspx?g=c7929761-cbf9-4a5f-8126-87926b439665&fbclid=IwAR2U0AqLuwbTf7p1XrNOZE8OoLYkfj3klqiaFAZsmeKRh0euNI8pEFym2wM>

⁷ <http://vneconomy.vn/vuot-anh-bang-california-cua-my-thanh-nen-kinh-te-lon-thu-5-the-gioi-20180508092553779.htm>

⁸ <https://www.employmentrightscalifornia.com/can-my-california-employer-enforce-a-non-compete-agreement/>

interests of employers. The problem is that California's government evaluated that supporting NCAs with an aim to protect the employers from their vague worries about the business secrets being revealed when employees work for competitors would result in more drawbacks than the achieving interests.

It is worth mentioning that this is one of the minority states applying this policy in the United States of America, but such acts of California's government have greatly influenced the United States and are wholeheartedly supported by the United States Federal Government. Specifically, the Government of President Obama called upon all the states across the country, issuing the similar policy as California in order to avoid the "wave" of employers abusing the NCA to prevent employees from seeking better positions or a more competitive environment.⁹

This is more meaningful for a country where currently 20% of employees are required to enter into NCAs, i.e. every American employee that is prevented to pursue the career fitting their specialties after terminating the labour contract. The worry over unemployment leaves employees scrupulous in getting rid of the employer that they no longer want to work with, hindering both labour productivity and creativity. Opportunities for increasing income and career advancement are limited or lost as the employers are relieved from the pressure to retain employees thanks to the "rare item" called the NCA.

For the government, the burden of unemployment allowance and other social security matters turns out to be overloaded with a large number of employees terminating employment and being prevented from working for new employers bound by the NCA.

Acknowledging or not acknowledging the NCA in Vietnam: it should be considered carefully

With reference to many NCAs in Vietnam, the author finds that the main reason given to explain employees being restricted from working for the employers' competitors focused on the employers' concerns that their business secrets or technology secrets may be revealed by the employees. Obviously, this is a reasonable and legitimate reason as pursuant to Article 23.2 of the Labour Code 2012 and Article 84 of the Intellectual Property Law, the holder of business secrets and technological secrets is allowed to apply legal measures to protect these intellectual properties.

Nevertheless, protecting the interests of either party which infringes upon legitimate rights and interests of the other party is another story, not to mention that the violated party is at the weaker side in the transaction between the two parties. As a result, the interpretation that the employees voluntarily enter into the NCA should be considered carefully in each specific situation when such documents are concluded.

As with the aforementioned analysis, the author supposes that whether to acknowledge the NCA, or at least recognise with limitation and conditional commitment to the restriction of rights of the employees, the NCA should be considered carefully by the Vietnamese competent authorities on the grounds of reference to other countries' view on the NCA. This is to issue a reasonable regulation on the NCA which is suitable to the actual situation of Vietnam's labour force in the coming time, especially given that Vietnam is entering into the Vietnam-EU Free Trade Agreement and has already been the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).



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⁹ <https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf>

Part 2 - Remarkable Regulations

1. REGULATIONS ON POLICIES ASSISTING EMPLOYMENT AND NATIONAL EMPLOYMENT FUNDS

As of 23 September 2019, the Government issued Decree 74/2019/ND-CP amending and supplementing Decree 61/2015/ND-CP on policies to support having a job and the National Fund for Employment. (“**Decree 74**”). Accordingly, Decree 74 features some key points as mention below:

Maximum loan

Borrowers will be lent to the National Employment Fund with double the limit compared to the current regulations, specifically as follows:

- Maximum loan of VND 2 billion/ project for production and business establishments and does not exceed VND 100 million for 01 employee having a job.

Meanwhile, the current regulations stipulate the maximum loan is VND 1 billion/ project and VND 50 million for one employee.

- Maximum loan of VND 100 million for employees (increasing of VND 50 million compared to current regulations).

Loan term

The maximum loan term is extended up to 120 months (compared to the current stipulating maximum loan term of 60 months). The specific loan term shall be agreed between the Vietnam Bank for Social Policies and the borrower according to the fund sources, business cycle and solvency of the borrower.

Collateral

Regarding the loans of VND 100 million or greater, the business entity must put up their property as collateral to apply for concessional loans for a guest worker program.

Application for loans

In addition to the required documents specified in Clause 2, Article 40 of Decree 61/2015/ND-CP, this Circular 74 has the following additions:

- For workers of the near-poor households: the loan application is certified by the commune-level People's Committee of the lawful residence; belong to the near-poor households according to Form No. 3a and Form 3b issued with this Decree 74; and
- For employees who are relatives of people with meritorious services to the revolution: the loan application as prescribed at Point a of this Clause; Copy of certificate of relatives of people with meritorious services to the revolution, made according to Form No. 4 issued together with this Decree 74.

