TNTP
ATTORNEYS AT LAW

LEGAL NEWSLETTER

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Dear Readers,

On the occasion of the Lunar New Year, TNTP would like to send happy new year wishes to our Readers, who have always accompanied and supported us through reading our articles and legal newsletters over the past time.

We understand that more and more Readers are interested in legal knowledge. Therefore, we always strive to provide legal knowledge and general news to help our Readers better understand the law and apply it effectively in their work and life.

In this Lunar New Year, TNTP looks forward to continuing to accompany our Readers as a reliable source of legal information and as a trustworthy partner, ready to support Readers in all legal issues.

We wish you a happy new year with prosperity and much success. Hopefully, the new year will open up many new opportunities and bring much joy and happiness to you and your families.

To start a promising new year, let's join us to look back at some of TNTP's featured articles in the past year. Hopefully, these articles can help you understand legal knowledge to support your business activities.

Best regards,

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Non-compete agreement – How to perform it in accordance with the law?

*Many businesses have asked their employees to sign a non-compete agreement **("NCA")** at the same time assigning a labor contract. However, due to the lack of regulation, NCA still has many different views on NCA. The following article will provide some ideas about NCA so that businesses and employees can understand and use it in accordance with the law.*

1. Definition of Non-Competition Agreement

Businesses will invest a lot of money and manpower to collect, develop, and secure information such as knowledge, technological know-how, business strategy, and customer list,... with the aim of serving commercial activities (collectively referred to as confidential information). Employees may know certain types of confidential information depending on their job position. Then, they may use this information to benefit by disclosing confidential information to business competitors or establishing or working for businesses in the same industry that they previously worked.

Therefore, to protect confidential information, and business advantages, as well as prevent acts that cause damage to enterprises, most businesses require employees to sign NCA before working. Accordingly, the employees commit not to establish or work for enterprises in the same industry as the enterprise for which the employees previously worked, either during the implementation of labor relations or after the termination of the labor relationship.

Non-compete agreement – How to perform it in accordance with the law?

2. Legal validity of Non-Competition Agreement

In terms of labor code, NCA has restricted the right to work of employees, and violated the principle of "freedom of labor". In the 2013 Constitution, Clause 1 of Article 35 stipulates that "Citizens have the right to work and to choose their occupations, employment and workplaces." In the Labor Code 2019, Article 5.1 stipulates the right of employees to "work; freely choose an occupation, workplace or occupation"; Article 10.1 stipulates the employee's right to "choose the employment, employer in any location that is not prohibited by law" and Article 19.1 allows "An employee may enter into employment contracts with more than one employer, provided that he/she fully performs all terms and conditions contained in the concluded contracts." In the Law on Employment 2013, Article 4.1 stipulates the principles of employment "Ensuring the right to work and freely choose jobs and workplaces" and Article 9.6 stipulates Prohibited acts as "Obstructing, or causing difficulties or damage to, the lawful rights and interests of workers or employers."

In case NCA is included in a labor contract (in the form of a term or an annex to the labor contract), NCA violates principles for the conclusion of an employment contract specified in Article 15.2 of Labor Code 2019, "Freedom to enter into an employment contract which is not contrary to the law, the collective bargaining agreement and social ethics". Is it regarded as a civil agreement if the NCA is not contained in the labor contract or the contract appendix but is signed in a separate document, independent of the labor contract? To answer this question, we need to consider the nature of NCA. NCA emerges from labor relations, only when the labor relations arise, the employees can access confidential information. Then, the enterprise requires employees to sign an NCA to preserve benefits and competitive advantage. If the employees sign the NCA without obtaining any advantages to compensate for the duties originating from the NCA during and after working for the enterprise, there is more basis to confirm the NCA's dependence on labor relations. Therefore, NCA is not considered a civil relationship but is considered a labor relationship, regulated by the labor law, with a high chance of being declared invalid by the Court due to violation of the law.

In Judgment No. 420/2019/LD-PT dated May 15, 2019, the Ho Chi Minh City People's Court based on the right of employees to "work; freely choose an occupation, workplace or occupation" to decide "Do not accept the petition of Enterprise U for forcing Mr. Phan Thanh B not to continue working for Enterprise P, a direct competitor of Enterprise U". Contrary to this point of view, on June 12, 2018, the Ho Chi Minh City People's Court issued Decision No. 755/2018/QD-PQTT to recognize the validity of the decision of arbitral tribunal of Vietnam International Arbitration Centre (VIAC). The court judged that the employee gave up her rights by voluntarily entering into the NCA, so she must comply with this agreement and suffer legal consequences when working for a competitor during the commitment period. It can be seen that Judgment No. 420/2019/LD-PT and Decision No. 755/2018/QD-PQTT were both issued by the Ho Chi Minh City People's Court, but the Court gave two different views on the same problem which is determining the legitimacy of the NCA. Thus, the NCA's validity determination will depend entirely on the internal beliefs and legal views of each judge when resolving the dispute.

