US Senators Introduce Bill to Limit Non-Compete Agreements Incident to Employment

Client Advisories

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On June 4, 2015, U.S. Senator Christopher Murphy (D-Conn) and Senator Al Franken (D-Minn), introduced in the US Senate a bill entitled the "Mobility and Opportunity for Vulnerable Employees Act" or the "MOVE Act." If it passes Congress and is signed into law, the bill will (1) prohibit employers from requiring low-wage employees to enter into covenants not to compete (also known as "non-compete agreements") and (2) require employers to notify potential employees at the beginning of the hiring process of any requirement to enter into a covenant not to compete. These restrictions will apply only to covenants not to compete entered into after (and if) the bill is enacted.

Senators Murphy and Franken stated that they introduced the bill "in response to reports that Jimmy John's sandwich shops and other retailers require their low-wage workers to sign non-compete agreements." Their press release announcing the bill stated that "[r]esearch shows that employers force anywhere from 8-15% of low-wage workers to sign non-compete agreements in an effort to dissuade those workers from seeking better, higher-paying jobs within the same industry." Id.

The "low wage employees" to whom the prohibition against non-compete agreements would apply are (1) workers whose hourly rate is less than the minimum wage in the State or locality in which they work or $15 (whichever is greater) or (2) workers whose annual compensation is equal to or less than $31,200. However, the prohibition would not apply to a salaried employee who receives compensation that, for 2 consecutive months, is greater than $5,000. These threshold amounts are for the fiscal year in which the bill becomes law, and would be adjusted for inflation for later years.

Although the law concerning the enforcement of non-compete agreements can vary significantly from state to state, as a general matter, in the employment context, these agreements are enforceable only to the extent that they are reasonably necessary to protect an employer's legitimate interest. In most cases, the interests that employers seek to protect as "legitimate" are interests in customer relationships and interests in protecting

against the disclosure or use of trade secrets or other confidential information. It is not legitimate for an employer to use a covenant not to compete merely to prevent employees from leaving to go to work for a competitor. As a practical matter, if enacted, the MOVE Act would require employers to pay those employees more than the threshold amounts required by the statute if they want them to enter into covenants not to compete.

The second aspect of the bill provides that "in order for an employer to require an employee...to enter into a covenant not to compete, the employer shall, prior to the employment of such employee and at the beginning of the process for hiring such employee, have disclosed to such employee the requirement for entering into such covenant." This provision applies to employees other than low wage employees.

In many states, an employer's failure to disclose a requirement to enter into a covenant not to compete until a newly hired employee reports to work is a factor that a Court may consider in deciding whether and to what extent to enforce the covenant. With some exceptions, Courts typically will not refuse to enforce a covenant if the prospective employee is advised of the requirement, in an offer letter or otherwise, before the employee accepts an offer of employment. This bill, at least on its face, would compel employers to disclose the non-compete requirement (but not necessarily the specific terms of the non-compete agreement) at "the beginning of the process for hiring," a term that is not defined, but which refers to a point in time earlier when an offer of employment is made or accepted.

The consequences of an employer's failure to comply with the bill are not completely clear. The bill authorizes the Secretary of Labor to impose fines for violations of the statute, but does not expressly provide a private right of action or state that a covenant not to compete entered into in violation of the statute is unenforceable. However, since courts typically consider public policy issues in determining whether to issue injunctions enforcing a non-compete agreement, the bill would practically sound the death knell for enforcement of such a covenant in all but the most unusual circumstances.

The MOVE Act is far from becoming law at this stage, having just been introduced. It was referred to the Senate Committee on Health, Education, Labor, and Pensions for further action. Archer's Trade Secret Protection and Non-Compete Practice Group will monitor the MOVE Act's progress through Congress and report on any new developments.

If you have questions about covenants not to compete or related issues, please contact Robert T. Egan at (856) 354-3079 or a member of Archer's Trade Secret Protection and Non-Compete Practice Group in Haddonfield, N.J., at (856) 795-2121, in Philadelphia, Pa., at (215) 963-3300, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, or in Wilmington, Del., at (302) 777-4350. The Group counsels employers, employees and consultants on matters relating to the protection of trade secrets and confidential information; covenants not to compete; non-solicitation agreements; confidentiality agreements; anti-piracy agreements; consulting agreements; severance agreements; invention, discoveries, "work for hire," technology and "know how" agreements, and represents clients in litigated matters concerning those issues as well as the misappropriation of trade secrets, inevitable disclosure, employee defection and piracy, breach of the duty of loyalty and a variety of business torts.

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