

The special employment regime for Senior Management in Spain

Foreign companies with a subsidiary in Spain usually ask about the special employment regime of senior managers and how it works in Spain. There are some important aspects that need to be considered before making any decision.

1.- Definition and main features of senior management employees

The Spanish Workers' Statute establishes that senior management employment relationships are special, and therefore have to be excluded from the general regime of common workers. The Royal Decree 1382/1985, of August 1st 1985 rules the special senior management employment relationship. The senior management employment relationship is classified as special because of the mutual trust between the employer and the senior manager, given the fact that the manager will have management authority.

According to the Royal Decree, a senior manager is an employee who has a broad management authority in relation to the company's general objectives and exercises that authority independently and with full responsibility, limited just by the criteria and direct instructions of the company's supreme governing body.

The Spanish Supreme Court has determined that some requirements must be met in order to consider an employee as a senior manager:

1) The authority granted to the employee must be related to the general objectives of the company, not only to certain areas of the company's life, but to the whole company's activity or main objectives;

2) The senior manager has to act independently and with full responsibility, only limited by the criteria and direct instructions of the company's supreme governing body, therefore not everyone who assumes managing powers can be considered a senior manager, as those who receive instructions by delegated governing bodies shall not be considered senior managers" (Judgment of the Supreme Court, dated 15 October 2014)

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2.- Termination of the contract by unilateral decision of the employer: indemnity

Article 11 of the Royal Decree 1382/1985 rules the termination of the contract by unilateral decision of the employer and establishes that:

“The senior manager is entitled to the indemnity agreed on the contract, and if there is no agreement, then the indemnity will have to be the equivalent to an indemnity of seven days’ pay for each year of service, up to a maximum of six months”.

This rule foresees the possibility for the contractual parties to agree on the value of the indemnity, but not the possibility to exclude the indemnity.

The Spanish Supreme Court has determined that the right to indemnity *“is a necessary minimum right for the contractual parties, therefore the indemnity established in the article 11 is a minimum indemnity that can be upgraded by the contractual parties, but cannot be abolished”* (Judgment of the Supreme Court, dated 22 April 2014). In other words, what the case law has established is that the indemnity of the article 11 of the Royal Decree has to be considered as an obligatory indemnity, even if the contractual parties agreed to exclude it.

3.- Post contractual non-compete clause

At the beginning of this article we have mentioned that the employment relationship of a senior manager is special because of the mutual trust between the employer and the senior manager, given the fact that the manager will have managing authority that will affect the whole company. This is why it is frequent to include a post contractual non-compete clause in the contract. The post contractual non-compete clause is relevant due to the fact that the senior manager has a deep knowledge of the company’s organization and had access to the most sensitive information.

Article 8 of the Royal Decree 1382/1985 establishes:

“The post contractual non-compete clause that applies after the employment contract is terminated must not exceed two years, being only valid when the following terms are met:

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a) *The employer must have a real industrial or commercial interest in the non-compete*

b) *The employer must pay the senior manager an appropriate economic compensation*

According to this rule, in order for the post contractual non-compete clause to be valid and, therefore, have the proper effects, it cannot exceed two years, the employer has to prove that there is a genuine industrial or commercial interest in the non-compete, and is obligated to satisfy an appropriate economic compensation to the senior manager. If one of the above requirements fails, the non-compete clause will have no effects and it will be null.

The post contractual non-compete clause raises some doubts when it comes to defining the “*real industrial or commercial interest*” and establishing the “*appropriate economic compensation*”.

The so called “*real industrial or commercial interest*” is an undefined legal concept, this means that in order to determine if it really exists we have to evaluate and compare the activity of the prior employer and the new employer, as well as some other factors such as the new employer’s purpose, the market in which the company develops its activity, or the clientele. The High Court of Justice of Catalonia considered that “*there is a real industrial or commercial interest, when the same activity affects the same market and the same potential clients*” (Judgment of the High Court of Justice of Catalonia dated 23 October 2014).

The amount of the “*appropriate economic compensation*” has not been clearly fixed by the tribunals, because it depends on each case and concrete situation. However, there are some court decisions that have established that if the clause is so restrictive that could impede the employee to find a job in its field of expertise, the compensation should reasonably allow the employee to bear the costs of live during the duration of the non-compete prohibition (Judgment of the High Court of Justice of Andalusia dated 23 March 2017). If the non-compete compensation established in the employment agreement is not appropriate the clause could be considered invalid and would have no effects.

4.- Conclusion

Taking all of the above into consideration, we can conclude that the senior management employment relationship is a complex one given that a senior manager holds a broad management authority and outstanding faculties that affect the whole company’s activity.

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The indemnity in case of contract termination is, at minimum, the one established by the law, if no higher indemnity has been agreed by the parties.

And the post contractual non-compete clause is a key aspect to protect the company's interests, but certain requirements must be met to give the non-compete clause legal effects.

These are the main features to consider from a legal standpoint when hiring an employee as a senior manager under Spanish Law.

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