Non-compete agreement – How to perform it in accordance with the law?

3. How do protect confidential information?

Because the purpose of the Non-Disclosure Agreement **(NDA")** or NCA is to prevent acts of disclosing confidential information and causing damage to the business, the enterprise may sign the NDA instead of signing the NCA. This is a safe solution for businesses as Article 21.2 of the Labor Code 2019 has specified "If the employee's job is directly related to the business secret, technological know-how as prescribed by law, the employer has the rights to sign a written agreement with the employee on the content and duration of the protection of the business secret, technology know-how, and on the benefit and the compensation obligation in case of violation by the employee." NDA must include at least the following contents: i) A list of trade secrets and technical know-how; ii) Scope of using trade secrets and technical know-how; iii) Duration of protection of trade secrets and technical know-how; iv) Methods of protection of trade secrets and technical know-how; v) Rights, obligations, liabilities of the employer, employee during the duration of protection of trade secrets and technical know-how; vi) Actions against breaches of the arrangement for protection of the trade secret and technical know-how.

In case enterprises still want to sign the NCA with the employees, enterprises should pay attention to the following contents so that this agreement can be accepted by the Court:

First, enterprises should specify the NCA in a document separate from the labor contract; in other words, the NCA should not be specified as a provision in the labor contract or the labor contract annex. Because if NCA is regulated in a labor contract, the Court will likely consider it from the perspective of labor law instead of a civil agreement from the perspective of civil law.

Second, enterprises should set a reasonable validity period and scope's application of NCA.

Third, enterprises should specify that employees will be compensated or get advantages for completing NCA. This confirms the voluntary will of employees when they agree to receive compensation to give up their rights rather than being compelled to sign an NCA.

Fourth, enterprises should not completely prohibit employees from working for a third party. Because the right to freedom of work is a human constitution, it is illegal to prohibit employees from working for a third party. Instead, enterprises may prescribe the legal responsibilities that employees must suffer when they violate the agreements in the NCA. Thus, enterprises can both require the employees to pay fines or compensation and confirm that the NCA is a civil agreement.

Above is an article about ***"Non-compete agreement – How to perform it in accordance with the law?"*** sent by TNTP to Readers. Hope this article will help you.

Best regard,

The process of debt collection for businesses

Debt collection is currently one of the essential needs for businesses to maintain their stable source of capital. However, not all businesses are familiar with the process of debt collection. In this article, TNTP will analyze and provide a debt collection process for customers to refer to in their operations.

1. Negotiating with the debtor

Before taking further measures to collect the debt, the first step is to negotiate and exchange to determine the debtor's willingness to pay. Specifically, through the following ways:

1.1. Using email, and official letters to request payment

The purpose of the request for payment letter is to gauge the debtor's willingness to pay. In reality, the percentage of debtors who decide to pay back the business when the business sends a request for a payment letter is relatively low. However, this is an option worth trying because contacting through email and official letters is relatively fast and cost-effective. In addition, the request for a payment letter is also necessary evidence to create an advantage in resolving disputes at the competent state agency.

1.2. Negotiation process

The process of negotiating to recover the debt can be divided into several stages. Depending on each stage, businesses can use different negotiation skills. To negotiate with the debtor effectively, businesses can refer to some of the following skills:

> Inquiry stage: When the payment deadline is approaching and the debtor has not responded, the business can call, email, or send a letter to remind the debtor to fulfill their obligations according to the law. This stage is carried out in a gentle and sympathetic spirit towards the debtor's delay, and at the same time, the business can extend a specific payment deadline (usually within 1 week).
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> Reminder stage: After the business has extended the deadline for the debtor, but the debtor still has not fulfilled their payment obligation, the business can remind them more strongly to cooperate in resolving the debt through negotiation between the two parties. However, the business should still show goodwill and trust that the debtor will fulfill their payment obligations in full.
>
> Warning stage: If the debtor continues to fail to meet the deadline, the business needs to show a stricter attitude towards demanding payment and may indicate the legal consequences if the debtor fails to fulfill their payment obligation. This time, the business should ask the debtor to commit to payment in writing to ensure that the debtor fulfills their obligation. In case the debtor fails to fulfill the commitment, this document will be submitted to the competent court as evidence of the debtor's uncooperative attitude in resolving the debt.

In case the debtor does not cooperate in payment, the enterprise may consider filing a lawsuit at the competent dispute settlement agency.

