

NON-COMPETITION, NON-SOLICITATION AND NON-DISCLOSURE OF CONFIDENTIAL INFORMATION UNDERTAKING GUIDE

References to the "Labour Law" are to Federal Law No. 33 of 2021, as amended, and references to the "Implementing Regulations" are to Cabinet Resolution No. 1 of 2022, as amended. References to "DMCC" are to Dubai Multi Commodities Centre Authority, governed by Law No. 3 of 2020, as amended, issued in the Emirate of Dubai, United Arab Emirates.

1. What is the undertaking for non-competition, non-solicitation and non-disclosure of confidential information?

This undertaking seeks to protect the company's confidential information and business interests by putting restrictions in place in relation to an employee's ability to work for a competitor of his/her previous employer and to solicit clients or other employees of his/her previous employer once the employment relationship has ended. It also seeks to prevent an employee from using and/or disclosing confidential information belonging to his/her employer. These types of restrictions are also known as post termination restrictions or restrictive covenants.

This is not a mandatory DMCC document – it is up to the employer whether it wishes to ask the employee to enter into this undertaking. Additionally, it is important to understand that the document provided by the DMCC is a template only which must be tailored as appropriate depending on the nature of the employer's business and the relevant employee's role. As alluded to below, there are various legal issues associated with restrictive covenants and their enforcement and the DMCC gives no assurances that restrictive covenants entered into using the template provided would be enforceable in the event of a dispute. DMCC recommends that member companies take specialist legal advice before entering into and/or seeking to enforce any restrictive covenants.

2. Can I restrict an employee indefinitely?

No, in order to be enforceable, post termination restrictions must go no wider than necessary to protect the employer's legitimate business interests. The restriction should therefore be limited in geography, scope and duration. This is confirmed by Article 10 of the Labour Law

which relates to non-competition restrictions. Article 12.1 of the Implementing Regulations also confirms that non-compete restrictions should not exceed two years.

3. How long can I restrict an employee?

Whilst the DMCC requires that restrictions are no longer than 12 months, it is important to appreciate that a restriction for this duration would not necessarily be enforced by the court in the event of a dispute.

There is no definitive rule on the duration of a post termination restriction. In order to be enforceable, the duration must be no longer than necessary to protect the company's legitimate business interests. This will depend on the nature of the company's business, the role performed by the employee and, specifically, the level and type of company confidential information that the employee had access to.

4. Where can I restrict an employee?

You should carefully consider the restricted area and ensure that it is no wider than necessary to protect the company's legitimate business interests taking into account the nature of the company's business, the role performed by the employee and the level and type of company confidential information that the employee has access to. A narrowly drafted restricted area is more likely to be enforceable than a clause that is drafted very widely.

For example, Fatima is employed by A Limited and works only in Dubai. She does not do any business outside of Dubai but the restricted area in the undertaking includes all of the UAE, the GCC and Africa. Given that she only works in Dubai, a restriction that encompasses all of these jurisdictions is unlikely to be enforceable.

5. What type of work/type of business can I restrict an employee from carrying out/joining?

You should carefully set out the precise type of work/type of business that you wish to prevent the employee from carrying out/joining in the future. You should consider the role that the employee is currently carrying out and the business sector in which they are employed – this should be limited to the activities in which the employee has been directly concerned. Again, a narrowly drafted restriction is more likely to be enforceable than a clause that is drafted very widely.

You can also choose to name specific companies that you consider are competing businesses in Schedule 1.

6. If I terminate the employee's contract or breach the employee's contract, will the restrictions still apply?

Article 12.3 of the Implementing Regulations states that a non-competition clause will not apply if the reason for terminating the employment contract is due to the employer or if the employer breaches their legal or contractual obligations. Such restrictions are therefore unlikely to be enforceable in the event that an employer terminates the employment for certain reasons (for example, redundancy) or if they terminate in violation of the Labour Law. DMCC recommends that member companies take specialist legal advice if they have any concerns about the enforceability of any restrictive covenants.

7. Can I change the governing jurisdiction of the undertaking?

Yes, as set out above, the undertaking provided by the DMCC is a template intended for guidance only.

There are various reasons why the parties may wish to contractually agree that the undertaking will be governed by a jurisdiction other than the UAE. For example, unlike onshore in the UAE, in some jurisdictions injunctive relief (e.g. a court order prohibiting a former employee from breaching the undertaking by working for a competitor) is available.

However, before choosing another governing jurisdiction, it is important that you fully understand the implications of doing so. Changing the governing jurisdiction of the undertaking may also mean that amendments should be made to the undertaking to ensure compliance with the laws of that jurisdiction. We strongly recommend taking specialist legal advice before changing the governing jurisdiction of the undertaking.

DMCC provides template documents and guidance notes in order to assist its member companies. The information and material provided in this document is for the purposes of general information and guidance only and is not intended to constitute legal or other professional advice on which reliance should be placed. Although DMCC makes reasonable efforts to update all information, we make no representations, warranties or guarantees, whether express or implied that the information and content is accurate, complete and up to date. DMCC recommends that specialist legal advice is sought before entering into or seeking to enforce any post termination restrictions.