Restrictive Covenant and Trade Secret YEAR-END REVIEW

2021

2021 was an active year for trade secret and restrictive covenant law. 28 states introduced a total of 68 restrictive covenant bills, the United States Senate re-examined two prior restrictive covenant bills, and President Joe Biden asked the Federal Trade Commission ("FTC") to examine restrictive covenants in order to determine if certain covenants, such as non-competition agreements, can be eliminated from the legal landscape. As with most years, however, only a few of these bills and activities actually resulted in meaningful changes to restrictive covenant and/or trade secret law. Below is a summary of those changes, and a few items/issues companies should be aware of as we head into 2022.

In This Issue:

New York tries to join the other 49 states

The New York legislature introduced three restrictive bills in 2022. One of the introduced bills attempted to adopt the Uniform Trade Secrets Act so that New York would join the other 49 states in codifying its trade secret laws under one statute. The other two bills mandated that an employer provide compensation to a former employee during any non-compete period, banned restrictive covenants on anyone making less than $31,000 annually, and required the disclosure of a non-competition agreement to a prospective employee before the new employee joined the company. None of the three (3) bills made it out of the state legislature. Nevertheless, the amount of legislative activity in New York surrounding restrictive covenants and trade secrets was significant and, as such, we will be monitoring the New York legislature at the start of next year's session to see if any of these three bills are reintroduced.

Nevada trims customer non-solicits

Nevada, who enacted a non-compete statute on October 1, 2021, now bans non-competition agreements for any employee "paid solely on hourly wages." The statute also prohibits customer non-solicitation agreements unless the employee solicited the former customer while working for his/her former employer and the former employer's customer "does not want to seek the services of the former employee." Any company who does not honor these statutory limitations can be liable for the "reasonable

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attorney's fees" of a former employee who defeats an attempt to enforce a restrictive covenant and/or has a court declare the restrictive covenant unenforceable.

Oregon updates its Non-Competition Statute

Oregon's original restrictive covenant statute went into effect in 2019. The most significant provisions of the statute are a) an employer must provide a terminated employee with a signed written copy of their restrictive covenant agreement within 30 days of termination, b) a potential employee must have at least two (2) weeks before the first day of employment to consider the restrictive covenant agreement, c) restrictive covenants that are over 18 months are unenforceable, and d) only employees whose gross annual salary and commissions exceed the median family income of a four (4) person family can be subject to a non-competition agreement. The new changes to the Oregon non-competition statute, which went into effect on May 21, 2021, decreases the maximum duration of a restrictive covenant agreement from 18 months to 12 months, replaces the "family of four (4)" compensation threshold with a specific dollar amount ($100,533.00), and now bars a court from "blue penciling" or modifying any non-competition agreement that does not comply with the statute. Hence, if your agreement does not comply with the Oregon restrictive covenant statute, then the agreement is automatically void.

The District of Columbia will ban Non-Competition Covenants sometime in 2022

On January 11, 2021, Washington, D.C. Mayor Muriel Bowser signed a non-competition statute that was initially expected to become law this fall. The statute essentially forbids employers from requiring or requesting that an employee who works in the District, or a prospective employee whom the employer reasonably expects will work in the District, sign any agreement with a non-competition provision. (You can read our analysis of the D.C. statute by clicking HERE). The statute also requires employers to provide specific notice to their District employees, or those who will likely perform services in the District, that non-competition provisions in the District are banned. Finally, the statute contains a provision that allows employees to engage in competitive activities with their employer during their employment. Some District Council Members, however, have raised concerns about allowing an employee to compete with their employer during employment and, as a result, the Council is now reconsidering portions of the non-competition statute. These "concerns" and "reconsiderations" have delayed the implementation of the statute to at least April 1, 2022.

Illinois blasts through 200 years of Restrictive Covenant Law

Illinois' restrictive covenant statute is the most significant 2021 restrictive covenant legislation in the United States. It significantly transforms (and in some instances negates) over 200 years of Illinois restrictive covenant law by, among other things: a) establishing compensation thresholds for the enforcement of non-competition and non-solicitation agreements; b) requiring employers to provide the employee with "adequate consideration" at the time of signing in exchange for the restrictive covenants becoming immediately enforceable; c) mandating that employers advise potential hires, in writing, to consult with an attorney before signing a restrictive covenant agreement; and d) obligating employers to allows the new employee to have at least 14 days to consider signing the restrictive covenant agreement. (Please click HERE for our complete analysis of the Illinois restrictive covenant statute). The 14 day notice provision is similar to the notice provisions enacted by Oregon, Massachusetts, New Hampshire, Maine, Washington and Virginia but, unlike these other states, the Illinois statute also allows a former employee to recover his/her attorney's fees if the former employee defeats an employer's attempt to enforce a restrictive covenant agreement or if the former employee is successful in having their former employer's restrictive covenant agreement declared unenforceable.

President Biden by-passes Congress

As Vice President and then as a Presidential candidate, Joe Biden repeatedly expressed his skepticism about non-competition agreements. Initially, candidate and then President Biden stated that he wanted to work with Congress to enact nationwide non-competition legislation. Congress did not, however, have an *initial* (see below) appetite for non-competition legislation and, as a result, President Biden issued an Executive Order on July 9, 2021 that encouraged the FTC to analyze restrictive covenants and decide whether the FTC's statutory rule making authority under the Federal Trade Commission Act would enable the FTC to curtail the "unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility." Members of Benesch's Trade Secret, Restrictive Covenant and Unfair Competition Group, along with 50 other nationwide restrictive covenant attorneys, responded to President Biden's Executive Order and the FTC on July 14, 2021. (A copy of the July 14, 2021 letter can be viewed HERE.) The letter recommended that restrictive covenant law be left to the States, as it has been for over 200 years. Nevertheless, if the FTC attempts to regulate non-competition agreements (and there is considerable debate whether the FTC has the constitutional authority to do so), then the letter pointed out that any regulation should be limited to addressing abuses of non-competition agreements and should not be a broad prohibition of non-competition agreements.

Not much has occurred since President Biden issued the Executive Order on July 9th. The lack of activity is likely due to the FTC currently operating with only four (4) of its five (5) member commission. Pursuant to FTC rules, no more than three (3) of its members can be from the same political party. When President Biden signed his Executive Order, the FTC had three (3) Democratic commissioners and two (2) Republican commissioners. In October, however, one (1) of the three (3) Democratic commissioners was confirmed to lead the Consumer Financial Protection Bureau, which put the FTC at a two-to-two political tie. The FTC is unlikely to make any major policy moves until after a third Democratic commissioner is confirmed and "confirmation" is unlikely to happen until early 2022. The FTC has, however, scheduled virtual "fact finding" hearings for December 6th and 7th. We will attend these virtual hearings and provide an update after the hearings conclude.

Congress gets into the act—sort of

Seven (7) days after President Biden issued his Executive Order to the FTC, Senators Marco Rubio (R-FL) and Maggie Hassan (D-NH) introduced the "Freedom to Compete Act." The July 16, 2021 Freedom to Compete Act is identical to the 2019 "Freedom to Compete Act" that initially attempted to ban non-competition agreements for non-exempt workers and, later, through the "Workforce Mobility Act," attempted to ban nearly all employee non-competition agreements. Just like the 2019 version, the Freedom to Compete Act has not gained any traction in the United States Senate and, for now, Washington's focus appears to be on the Executive Order and the FTC.

If you have questions about the above state and/or federal legislation and activity, please contact SCOTT HUMPHREY, CHARLES LEUIN, or MARGO WOLF O'DONNELL.