Decree 74/2019/ND-CP shall take effect from 08 October 2019

2. PENALTIES FOR ADMINISTRATIVE VIOLATIONS IN THE SECTOR OF COMPETITION

As of 23 September 2019, the Government issued Decree 75/2019/ND-CP regulating penalties for administrative violations in the sector of competition for organisations and individuals, with some notable points as follows (“**Decree 75**”).

Acts of administrative violation

Under the provisions of Decree 75/2019, administrative violations of competition will include violations of the provisions on: anti-competition agreement, abuse of dominant position on the market, monopoly position, economic concentration, unfair competition, and other competition.

Penalties

The decree states that, for each act of violation of competition, organisations and violating individuals are subject to one of

the main sanctioning forms as a warning or monetary fine.

Depending on the nature and severity of the administrative violation in sports, the wrongdoer may receive suspension of license or practicing certificate and therefore must suspend operations. From 06 months to 12 months, the wrongdoer will have exhibits of violations confiscated, benefits from administrative violations confiscated, and Certificate of Business registration revoked.

Remedial measures

In addition to the sanctions mentioned above, organisations and individuals may be forced to apply a number of remedies such as: forcing public rectification; forced restructuring businesses abusing the dominance of the market, monopoly position; forced removal of illegal provisions from contracts, agreements or business transactions; being placed under the control of competent state agencies on the purchase and sale prices of goods or services or other transaction conditions in contracts of merging enterprises, acquiring enterprises or newly formed enterprises, after economic concentration, and other measures detailed in this Decree 75/2019.

Maximum fine for the act of violation

- The maximum fine for violating unfair competition practices is VND 2,000,000,000;
- The maximum fine for violating Anti-competitive agreement, abuse of a dominant position on the market, and abuse of monopoly power is 10% of the total turnover of a violating enterprise on the relevant market in a fiscal year;
- The maximum fine for violating economic concentration is 05% of the total turnover of a violating enterprise on the relevant market in a fiscal year;
- The maximum fine for other violations specified in this Decree 75/2019 is VND 200,000,000; and
- The above-mentioned maximum penalties apply to organisational behaviour; for individuals committing the same violation, the maximum fine level is equal to half of the maximum fine imposed on an organisation.

The specific fine level for an act of competition

The specific fine for an act in a competition is the average of the fine frame of that act:

- If extenuating circumstances are involved, the fine level may be reduced but must not exceed the minimum level of the fine bracket;
- If aggravating circumstances are involved, the fine level may be increased but must not exceed the maximum fine level of the fine bracket; and
- Extenuating and aggravating circumstances are adjusted and do not exceed 15% of the average of the penalty frame.

Decree 75/2019/ND-CP shall take effect from 01 December 2019

3. SUPPORT TRAINING FOR EMPLOYEES IN SMALL AND MEDIUM-SIZED ENTERPRISES (SMEs)

As of 8 August 2019, the Finance and Accounting Department issued Circular 49/2019/ TT-BTC guiding the management and use of State budget funding to support the development of human resources for small and medium-sized enterprises (“Circular 49”). Accordingly, Circular 49 has the following remarkable points:

The cost of vocational training and supporting policies for workers in small and medium-sized enterprises

Accordingly, employees working in small and medium-sized enterprises participating in vocational training courses are exempt from training costs but not exceeding VND2,000,000/person/course.

Conditions for enjoying the support level

- Working in the SME for at least 06 consecutive months; and
- Not over 50 years old for men, 45 years old for women.

Remaining costs such as meals, travel and other expenses incurred included for participation in vocational training courses shall be agreed by the SMEs and workers.

Circular 49/2019/TT-BTC shall take effect from 01 December 2019.

4. THE CASES OF SMALL AND MEDIUM-SIZED ENTERPRISES WERE CONSIDERED TO HANDLE RISKS

As of 26 August 2019, Circular 57/2019/TT-BTC provides guidance on the risk of the mechanism for dealing with risks of credit guarantee funds for small and medium-sized enterprises issued by the Ministry of Finance ("**Circular 57**"). According to the Circular, the remarkable points are as follows:

05 cases of small and medium-sized enterprises were considered to handle risks

- Customers suffering financial losses, assets damaged by natural disasters, crop failure; factors adversely affecting production and business activities causing failure to pay debts (principals, interests) on time according to the debt collection signed contracts;
- The customer goes bankrupt in accordance with current laws;
- The State changes policies that affect customers' business and production activities, leading to failure to pay debts (principals and interests) on time according to the signed debt recognition contracts;
- Customers are at risk due to other objective causes directly affecting the production and business activities, resulting in failure to pay debts (principals and interests) on time according to the signed debt acceptance contracts;
- Customers have bad debts (from group 3 to group 5) according to debt classification results prescribed in Clause 1, Article 36 of Decree 34/2018/ND-CP.

