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POST GOVERNMENT EMPLOYMENT WAITING PERIOD AGREEMENT AND ORGANISATION OF DUTIES AT THE BEGINNING AND END OF EMPLOYMENT

1 SCOPE OF APPLICATION, PURPOSE AND OBJECTIVE OF THIS INSTRUCTION

This instruction is applied when filling public administration posts and civil services, whose duties require a waiting period agreement as specified in section 44 a of the State Civil Servants' Act, as well as when a civil servant transfers to such duties during a public administration posting. The instruction also applies to the organisation of a civil servant's duties at the beginning and end of his or her employment.

As a rule, the transfers of Civil servants from Government employment to new or other duties can be considered unproblematic. However, an authority may have a justified reason to prevent information protected by secrecy or other provisions limiting its publicity and the related knowledge from being exposed to parties outside the Government.

The purpose of the instruction is to emphasise the obligation of agencies and ministries to consider the need for a waiting period agreement as part of their appointment process or when transferring a civil servant to new duties. The objective of the instruction is to protect the public interest and the impartiality of the civil servant as well as to prevent possible corruption when civil servants move to the private sector. The purpose of the instruction is also to provide instruction to agencies and ministries on how to ensure that their waiting period agreements are sufficiently detailed.

A civil servant's non-disclosure obligation and prohibition of use of information classified as confidential also apply in part to the time after employment has come to an end. In addition to what is provided in section 44 of the State Civil Servants Act and this instruction, all other provisions concerning civil servants shall be taken into account.

- Pursuant to section 17 of the State Civil Servants Act, a civil servant's non-disclosure obligation is valid as provided in the Act on the Openness of Government Activities (621/1999) and other legislation.
- The grounds for disqualification of an official are provided on in chapter 5, section 28 of the Administrative Procedure Act (434/2003).
- Chapters 16, 30, 40 and 51 of the Criminal Code of Finland provide on the giving of bribes, business offences, business espionage, offences in office and the abuse of insider information.
- Section 4 of the Unfair Business Practices Act provides on the unjustifiable obtaining of information regarding a business secret and the prohibition on the unjustifiable use and revelation of information acquired in this manner.

Chapter 3, section 5 of the Employment Contracts Act on an agreement of non-competition and, where relevant, sections 2 and 5 of this instruction are applied to the employed personnel.

2 ORGANISING OF DUTIES AT THE BEGINNING OF EMPLOYMENT

A civil servant's relationship with his or her former employer and the resulting possible grounds for disqualification must be taken into account when a new person steps into a civil servant position. According to the general clause in the Administrative Procedure Act concerning grounds for disqualification an official shall be disqualified, if his or her impartiality is compromised for a specific reason (Administrative Procedure Act 434/2003, section 28.1, paragraph 7).

On the basis of the above, an official must not handle matters concerning his or her former employer or a partner or competitor of his or her former employer which can compromise the impartiality of the official. When organising the tasks of an official, his or her former employer will be taken into account for at least a period of six months from the beginning of his or her employment.

The person appointed as an official may also only have left the employment of another employer temporarily meaning he or she may or will return to their former employer's employment. Pursuant to the Administrative Procedure Act, an official is disqualified if he or she is in service with or in a pertinent commission relationship to a party or a person due to gain specific benefit or suffer specific loss from the decision of the matter (Administrative Procedure Act, section 28.1, paragraph 4). The Committee on Ethics of State Civil Servants gave recommendations on these situations in its report (Ministry of Finance publications 3/2014):

If the individual has been given the option of returning to his or her former position, the authority must be notified of this and the individual must refrain from taking part in matters concerning this background employer for the option period and for the following cooling-off period.

The duties of a civil servant must in this case be organised in a manner that ensures the civil servant does not handle matters that apply to these parties during the period of possible return or for the six months following this.

