

Top IT executives joining competitors without adhering to cooling-off period

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Synopsis

Many top-level Indian IT executives are switching to rival companies without adhering to any cooling-off period. Non-compete clauses in their employment agreements are not legally enforceable in court, which is why they don't concern these executives. However, companies have non-compete agreements to protect confidential deal terms and competitive business data.



Representative image.

Many top-level Indian IT executives are transitioning to rival companies without adhering to any cooling-off period. According to HR consultants, most of them may have non-compete clauses in their employment agreements, but this doesn't seem to concern them because these clauses are not legally enforceable in court, reported TOI.

In the past, executive contracts used to include non-compete obligations lasting from 6 to 12 months.

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Less than three months after leaving Infosys as president, Ravi Kumar became the CEO of Cognizant. Soon after leaving the former, Mohit Joshi, another president of Infosys, joined Tech Mahindra. Jatin Dalal, who left Wipro as CFO a few days ago, is most likely going to start the new year off as CFO of Cognizant. At least a dozen other senior executives have moved to rival companies in a like manner.

These executives have access to confidential deal terms such as pricing, client milestones, financial commitments, post-acquisition integration, penalty clauses, and competitive business data that can move the market. Companies have non-compete agreements because of this.

Law firm Nishith Desai Associates says courts in India frown upon any form of post-employment restraint, as such restraints are considered to limit the economic mobility of the employees, thereby limiting their personal freedom of choice of work/livelihood.

Pooja Ramchandani, partner for employment, labour, and benefits in law firm Shardul Amarchand Mangaldas, says the obligation of non-compete cannot extend beyond the term of employment. "This is because the Indian Contract Act 1872 prohibits any agreement which is in restraint of trade. Therefore, any obligation of non-competition which extends beyond the term of employment is void ab initio and not enforceable. This principle has been upheld in a plethora of judgments. Even in cases where there is a monetary consideration for non-compete, an employee cannot be restrained

from joining a competitor and the only relief that may be claimed is damages if there is a loss. That said, non-compete provisions still found place in employment contracts especially of senior level employees. The provisions usually acted as a deterrent factor when conjoined with non-disclosure and non-solicitation obligations,” she says.

A non-solicitation provision forbids former employees from engaging in business against the company's interests with its customers or employees.

According to Ramchandani, parties to a contract are aware of the viability of the non-compete and non-solicitation clauses. "As a result, these obligations have seen a change in its applicability and enforcement," she says. However, she says non-solicitation and non-disclosure agreements can be upheld after the employment has ended as long as they are reasonable.

Vikram Shroff, head of HR law at Nishith Desai Associates, says the general trend was to contractually impose longer notice periods and even place the employee on garden leave to keep him or her away from customers. “However, in recent times, some employers have allowed the employee to leave the company even before completion of notice period, for various reasons including saving employee costs and avoiding negativity at the workplace. Over time, employers have become better equipped to handle employee departures by ensuring seamless transition of customers and having alternate resources take over the role quickly, besides having robust documentation and using technology,” he says.

Last year, Microsoft said they are removing non-competition clauses from its US employee agreements and will not enforce existing non-competition clauses in the US, except for Microsoft’s most senior leadership (partners and executives).

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Shriram Subramanian, founder of corporate governance firm InGovern Research Services, says IT firms seem to have crunched the notice period itself as business processes have moved beyond a practical need for a notice period. "Most companies would already have succession planning for unplanned departures, and business continuity plans ensure that the companies and clients are not dependent on one person leaving the company. Also, in IT services, it is not easy for a client to switch from one vendor to another. So, as long as companies have robust succession planning in place across all levels, the key risk is mitigated,” he says.

(With TOI inputs)

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