Risk-handling measures

According to the Circular, risk-handling measures include debt structure, debt freezing, handling of collaterals, selling debts, writing off interest debts, and writing off principal debts.

Risk-handling authority

This Circular refers to the provisions of Clause 3, Article 37 of the Government's Decree No. 34/2018/ND-CP on the competence to handle risks as follows:

- Chairman of provincial People's Committee decides measures: debt write-off (principal and interest), debt sale lower than book value of debt;
- The Chairman of the Credit Guarantee Fund shall decide on measures to freeze debts and handle security assets; and
- The director of the Credit Guarantee Fund shall decide on debt restructuring measures.

Circular 57/2019/TT-BTC shall take effect from 15 October 2019.

Part 3 - Monthly Legal Update

No	DOCUMENT TITLE	ISSUANCE DATE	EFFECTIVE DATE
THE GOVERNMENT			
1	Decree 73/2019/ND-CP stipulating the management of investment in information technology application using State budget Capital.	05/09/2019	01/01/2020
2	Decree 74/2019/ND-CP amending and supplementing a number of articles of the Government's Decree No. 61/2015/ND-CP dated 9 July 2015, providing policies assisting employment and national employment funds.	23/09/2019	08/11/2019
3	Decree 75/2019/ND-CP stipulating penalties for administrative violations in the sector of competition.	26/09/2019	01/12/2019
MINISTRY OF HOME AFFAIRS			
1	Circular 11/2019/TT-BNV announces a number of legal documents.	30/09/2019	15/11/2019
MINISTRY OF NATURAL RESOURCES AND ENVIRONMENT			
1	Circular 16/2019/TT-BTNMT regulating the technical assessment of forecast quality and customs warning.	30/09/2019	15/11/2019
2	Circular 15/2019/TT-BTNMT providing the organisation and operation of the council for evaluation of applications for licenses to access genetic resources for commercial research and development of commercial products.	11/09/2019	28/10/2019
MINISTRY OF AGRICULTURE AND RURAL DEVELOPMENT			
1	Circular 10/2019/TT-BNNPTNT promulgating the list of plant protection drugs allowed to be used and banned for use in Vietnam.	20/09/2019	05/11/2019
MINISTRY OF FINANCE			
1	Circular 64/2019/TT-BTC amending and supplementing a number of articles of Circular No. 314/2016/TT-BTC dated 28 November 2016 of the Ministry of Finance guiding a number of articles in Decree No. 24/2016/ND-CP 5 April 2016 of the Government stipulating the regime of State budget management.	16/09/2019	01/11/2019
2	Circular 62/2019/TT-BTC amending and supplementing a number of articles of the Minister of Finance's Circular No. 38/2018/TT-BTC of 20 April 2018, defining determination of origin of imported and exported goods.	05/09/2019	21/10/2019
3	Circular 65/2019/TT-BTC regulating the content of training, examination, and granting and	16/09/2019	01/11/2019

	recognising certificates for insurance auxiliary.		
4	Circular 63/2019/TT-BTC guiding the regime of collection, remittance, management, and use of maritime security charges and financial mechanisms in the field of provisions for public non-business services to ensure maritime safety.	09/09/2019	01/01/2020
5	Circular 16/2019/TT-BCT guiding auction of pilot sugar import quota in 2019.	19/09/2019	02/11/2019
6	Circular 67/2019/TT-BTC regulating the content and expenditure of conducting archaeological exploration and excavation from the State budget.	23/09/2019	08/11/2019
MINISTRY OF HEALTH			
1	Circular 27/2019/TT-BYT amending a number of articles of the Health Minister's Circular No. 17/2012/TT-BYT dated 24 October 2012 providing for the issuance and use of birth certificates.	27/09/2019	01/12/2019
MINISTRY OF LABOR, WAR INVALIDS AND SOCIAL AFFAIRS			
1	Circular 15/2019/TT-BLĐTBXH regulating the statistical reporting regime of Labour, War Invalids, and Social Affairs.	18/09/2019	02/11/2019
2	Circular 13/2019/TT-BLĐTBXH promulgating national technical regulations on protective clothing for heat and fire.	16/09/2019	01/04/2020
3	Circular 14/2019/TT-BLĐTBXH promulgating national technical regulations for personal protective equipment such as safety boots.	16/09/2019	01/04/2020
MINISTRY OF TRANSPORT			
1	Circular 36/2019/TT-BGTVT amending and supplementing Circulars of the Minister of Transport regulating the management of waterway routes from coast to island in Vietnam's sea.	12/09/2019	01/11/2019
MINISTRY OF CULTURE, SPORTS AND TOURISM			
1	Circular 08/2019/TT-BVHTTDL prescribing the judicial expertise process for cultural products	03/09/2019	15/11/2019

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