Sills Cummis & Gross P.C.

Client Alert **Employment & Labor**

Will Your Non-Compete Agreement Be Enforceable in 2019?

For many businesses, corporate success is reliant on human capital. A key component to managing a business's workforce and safeguarding its confidential information and relationships with customers and other assets is the ability to place post-employment restrictions on employees. However, the trend nationwide is toward legislation that would dramatically limit the enforceability of restrictive covenants and therefore threaten employers' property and relationships.

On the federal level, the Defend Against Trade Secrets Act does protect trade secrets from being used post-employment if certain conditions are met, however the proposed Workforce Mobility Act of 2018, Senate Bill 2782 (2018), introduced in the U.S. Senate in April 2018 would be a national ban on employers engaged in interstate commerce on requiring employees to enter into non-competition agreements. In May 2018, this bill was referred to the Committee on Health, Education, Labor, and Pension. A similar bill was introduced in the U.S. House of Representatives in April 2018, H.R. 5631, and referred to the House subcommittee on Regulatory Reform, Commercial and Antitrust Law in May 2018. No further actions have been taken on either bill.

Several states have recently passed legislation limiting the use of restrictive covenant agreements in certain contexts, such as California and Massachusetts.

While employers are well aware that California generally prohibits non-competes in the employment context (with certain exceptions), some employers had successfully contracted around this prohibition by incorporating choice of law provisions applying the

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law of other states to contract disputes. However, effective January 1, 2017, California Labor Code section 925, which applies to all contracts entered into after that date, voids any agreement that requires an employee who "primarily resides and works in California, as a condition of employment" to agree to a foreign venue and choice of law requiring the application of the law of another state. Significantly, Section 925 does not apply if the employee is represented by counsel who negotiates the terms of the forum selection or choice of law clause applicable to employment disputes.

The recent Massachusetts law that went into effect on October 1, 2018 limits the enforceability of certain non-competes in the employment context and codifies express requirements that agreements must meet to be enforceable. Other states, such as Pennsylvania and Vermont, have gone further by recently proposing legislation aimed at entirely prohibiting the use of restrictive covenant agreements in the employment context. We will certainly be keeping an eye on this proposed legislation in 2019.

Closer to home, New Jersey employers are concerned about the potential enactment of a bill that would, if it were enacted unchanged, severely limit the enforceability of non-competition and other restrictive covenant agreements. Last May, Assembly Bill A1769, (the "Bill") was introduced in the New Jersey state assembly. The Bill as currently written would impose numerous and significant restrictions on the enforceability of non-competition agreements. Some of the more onerous provisions in the Bill are: (1) limitations on the duration of agreements to one-year post-employment; (2) requirements that employers pay employee full wages and benefits during the duration of the enforcement of the agreement, unless the employee was terminated for "misconduct" as defined therein; (3) requirements that notice of the agreement must be given by the earlier of the time of a formal offer of employment or 30 days before commencement of employment or the effective date of the agreement; (4) requirements that the agreement must be limited in scope to the geographic area where the employee provided services or had a material presence within the two years preceding the date of separation, and a prohibition of a restriction of the employee from working in states other than NJ; and (5) prohibition on blue-penciling (i.e. rewriting, striking, and modifying unenforceable provisions).

Moreover, the Bill would create a private right of action for employees to seek relief against an employer or person who allegedly violated the bill, and, if successful would permit the employee to recover compensatory damages, liquidated damages, and reasonable attorneys' fees and costs.

Some areas that would remain consistent with the current common law governing restrictive covenant agreements include that agreements must be no broader than necessary to protect the business interests of the employer, and that agreements shall not be unduly burdensome on the employee, injurious to the public or inconsistent with public policy.

The Bill would broadly apply to restrictive covenant agreements, which it defines, in sum, as an agreement between an employer or employee in which the employee agrees not to engage in certain post-employment competitive activity. It is not entirely clear on the face of the Bill whether it would apply only to non-competes or whether it would apply to other types of restrictive covenant agreements, such as non-solicitation agreements; however, for the most part, the Bill focuses on non-compete provisions/agreements. If enacted it would not apply retroactively to agreements entered into before the date of enactment.

Aside from the Bill that focuses on restrictive covenant agreements, a separate bill (Assembly Bill A1242) that would ban non-disclosure agreements in employment discrimination, harassment and retaliation cases was also introduced last year, which, if passed, would further limit restrictive covenant agreements in the employment context. The only certainty for restrictive covenants in 2019 is that this challenging area of law will continue to evolve and change and so employers must be prepared.

Employer Tips

As it is unclear if and when restrictive covenant agreements will be regulated at a federal level, employers will continue to be subject to the vastly differing laws, reform efforts and case law governing restrictive covenant agreements at a state level. For multistate employers, this means carefully drafting agreements with an aim to make them enforceable in various jurisdictions or utilizing different agreements with terms that vary by location. In New Jersey, employers would be well advised to ensure that their restrictive covenants are in place before the passage of the Bill, as in its current form, the Bill is extremely restrictive to employers' rights. For all employers, the unsettled state of restrictive covenant law in most locations makes it critical to stay current on developments and regularly review agreements with counsel for compliance.

The following attorneys in our Employment and Labor Law Practice Group can assist employers regarding the issues raised in this alert.

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