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Employment Agreements: Employers Need To Pay Attention to Growing Government Activism

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In the past, employers typically only needed to be concerned that confidentiality and non-compete clauses in their employment agreements may be challenged either by departing employees who want to work for a competitor or by a competing company attempting to hire an employee or former employee. That tide is changing as an increasing level of government scrutiny has been directed at these employee restrictive covenants. Recently, federal and state agencies have been challenging the enforceability of confidentiality provisions and non-competes that the agencies claim are not supported by legitimate business interests. Given this change-in-tide and the New Year, now is the perfect time for employers to engage counsel to review their confidentiality and non-compete provisions.

Non-Compete Agreements

Non-complete agreements have perhaps received the most amount of new attention. The White House has led the charge in 2016 with a series of actions beginning with an Executive Order requesting federal agencies to find ways to increase economic competition in April, to a report analyzing the use of such agreements in May, to a Call to Action document in October urging state policymakers to increase transparency and fairness in the use of non-compete agreements, including by adopting outright bans on these agreements for certain categories of workers. Similarly, in March, the Department of the Treasury published a report detailing the effects of non-compete agreements and urging reform.

Individual states also have taken action on this front. For instance, New York Attorney General Eric Schneidermann has been investigating companies in a range of industries for purportedly improper and overly broad use of non-competes. His office has issued statements that "New York law does not permit the use of non-compete agreements, except in very limited circumstances."

In one case this past June, the Attorney General Schneidermann settled a dispute with Jimmy John's, the fast food sandwich chain, for the company to remove non-compete language in employment agreements with store employees in New York. The agreement had prohibited Jimmy John's sandwich makers and delivery drivers from working at any establishment that made more than 10% of its revenue from sandwiches within a two-mile radius of any Jimmy John's location for a period of two years after leaving Jimmy John's. In announcing the settlement, Attorney General Schneidermann stated that "non-compete agreements for low-wage workers are unconscionable" because "they limit mobility and opportunity for vulnerable workers and bully them into staying with the threat of being sued." That same month, the legal news website *Law360* also entered into a settlement agreement with Attorney General Schneidermann whereby the company agreed to stop using non-compete agreements for the vast majority of its employees, including some who were in their first jobs out of college. The non-negotiable and non-waivable agreements prohibited employees from working for any media outlet that provided legal news for one year after leaving the company. Pursuant to the settlement, the company would only continue requiring the agreements for a small number of its top executives. In connection with that case, Attorney General Schnedermann stated that, "Unless an individual has highly unique skills or access to trade secrets, non-compete clauses have no place in a worker's employment contract."

Two months later, the New York Attorney General entered into a settlement agreement with a national medical information services provider, Examination Management Services, Inc. (EMSI). Prior to the settlement, EMSI had used mandatory non-compete agreements that prohibited its employees from working with any of its competitors within fifty miles of where the employee worked for a period of nine months after the employee left EMSI. The restriction was particularly onerous since most EMSI employees traveled frequently for work. The New York Attorney General's Office noted that these agreements were being used whether or not the employee had access to trade secrets or other sensitive information. Like in the other cases, Schneidermann stated that "Restricting rank-and-file workers from being able to find other jobs is unjust and inappropriate."

New York is not the only state to have acted. This summer, Illinois Attorney General Lisa Madigan likewise challenged Jimmy John's use of non-competes, alleging the provisions violated the Illinois Consumer Fraud and Deceptive Practices Act because they were a "restraint of

trade," which decreased worker mobility. In early December, Jimmy John's reached a settlement in the case, agreeing to pay $100,000 to the Illinois Attorney General's Office and ask their franchisees to remove the disputed non-competes from any existing employment agreements. The company also agreed to only use such agreements in compliance with Illinois law in the future.

Some states have even passed new laws restricting the use of non-compete agreements. For example, the Illinois Freedom to Work Act, which was signed into law this August and went into effect January 1, 2017, bans non-compete agreements for all workers making less than $13 an hour. The Utah Post-Employment Restrictions Act, which became law in March, limits the duration of new non-compete agreements and restricts their use in certain situations. In Connecticut, a new law signed in June places severe limitations on the use of non-compete agreements with physicians.