Before a person proposed for the highest ranking civil servant positions referred to in Section 26, paragraphs 1 - 4 of the State Civil Servants' Act can be appointed, the person must submit a declaration of interest (section 8 a of the State Civil Servants' Act), which can be of importance when assessing his or her ability to carry out the duties of the public post to be filled.

3 POST GOVERNMENT EMPLOYMENT WAITING PERIOD AGREEMENT

3.1 General

A waiting period agreement is an agreement based on section 44 a of the State Civil Servants' Act, which the authority and the person proposed for a post or a civil servant who transfers to new duties during his or her employment enter into. When the conditions set for drawing up such an agreement are met, the authority considers and decides on whether the duties in question require the drafting of a waiting period agreement in practice.

The authority that draws up a waiting period agreement is the same agency to which the person has been proposed for appointment in or whose civil servant is changing duties. With regard to the civil servants referred to in section 26 of the State Civil Servants' Act, the authority that draws up the agreement is the ministry which pursuant to the Government Act (175/2003) prepares the appointment.

A waiting period agreement must be drawn up before a person is appointed to an official post or during a post before a civil servant is transferred to duties that require a waiting period agreement.

A waiting period agreement is an agreement on a specified period after the end of employment during which the authority has the possibility of limiting the civil servant's right to take on other employment or another position outside of Government or to engage in business or self-employment or other activities that can be considered gainful employment.

A temporary restriction on transfers will enter into force if the authority determines that the civil servant has the possibility of using the information protected by the waiting period agreement to his or her benefit when leaving government employment and taking on duties in another sector.

3.2 Needs assessment, conditions and target group for a post government employment waiting period agreement

An authority must assess the need for a waiting period agreement case-by-case for each person proposed for an official post and civil servants who transfer to other duties during a term of employment:

- 1) when his or her post, duties or position
- 2) allow him or her access to information classified as secret or information the access to which is otherwise protected by restricting legislation, and
- 3) could be used in a fundamental manner for one's own benefit or the benefit or detriment of another in another service relationship or other undertaking.

The need for drawing up a waiting period agreement will be assessed already during the selection procedure. If the character of a duty is such that a waiting period agreement is a binding condition for employment, this will be mentioned in the job ad for the post or position. The need for a waiting period agreement must also be assessed throughout the term of employment before duties are altered.

Entering into a waiting period agreement will require that the civil servant has access to information that is protected in the post, position or duties in question. In practice, this applies to civil servants whose duties allow them access to sensitive information or information that have significant financial value. This group includes for the most part the Government's highest ranked civil servants, but also other civil servants, who handle e.g. supervisory authorities that have great financial value, public procurements or agency agreements.

Chapters 6 and 7 of the Act on the Openness of Government Activities provide on the protection of information that is classified as secret or access of which is limited with other provisions, the related secrecy obligation, and the prohibition on use.

When considering whether information is used in a fundamental manner for one's own or another's benefit, matters such as whether the civil servant can benefit from the information he or she has on competing companies or the conditions or markets of the field in question. Other matters that should be taken into consideration include whether the civil servant has information that the companies in the field do not generally have and whether the nature of the information is such that it has only been accessible to people in official status. The right of an individual to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice provided in section 18, subsection 1 of the Constitution of Finland should also be taken into consideration in this assessment.

3.3 Conditions for appointment or transfer to new duties

If a civil servant's duties necessitate a waiting period agreement, the authority can set entry into a waiting period agreement as a condition for appointing to an official post or for transferring to new duties (section 44 a, subsection 2 of the State Civil Servants' Act). However, section 44 a of the State Civil Servants Act does not obligate the applicant or civil servant in these situations to enter into a post Government employment waiting period agreement. Declining from entering into an agreement can however be considered grounds for not appointing a person to a post or for not transferring a civil servant to new duties.

3.4 Disputes on the content of the agreement

A waiting period agreement is a contract government by public law. A party to the agreement may request that the Administrative Court examine and resolve a dispute concerning the content of such an agreement as an administrative dispute.