The process of debt collection for businesses

2. Proceed to file a lawsuit in a court of competent jurisdiction or initiate arbitration

After determining that the debtor has no willingness to pay the debt, the enterprise has the right to initiate legal proceedings to request the court or arbitration to resolve the dispute and recover the debt from the debtor if three conditions are met simultaneously: (i) a debt arises and the debtor does not repay it as promised, leading to a dispute, and the enterprise believes that its rights and interests have been infringed; (ii) the dispute between the enterprise and the debtor must fall within the jurisdiction of the court or arbitration, not any other agency or organization; (iii) in some cases, if there is an agreement or mandatory legal regulations that require pre-litigation procedures such as conciliation, negotiation, notification, etc., the enterprise must complete those procedures before requesting the competent authority to settle the dispute between the enterprise and the debtor.

Litigation can be costly, time-consuming, and require effort, so the enterprise needs to consider whether the benefits are worth the debt that can be recovered. From there, the enterprise can proceed to file a lawsuit in a court of competent jurisdiction or initiate arbitration as provided by law.

Best regard,

Resolving disputes in the field of business and commerce: Choosing Arbitration or Court?

In recent years, disputes in the line of business and commerce have been increasing. To minimize damage, the parties shall choose a dispute resolution suitable to their business and production situation. Accordingly, when a dispute occurs, the parties can choose the following resolution methods: Negotiation, conciliation, arbitration, or court. In case negotiation or conciliation is unsuccessful, the parties will have to consider resolving the dispute at an arbitration agency such as Arbitration or Court. In this article, TNTP will present some characteristics of these two methods so that the parties have more basis to choose the appropriate dispute resolution.

1. Dispute resolution in Court

Firstly, in nature, resolving disputes by the Court is through the operation of the judicial apparatus and on behalf of state power to issue judgments or decisions that force the parties to carry out their obligations, even by physical force. When a dispute occurs, one of the parties can sue in court to protect their legitimate rights and interests. However, before submitting a lawsuit in Court, the plaintiff needs to determine whether the Court has jurisdiction and whether the parties have an arbitration agreement or not. In case the parties have an arbitration agreement but still sue a lawsuit in Court, the Court will refuse to accept the case, unless the arbitration agreement is invalid or the arbitration agreement cannot be performed.

Secondly, dispute resolution by the Court shall follow the two-level adjudication regime (first instance, appeal,...). Accordingly, in case of disagreement with the judgment or decision of the first instance, each party has the right to appeal within the prescribed time limit

Thirdly, dispute resolution in Court must be carried out according to the principle of public trial. In special cases where it is necessary to keep State secrets, preserve the nation's fine customs and practices, protect minors, or keep professional secrets, business secrets, and personal secrets of the involved parties at their legitimate claims, the Courts may conduct the trials behind closed doors (Article 15 of the Civil Procedure Code 2015).

Resolving disputes in the field of business and commerce: Choosing Arbitration or Court?

2. Dispute resolution at Arbitration

Firstly, the Arbitration method allows parties to resolve disputes quickly, simply, conveniently, and in accordance with the psychology of businesses. However, Arbitration fees are often higher than court fees. In the case of reimbursement of arbitration fees, depending on the regulations of each Arbitration Center, the reimbursement fee may not be equal to the Court's refund fee.

Secondly, the disputing parties have the right to choose an arbitration body. If initiating a lawsuit in Court, the plaintiff must submit a lawsuit at a Court with jurisdiction according to the provisions of the Civil Procedure Code 2015. For cases resolved in Arbitration, the parties can agree to any arbitration centre or arbitrator to resolve the dispute. For instance: The disputing parties all have their business headquarters in Hanoi city, so to facilitate dispute resolution, the parties agreed to choose an arbitration center in Hanoi city to resolve the dispute.

Thirdly, regarding information confidentiality: Dispute resolution by Arbitration is carried out on the principle of non-publicity unless the parties agree otherwise. Therefore, a closed trial at Arbitration can minimize negative effects on the reputation and business activities of the disputing parties.

Fourthly, the trial at Commercial Arbitration only takes place at one level of trial, the arbitration award is final and binding on the parties. Thus, resolving disputes by Arbitration will save time and money for the parties as they do not have to continue resolving the dispute at the appellate level like in Court. However, the arbitration award can be annulled according to cassation procedures.

With the contents analyzed above, depending on the production and business situation, the parties should choose the method of dispute resolution by Court or Arbitration when there is a dispute in the field of business and commerce. However, the parties need to pay special attention and remember that the prerequisite for resolving disputes by commercial arbitration is that the parties must have an arbitration agreement, and must ensure that this agreement is legally valid and can be done.

Above is the content of the article ***"Resolving disputes in the field of business and commerce: Choosing Arbitration or Court?".*** Hope the above article is useful for those interested in this issue.

Best regards,

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Dispute Settlement And Debt Collection