Non-Disclosure of Confidential Information Agreements

Separately from non-compete agreements, confidentiality clauses also have come under attack by governmental agencies, including the Securities and Exchange Commission (SEC) and the National Labor Relations Board (NLRB). While each agency focuses on different policies and, thus, different aspects of these agreements, each have challenged confidentiality provision claiming that they are not enforceable because they are not tied to a legitimate business purpose and/or violate statutory rights.

The SEC recently has started challenging confidentiality agreements, claiming that they violate the Dodd-Frank Act because they purportedly impede whistleblowing activities related to possible securities law violations. In October 2016, the agency issued a "National Exam Program Risk Alert," notifying relevant companies that "Recent [SEC] Enforcement actions have identified certain provisions of confidentiality… agreements required by employers" as violating the Act. The SEC's alert "encouraged" companies to evaluate their documents and ensure that they did not violate the Act.

While the NLRB's focus on confidentiality clauses began a couple years ago, it has increased its scrutiny recently. The NLRB challenges confidentiality provisions that it claims violate the National Labor Relations Act by restraining an employee's right to engage in "protected concerted activity," including the rights to self-organize, to participate in labor organizations, to bargain collectively, and to engage in other concerted labor activities. The agency has successfully challenged confidentiality clauses as unlawful employer interference with these rights where such clauses prohibited employees from discussing employment-related issues such as wages, benefits, terms and conditions of employment, and disparagement of the employer. Requiring employees to keep internal investigations confidential can also be seen as improper interference.

In one representative case, the NLRB went after Quicken Loans alleging that the confidentiality agreements violated the Act by prohibiting employees from disclosing certain personnel information unless authorized by the Company. The case eventually reached the D.C. Circuit, which agreed with the NLRB because it found the agreement could reasonably be viewed as coercive by employees.

Additionally, perhaps spurned on by its successes, the NLRB has expanded its activities into sectors it did not historically regulate. For instance, in June, 2016 the NLRB filed a Complaint against Bridgewater Associates, the world's largest hedge fund, challenging, among others, the confidentiality clause in the company's employment agreement. The NLRB's action was prompted by a sexual harassment claim filed by a Bridgewater employee with the Connecticut Commission on Human Rights and Opportunity. The employee had alleged that he had been harassed for months, but had remained silent because the company's environment was like a "cauldron of fear and intimidation." The employee was indefinitely suspended shortly after filing his claim. The NLRB withdrew its complaint on October 28, 2016. While it had been reported that Bridgewater had engaged in settlement negotiations prior to the NLRB withdrawing its complaint, it is not clear whether a settlement was reached as none has been reported.

What An Employer Should Do In This Changing And Hostile Climate

Employment agreements tend to be broadly drafted and used. This is because, oftentimes, employers take an "everything but the kitchen sink" approach on the theory that more is better to protect the company line without considering the specific circumstances of each employment relationship. Other times, employers use similar agreements for a large number of their employees regardless of locations or job duties simply because it is easier or there does not seem to be any need to vary the agreements. However, companies who continue to use such broad agreements and ignore the changing and increasingly hostile climate do so at their own risk. The New Year is a great time for reevaluating the scope or necessity of confidentiality and non-compete provisions.

To assist companies in conducting this review, there are certain questions companies can consider to see if their non-competes and confidentiality agreements pass a basic smell test.

- Are all or most employees being required to sign an agreement containing a non-compete or confidentiality provision?
- Are non-compete or confidentiality provisions required without regard to the specific skill sets or job descriptions of individual workers?
- Are low-wage and entry level employees being forced to sign agreements with non-competes or confidentiality provisions?
- Are non-competes being used for employees without highly specialized skills?
- Are confidentiality agreements or non-competes required even if employees will not be exposed to trade secrets or other sensitive confidential business information?
- Are the confidentiality restrictions so broad that they can be construed as interfering with protected concerted activity?

If the answer to any of these questions is "yes," it would be wise to revisit your employment agreements. ▫