4 TERMS OF AGREEMENT AND ENTRY INTO FORCE OF COOLING-OFF PERIOD

4.1 Content and entry into force of the cooling-off

The key purpose of a waiting period agreement is to agree on the cooling-off period that will take force after the civil servant's employment comes to an end (section 44 a, subsection 1 of the State Civil Servants' Act). The authority then has an agreement-based opportunity to limit the civil servant's right to take on employment with another employer or another task or position outside of Government or to undertake self-employment or a comparable activity. Other activities can include working as a managing director or as a professional board member.

The waiting period agreement must include an agreement on the content of the restrictions that apply to the cooling-off period:

Content of restrictions for the cooling-off period: A civil servant cannot transfer during the cooling-off period to the employment of another employer, begin business activities or other comparable activities.

The contractual term on the cooling-off period enters into force when according to the assessment of an authority a civil servant can utilise information that is protected by the waiting period agreement for his or her own benefit or to the benefit or detriment of another (section 44 a, subsection 2 of the State Civil Servants' Act).

The entry into force of the cooling-off period can be agreed on in e.g. in the following manner:

Entry into force of cooling-off period: The contractual term on the cooling-off period enters into force when according to the assessment of an authority a civil servant can utilise information that is protected by secrecy or restricted access for his or her own benefit or to the benefit or detriment of another, which the civil servant has had access to in the scope of his or her post, position or related duties.

If the assessment by the authority finds that the civil servant is either directly or after the end of employment during the period he or she is under obligation to notify taking on employment with an employer or taking on other duties where the civil servant could utilise the information protected by the post Government employment waiting period agreement, the agreement's provision for a cooling-off period enters into force.

The authority may reach the conclusion in its assessment that the civil servant's upcoming duties do not require a cooling-off period or the activities of the authority pose no need for a cooling-off period. In this case, the civil servant is not restricted from working under the employment of a new employer or in other duties and the authority will not be obligated to pay him or her compensation for the cooling-off period.

The waiting period agreement does not obligate the civil servant if his or her employment comes to an end for a reason due to the authority, i.e. the official post is terminated under section 27 of the State Civil Servants' Act (production or finances-based reasons). If the a civil servant's employment comes to an ends for a reason such as the end of a fixed-term posting, the termination of an official post during a probationary period or resignation from an official post at the decision of the civil servant, the waiting period agreement shall bind the civil servant. Similarly, the agreement will bind the civil servant if the civil servant resigns from the official post for a reason independent of the authority.

4.2 Obligation to notify

The civil servant that has entered into the waiting period agreement has a statutory obligation to notify the authority during his or her employment or during a period of time equal to a cooling-off period after his or her employment has come to an end of a transfer to new duties (section 44 a, subsection 4 of the State civil Servants' Act). The waiting period agreement must specify that the civil servant must submit written notice of this to the address given by the authority in its contact details.

The waiting period agreement shall include information on a civil servant's obligation to notify and specify the way in which a notification is submitted, e.g.

Obligation to notify: The civil servant must notify the authority during his or her employment or during the period equal to a cooling-off period after his or her employment has come to an end on taking on new employment or duties or on undertaking self-employment or other activities (section 44 a, subsection 4 of the State Civil Servants' Act).

The notification must be submitted to the address supplied by the authority in its contact details. The party sending the notification will be responsible for ensuring it is delivered.

4.3 Carrying out an assessment of a cooling-off period

In order to carry out an assessment on the entry into force of a cooling-off period, the authority must hold a dialogue on the matter with the civil servant who is transferring to other duties or resigning or must give the civil servant the opportunity to be heard in writing on the topic. The same applies when an authority receives notification from the former civil servant during the period of time equal to a cooling-off period on new employment he or she is undertaking.

The dialogue or a hearing must be documented in writing by drawing up minutes or a memorandum. The authority's assessment on whether there is a need for a cooling-off period and the grounds for this will be attached to the memorandum or minutes. The memorandum or minutes and the assessment by the authority on the necessity of the cooling-off period will be given to the civil servant.

