

Non-Compete Clauses with Financial Compensation

In a recent ruling (4A_5/2025 of 26 June 2025), the Swiss Federal Supreme Court addressed whether an employer may unilaterally waive a non-compete clause with financial compensation, and whether income earned by the employee during the non-compete period may be deducted from that compensation.

Facts of the Federal Supreme Court Ruling

In this case, an employee had agreed to a two-year post-contractual non-compete clause, with financial compensation equal to 50% of his last base salary for the duration of the non-compete.

The employee resigned on 22 June 2021, with his resignation effective at the end of December 2021. Following his resignation, the employee was released from his duties on 2 July 2021 and reminded of his contractual obligations, including those arising from the non-compete clause. On 1 September 2021, the employer presented a termination agreement to the employee addressing the non-compete, which the employee did not sign. By letter dated 28 September 2021, the employer informed the employee that it was waiving the non-compete clause, which effectively ended the associated financial compensation.

The matter was brought before the Swiss Federal Supreme Court, which examined (i) whether an employer may unilaterally waive a non-compete clause with financial compensation, and (ii) whether income earned by the employee during the non-compete period may be deducted from that compensation.

Considerations of the Swiss Federal Supreme Court

The Swiss Federal Supreme Court reaffirmed its previous case law, holding that a post-contractual non-compete clause with financial compensation constitutes a bilateral agreement. Consequently, the employer cannot unilaterally terminate it – even with notice – unless the contract explicitly allows such a waiver.

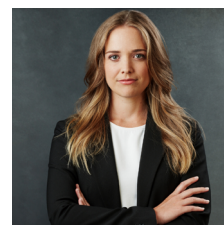
Without a contractual provision permitting unilateral waiver, the financial compensation is mandatory and can only be waived by mutual agreement.

The Swiss Federal Supreme Court further clarified that financial compensation is intended to remunerate the employee for refraining from competition. It is therefore owed regardless of whether the employee suffered damages, earned income, faced obstacles in seeking other employment, or changed professions. Unless the contract explicitly provides otherwise, any income earned elsewhere or voluntarily foregone cannot be offset against the financial compensation.

Conclusion and Practical Significance

This ruling highlights the importance of precise drafting of non-compete clauses, particularly when financial compensation is involved. Employers should clearly define the conditions under which a non-compete may be waived and how financial compensation is calculated, including whether any alternative income can be offset.

Should you require any further information on this subject, please do not hesitate to contact the author or your usual contact person at Borel & Barbey. Our specialists will be pleased to assist you.



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