Navigating Non-Compete Agreements in the Ever Changing Labor Market

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Recent years have seen the shift in the sands of the regulatory landscape, with more and more statutes and policies barring employers from the benefit of post-employment non-competition agreements. Non-compete agreements have typically been used to prevent employees from competing in the industry space or from interacting with certain customers or business contacts. The purpose of these agreements and clauses is to protect an employer's business models or trade secrets. In order to enforce these agreements they traditionally must be reasonable in terms of geographic and temporal scope, and serve a legitimate business interest such as protecting trade secrets or proprietary information.

Why the sudden shift? While a myriad of jurisdictions still permit the use of these agreements, the growing trend is that such agreements are prohibited as a matter of public policy. The stated reasoning for these changes is the desire to promote employee mobility, particularly for those of lower incomes.

This article highlights some of the more prominent federal and state-level prohibitions on using non-competition agreements, and provides information for states where non-competes are proscribed by statute.

Navigating these changes can be difficult, and should you have any concern about how these laws impact you or your business, please feel free to reach out to any of the Team from the Staffing Group at Becker LLC.

Federal:

On the federal level, the Federal Trade Commission (FTC) proposed a newrule on January 5, 2023 banning the use of post-employment non-compete clauses, and covers both employees and independent contractors (the "Federal Rule"). The Federal Rule prohibits the use of *de facto* non-compete clauses as well, including overly broad non-disclosure agreements that effectively precludes the worker from working in the same field post-employment.

The Federal Rule also requires that (i) the employer rescind existing non-competes and (ii) notify workers that their non-competes are no longer in effect and may not be enforced against the worker. This notification requirement is particularly onerous because it requires

that the notice be provided to the worker in an individualized communication within 45 days of rescinding the non-compete clause.

It is important to note that the Federal Rule is still proposed and is currently not in effect. Based on initial pushback, the Federal Rule is unlikely to go into effect in its current form. That said, Attorneys General from a myriad of jurisdictions, including New Jersey, California, New York, and Pennsylvania co-signed a letter to the FTC on April 19, 2023 expressing support for the proposed Federal Rule.

California:

California is famously hostile towards non-competes and only has a few statutory exceptions, including restrictive covenants entered into in connection with (1) the sale of a business; (2) dissolution or disassociation from a partnership; and (3) dissolution of or termination of a member's interest in a limited liability company.

Given the legislative landscape in California, employers would be wise to avoid entering into non-competes with California employees. As of 2024, an employer entering into or enforcing a void non-compete may be sued by employees, former employees, or prospective employees for injunctive relief, actual damages, reasonable attorney's fees and costs. Courts are also likely to analyze customer and employee non-solicitation covenants under the same framework.

In addition to the above restrictions, employers must, byFebruary 14, 2024, notify employees employed after January 1, 2022 that their existing non-compete is void (if such employee's contract includes a non-compete clause), unless a statutory exception applies. This notice must be made in the form of a written individualized communication to the employee or former employee, and must be delivered to the last known address and the email address of the employee or former employee.

Delaware:

Though non-competes are legal in Delaware, recent court decisions have made it clear that non-competes need to be drafted carefully, as courts are hesitant to modify agreements to permit their enforcement against former employees. For example, in the last 12-months, courts in Delaware have refused to (1) blue pencil or enforce an overly broad non-compete;[1] (2) apply a choice of law provision to apply Delaware law;[2] and (3) enforce a non-compete because of poor drafting.[3]

New Jersey:

In May, 2022 the New Jersey State Legislature introducedBill A3715. The bill, which, while not a ban on non-competes, serves to protect employees by requiring written disclaimers of intent to enforce a non-compete and requires employers provide notice that employees have the right to review with counsel before signing. While not as drastic as some other jurisdictions, New Jersey's bill, which remains before the Assembly Oversight, Reform and Federal Relations Committee, represents a further step towards employee protections.

New York:

The New York State (NYS) legislature recently passed abill banning non-competes, which has *not* been signed into law by Governor Hochul (the "NYS Bill"). The NYS Bill also allows employees to sue employers and may subject employers to liquidated damages, lost compensation, other damages, reasonable attorneys' fees, and costs. The NYS bill does not explicitly state that it applies retroactively.

Pennsylvania:

While Pennsylvania does not have statutes or policies on the books addressing non-competes, Michelle Henry, Pennsylvania's Attorney General, co-signed the letter in support of the Federal Rule.

Similarly, on March 15, 2023, Pennsylvania State Senators Brooks, Cappelletti, and Kane introduced Senate Bill No. 521 which would make non-competes unenforceable for healthcare practitioners who are "dismissed". This bill was referred to Health and Human Services.

Thus, while nothing is official yet, there is growing support in Pennsylvania for the national trend towards a ban on non-competes.

In Conclusion:

While there is likely some time before the Federal Rule takes effect (and a question as to what degree), it is important to stay abreast of the ever-evolving legislative landscape as more and more states take employee-friendly approaches to non-competes. Failure to do so could subject an employer to penalties or exposure in litigation.

[1] Centurion Serv. Grp., LLC v. Wilensky, Civil Action No. 2023-0422-MTZ, 2023 Del. Ch. LEXIS 354, at *10-11 (Ch. Aug. 31, 2023).
[2] Id. at *1-2.
[3] Frontline Techs. Parent, LLC v. Murphy, No. 2023-0546-LWW, 2023 Del. Ch. LEXIS 336, at *1-2, *10 (Ch. Aug. 23, 2023).