The authority must carry out an assessment on the entry into force of a cooling-off period as soon as possible after receiving word of the civil servant's intention to take on new duties. If the civil servant receives word of the entry into force of the cooling-off period only after reigning during his or her notice period, the authority may give the civil servant the opportunity to cancel his or her resignation pursuant to section 28.2 of the State Civil Servants' Act.

4.4 Payment of compensation

Compensation related to a waiting period agreement will only be paid if the cooling-off period enters into force. When his or her employment comes to an end, the civil servant is paid a compensation sum equal to his or her regular working hours salary for the time of his or her cooling-off period. The compensation is paid in monthly instalments. This is an agreement-based compensation sum not a salary paid for the cooling-off period. The compensation is paid from the authority's funds.

The sum and payment of compensation is agreed on in the waiting period agreement in e.g. the following manner.

Compensation paid for a cooling-off period: A sum corresponding to the civil servant's regular working hours salary shall be paid to the civil servant at the end of his or her employment if the cooling-off period mentioned in the agreement enters into force.

The compensation will be paid in monthly instalments to a bank account specified by the civil servant.

4.5 Duration of cooling-off period

A period of six (6) months will be agreed on for a cooling-off period after a civil servant's term of employment has come to an end. The waiting period agreement determines the duration of the cooling-off period, e.g.

Duration of cooling-off period: 6 months from the time a term of employment has come to an end.

At the end of a public term of employment, a shorter than agreed upon cooling-off period can also be required. The following will be taken into consideration when determining the actual length of the cooling-off period: whether the civil servant could use the information he or she has obtained during his or her employment on competing companies or on the conditions or markets of the field in question to his or her own benefit and whether the civil servant has knowledge or expertise that companies operating in the field do not generally have. Also the following would be considered when determining the actual duration of a cooling-off period: at what point in time would the information protected by secrecy or other legislation limiting access to them that he or she has knowledge of lose its significance which could allow it to be used in a fundamental manner for one's own benefit or another's benefit or detriment of others in a new employment relationship or undertaking.

A change to the contractual term that applies to the reduction of the cooling-off period will be added to the agreement and confirmed with a signature from both parties.

4.6 Contractual penalty

A waiting period agreement must include a provision on a contractual penalty, which may be at most double the compensation paid for the entire duration of the cooling-off period. If a contractual penalty has not been agreed on, the possible liability for damages resulting from the breach of contract will be determined according to provisions concerning compensation for damages.

A waiting period agreement must require the maximum contractual penalty sum. E.g.

Contractual penalty: If the civil servant breaches the waiting period agreement, he or she will be required to repay the authority double the sum he or she has been paid for the cooling-off period.

5 ORGANISING OF DUTIES AT THE END OF EMPLOYMENT

The reorganisation of the duties of a civil servant who is taking on employment outside of the Government may be justified already for the period of notice.

The civil servant's duties must be altered for the period of notice to ensure that the civil servant does not handle the information protected by the post Government employment waiting period agreement that the civil servant and the authority have entered into.

The reorganisation of duties for the notice period may also be justified for civil servants with whom no waiting period agreement has been concluded. In this case, the duties of the civil servant are reorganised in a way that ensures he or she does not handle information in the scope of the secrecy obligation and prohibition of use referred to in chapter 6 of the Act on the Openness of Government Activities (621/1999), which can be used for one's benefit when leaving State employment.

The reorganisation of duties does not involve relinquishment of work obligations nor a fundamental change to the duties related to one's post, but the reorganisation of duties for the notice period so as to prevent the person from possibly using the information protected by the Act on the Openness of Government Activities and the post Government employment waiting period agreement after their employment has come to an end.

