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ALERT

August 2021

Are Non-Competes Headed For Extinction?

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Regulation of non-competition agreements or provisions has traditionally been governed by state law. As set forth below, however, a new Executive Order may signal that change is coming on the federal level.

Background

A non-compete clause or provision ("Non-compete") typically restricts an individual's entitlement to work for their former employer's competitors (however narrowly or broadly defined) or operate their own competing business both during and after leaving employment. Non-competes vary in duration and geographic scope and may be part of a standalone agreement, a larger employment agreement, or a narrower set of restrictions.

States laws regarding Non-competes vary widely. Where Non-competes are permitted, a well-crafted Non-compete should strike a balance to protect the interests of an employer without unlawfully limiting an employee. As a general proposition, where Non-competes are permitted by law, courts generally recognize that employers have a legitimate interest in protecting their confidential or proprietary information, customers and existing employees.

Non-competes Under New York Law

In New York, Non-competes are permissible, so long as they are reasonable in duration,[1] geographic area,[2] and reasonably tailored to protect an employer's legitimate interests.[3]

A Non-compete must be "no greater than required for the protection of [the employer's] legitimate interests."[4] Cognizable employer interests include the "(1) protection of trade secrets, (2) protection of confidential customer information, (3) protection of the employer's client base, and (4) protection against irreparable harm where the employee's services are unique or extraordinary."[5]

Under New York law, a Non-compete is reasonable "only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public." BDO Seidman v. Hirshberg, 93 N.Y.2d 382, 388–89 (1999). Thus, a Non-compete will be enforced if it is reasonably limited as to time, geographic area, and scope, is necessary to protect the

employer's interests, is not harmful to the public, and is not unduly burdensome.[6] While the reasonableness inquiry is fact based, New York courts have routinely found one-year restrictions to be reasonable,[7] and have also found restrictive covenants of two years not to be "unduly burdensome."[8]

Other States' Laws

As noted, laws governing Non-competes vary widely among states. Some states, such as California[9] and Oklahoma[10] have outright banned Non-competes. Other states, like Montana,[11] North Dakota,[12] and Washington[13] tightly restrict the use of Non-competes, permitting them only in specific circumstances. It is expected that several other states or jurisdictions will follow that trend, such as Washington D.C., which recently passed the Ban on Non-Compete Agreements Amendment Act of 2020.[14]

President Biden's July 9, 2021 Order

On July 9, 2021, President Biden signed the Executive Order on Promoting Competition in the American Economy (the "Executive Order" or the "Order"), which encourages the Federal Trade Commission ("FTC") to work with the Department of Justice ("DOJ") to "curtail the unfair use of non-competes and other clauses or agreements that may unfairly limit worker mobility" in an attempt to further the regulation of anticompetitive conduct.[15] The Order and accompanying Fact Sheet highlight the following recommendations from the President:

- Encouraging the FTC to ban or limit non-compete agreements.
- Encouraging the FTC to ban unnecessary occupational licensing restrictions that impede economic mobility.[16]
- Encouraging the FTC and DOJ to strengthen antitrust guidance to prevent employers from collaborating to suppress wages or reduce benefits by sharing wage and benefit information with one another.

The Order then explains why, in its view, these actions would benefit the healthcare, transportation, agriculture, internet service, technology, and banking and consumer finance industries.

While the Order itself does not ban or limit the scope of existing Non-competes, it is a directive to the FTC and DOJ do so, and thus we can expect that the organizations will respond to the Order in some form.

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Employer Takeaways

To date, neither the FTC nor the DOJ has acted on the President's Order. Nonetheless, as they have been directed to do so, employers should begin to plan accordingly. Specifically, Employers should remain up to date on both state and federal legislation, monitor the FTC for further developments to ensure that any agreements entered into have the greatest likelihood of enforcement, and modify their Non-competes accordingly.

We will continue to monitor applicable case law and new laws, rules and regulations. If you have questions or wish to have your form documents reviewed, please contact Keith Frank at (516) 265-1181 or kfrank@moritthock.com, Jonathan Trafimow at (516) 880-7283 or jtrafimow@moritthock.com and Jennifer Calamia at (516) 265-1136 or jcalamia@moritthock.com.

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[1] The durational reasonableness of a non-compete agreement is judged, in part, by "the length of time for which the employer's confidential information will be competitively valuable." Estee Lauder Cos. v. Batra, 430 F. Supp. 2d 158, 180 (S.D.N.Y. 2006).
[2] Poller v. BioScrip, Inc., 974 F. Supp. 2d 204, 222 (S.D.N.Y. 2013).
[3] See, e.g. BDO Seidman v. Hirshberg, 712 N.E.2d 1220 (1999); see also Flatiron Health, Inc. v. Carson, 2020 WL 1320867 at *19 (S.D.N.Y. 2020) (quoting Int'l Bus. Machs. Corp. v. Visentin, 2011 WL 672025, at *21 (S.D.N.Y. 2011), aff'd, 437 F. App'x 53 (2d Cir. 2011).
[4] Flatiron Health, Inc. v. Carson, 2020 WL 1320867 at *19 (S.D.N.Y. 2020) (internal quotations omitted).
[5] Oliver Wyman, Inc. v. Eielson, 282 F. Supp. 3d 684, 694 (S.D.N.Y. 2017) (quoting Reed Elsevier Inc. v. Transunion Holding Co., 2014 WL 97317, at *2 (S.D.N.Y. 2014)).
[6] Ricca v. Ouzounian, 51 A.D.3d 997, 998 (2d Dep't 2008); see also BDO Seidman, 93 N.Y.2d at 388–389.
[7] Silipos, Inc. v. Bickel, 2006 WL 2265055, at *6 (S.D.N.Y. 2006) (citing Crown IT Servs., Inc. v. Koval-Olsen, 11 A.D.3d 263, 263 (2004)).
[8] Reed Elsevier Inc., 2014 WL 97317 at *8; Chernoff Diamond & Co. v. Fitzmaurice, Inc., 234 A.D.2d 200, 651 N.Y.S.2d 504, 505 (1st Dep't 1996).
[9] Cal. Bus. & Prof. Code § 16600.
[10] 15 OK Stat. § 15-219A (2014).
[11] Mont. Code Ann. § 28-2-703.
[12] N.D. Cent. Code Ann. § 9-08-06.
[13] RCW 49.62, prohibiting non-competes unless, among other things, an employee's earnings exceed one hundred thousand dollars per year, an amount to be annualized in accordance with RCW 49.62.040.
[14] D.C. Law 23-209, which became effective March 16, 2021.
[15] Executive Order, Section 5(g).
[16] The Fact Sheet notes that while there are many occupations that do require licensing, "[f]ewer than 5% of occupations that require licensing in at least one state are treated consistently across all 50 states." It contends that these irregularities among states needlessly lock individuals out of jobs and prevent mobility across states.