

[TERMINATION OF EMPLOYMENT CONTRACT]

Waiving a non-compete clause on time in case of exemption of the notice period – Cass. Soc. 21-01-2015 n°13-24.471

When exempting from work during a notice period an employee, the employer wishing to waive the non-compete obligation must do so at least upon the last day of work. Otherwise, the employee may claim the indemnity.

Under French law, an employer may waive the non-compete clause that binds an employee without the latter's consent only if the contract, or the collective agreement to which the contract refers to, allows it.

The employer must scrupulously abide by the terms of the renunciation procedure. Otherwise, the renunciation will not be binding on the ex-employee who may claim the non-compete indemnity.

As a general rule, the renunciation must always be explicit and notified individually to the employee. But more specific terms may be provided, particularly regarding the time-frame of the renunciation.

In the absence of the specific time-frame, the renunciation must be notified at the same time as the dismissal (Cass. Soc. 22-09-2010 n°08-45.341). However, a longer period may be provided. Such was the case in the French supreme court's decision of January 21st, 2015: the employer had a month after the termination notice to release the employee from the non-compete obligation. In that case, the termination notice had been notified on April 24th, 2008. On the same day, he had been exempted from work during the notice period. The employer waived the non-compete obligation later, on May 14th, 2008.

The ex-employee brought a claim before the labour court in payment of the non-compete indemnity.

The employee argued that in case of termination with an exemption of work during the notice period, the non-compete obligation of the employee, as well as the payment obligation of the employer both came into force on the day the employee actually stops working (i.e.: when the exemption of work begins; please note that during this period, the employee technically remains an employee and the contract is nonetheless only terminated on the theoretical end date of the notice period).

The French supreme court upheld this reasoning. It further added that whenever an employer exempts an employee from work during the notice period and intends to waive the non-compete clause, it must do so on the actual departure date at the latest, notwithstanding any provision of the contract or of the collective agreement.

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