6 APPROVING A LEAVE OF ABSENCE WHEN A CIVIL SERVANT LEAVES GOVERNMENT EMPLOYMENT

Pursuant to the State Civil Servants' Act, an agency shall decide at its own discretion about approving a leave of absence if the person is not directly on a leave of absence under the law or the right to a leave of absence is not based on law. A leave of absence shall not be approved if the civil servant might be disqualified for a longer period from performing his or her duties in his or her primary position with the Government due to other work he or she undertakes during the leave of absence or the general trust in the work of authorities can be said to be compromised. Civil servants do not have a subjective right to a discretionary leave of absence, which means that when a civil servant ceases to work for the Government and takes on duties in another sector, the authority that must make the decision on a leave of absence must carefully assess grounds for disqualification and the aspects related to the reliability of official services when considering whether to approve a leave of absence.

7 MEASURES TO BE TAKEN WHEN THIS INSTRUCTION ENTERS INTO FORCE

With regard to this instruction's entry into force, ministries and agencies must determine by the end of 2017 whether there is a need to enter into post Government employment waiting period agreements with some civil servants that hold official posts. Pursuant to the entry into force provision in section 44 of the State Civil Servants' Act, a waiting period agreement can be entered into with an appointed civil servant before the provision that applies to it enters into force. If there are civil servants who have not signed a waiting period agreement working in an agency at which the aforementioned conditions for a waiting period agreed exist, the agency must make an effort to enter into a waiting period agreement with these civil servants. However, a civil servant is not obligated in these situations to enter into an agreement and a post Government employment waiting period agreement is not a condition for continuing in an official post.

8 PROVISIONS THAT APPLY TO THE TOPIC

Constitution of Finland (731/1999)

According to section 18, subsection 1 of the Constitution of Finland, everyone has the right to earn his or her livelihood through the employment, profession or commercial activity of his or her choice.

State Civil Servants' Act (1994/750)

According to section 8 a, subsection 1 of the State Civil Servants' Act the person proposed for appointment to a post referred to in section 26, paragraphs 1 - 4 must submit a report on his or her business activities, ownership in companies and other assets, duties unrelated to the post as well as other private interests, which may have an impact on his or her ability to perform the duties of the post to be filled before he or she can be appointed. With regard to the outside employment referred to in section 18 that requires an outside employment permit the notification must include information on gained income.

Pursuant to section 17 of the State Civil Servants Act, a civil servant's non-disclosure obligation is valid in the manner provided in the Act on the Openness of Government Activities and other legislation.

According to section 28 of the State Civil Servants' Act, a civil servant can cancel their resignation, if the authority gives them permission to do so.

Pursuant to section 44 of the State Civil Servants' Act, the authority may enter into a written agreement with a person proposed for appointment to a post or position prior to their appointment or with a civil servant prior to their transferring to new duties that will restrict for a determined period of time the civil servant's right to take on employment with another employer or undertake business or self-employment activities or other comparable activities (post Government employment waiting period agreement).

Act on the Openness of Government Activities (621/1999)

Chapter 6 of the Act on the Openness of Government Activities provides on the grounds for secrecy and non-disclosure obligations, the relation between the two obligations as well as the prohibition on use for information that is classified as secret. Section 22 of the Act includes the basic grounds on the secrecy of documents and the content of the obligation to secrecy. Section 23 provides on the basic grounds of the non-disclosure obligation as well as the prohibition on use.

The secrecy obligation for documents includes a clause forbidding civil servants from showing secret documents, or a copy or print-out thereof to third parties. The non-disclosure obligation in turn for the most part applies to the behaviour of a civil servant. It prohibits civil servants from disclosing information regardless of whether this information is saved or not. Disclosing refers to both active and passive disclosure such as leaving a document where a third party has access to it. Information included in the scope of the obligation to non-disclosure can be from documents or verbally receive information. The obligation to non-disclosure is thus broader in scope than the obligation to maintain the secrecy of documents. The non-disclosure obligation includes a prohibition of use. A person who is under a non-disclosure obligation cannot use information classified as secret for his or her own or another's benefit. The use of information to the detriment of another is also within the scope of the prohibition on use.

Section 23, subsection 1 provides on the scope of time for which the non-disclosure obligation is in place. According to the section, information included in the scope of the non-disclosure obligations cannot be disclosed even after the activity that the information refers to or the performance of a duty by the authority that the information refers to has come to an end. The aforementioned prohibition is further specified in the preparatory work for the Act on the Openness of Government Activities (HE 30/1998). According to the preparatory work, a non-disclosure obligation will continue even after a service relationship, term in a position of trust, the performance of a commission or acting as an authority has come to an end.

Thus, a non-disclosure obligation will continue even after a service relationship or duties have ended as long as the information is classified as secret. No similar continuity has been provided on a prohibition on use.

Administrative Procedure Act (434/2003)

Chapter 5, section 28 of the Administrative Procedure Act provides on the grounds for the disqualification of a civil servant. A civil servant shall be disqualified if:

- 1) he or she or a close person is a party to the matter;
- 2) he or she or a close person assists or represents a party or a person due to gain specific benefit or suffer specific loss from the decision of the matter;
- 3) a specific benefit or specific loss from the decision of the matter is foreseen for him or her or a close person as referred to in subsection 2, paragraph 1;
- 4) he or she is in service with or in a pertinent commission relationship to a party or a person due to gain specific benefit or suffer specific loss from the decision of the matter;
- 5) if he or she or a close person as referred to in subsection 2, paragraph 1 is a member of the board, supervisory board or a corresponding organ of, or the managing director or in a comparable position in, a corporation, foundation, state enterprise or institution that is a party or that is due to gain specific benefit or suffer specific loss from the decision of the matter;
- 6) he or she or a close person as referred to in subsection 2, paragraph 1 is a member of the executive body or a corresponding organ of an agency or institution, where the matter pertains to the supervision or oversight of the agency or institution; or
- 7) his or her impartiality is compromised for another special reason.

Criminal Code of Finland (1889/39)

Provisions on bribery, business offences, business espionage and official offences as well as regulation of abuse of insider information contained in Chapters 16, 30, 40 and 52 of the Criminal Code of Finland are also related to the topic area.

Chapter 30, section 5 of the Criminal Code of Finland provides on the violation of business secrets. According to the provision, a violation of business secrecy is in question when a person who, in order to obtain financial benefit for himself or herself or another, or to injure another, unlawfully discloses the business secret of another or unlawfully utilises such a business secret. According to the section, a person may have gained knowledge of the secret while in the service of another, while acting as a member of the administrative board or the board of directors, the managing director, auditor or receiver of a corporation or a foundation or in comparable duties. Pursuant to Chapter 30, section 5, subsection 2 of the Criminal Code of Finland, the obligation to secrecy does not apply to an act that a person has undertaken after two years has passed since his or her period of service has ended.

Chapter 40, section 5 of the Criminal Code of Finland provides on the breach of official secrecy and the negligent breach of official secrecy. According to the provision, a civil servant is guilty of a violation of official secrets if he or she during his or her employment or subsequently intentionally and unlawfully reveals a document or information that is classified as secret pursuant to the Act on the Openness of Government Activities or another Act classified or which cannot be published or used for one's own or another's benefit or the detriment of another. A civil servant must be sentenced to a fine or imprisonment for at most two years for the breach of official secrecy. A civil servant can be sentenced to dismissal from his or her position if the offence demonstrates that he or she is manifestly unfit for the involved duties. A civil servant can be sentenced to a fine or imprisonment for a period of at most six months for the negligent breach of official secrecy.

Unfair Business Practices Act (1061/1978)

Section 4 of the Unfair Business Practices Act provides on the unjustifiable obtaining of information regarding a business secret and the prohibition on the unjustifiable use and revelation of information acquired in this manner. The Act does not limit the time for which a business secret is protected.

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