The Tumultuous Year in Noncompete

Client Advisories

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As we close the book on 2021, we take a few moments to reflect on the past year's developments of the law on noncompete agreements ("NCAs"), offer a few predictions as to what we think 2022 may have in store, and leave you with a valuable piece of advice.

The year saw President Biden sign an Executive Order ("EO") entitled "Promoting Competition in the American Economy." This EO does not in itself change the law, but it encourages the Federal Trade Commission ("FTC") to take steps to limit or ban NCAs in the country, which if adopted will be a game-changer. The FTC has begun this process and is currently pondering what action, if any, to take. We expect the FTC to make its decision this year and we will, of course, keep you updated.

Congress also attempted to act on NCAs in 2021. In what has become a pattern in recent years for new congressional sessions, both the House of Representatives and the Senate introduced the Workforce Mobility Act. This bill, if enacted, would drastically limit the use of NCAs throughout the United States. While the bill did not pass, the appetite for federal legislation for some members of Congress remains strong. Expect these efforts to continue into the new year as lawmakers continue this push.

State governments have followed the lead of the federal government and taken their own steps to limit or ban NCAs. The past year witnessed an unprecedented effort in dozens of states to chip away at, or eliminate, the protections employers enjoy from NCAs. For example, Illinois enacted a law that bans NCAs for employees making less than $75,000 per year, and nonsolicitation agreements for employees making less than $45,000 per year. Other states, such as Oregon and Nevada, passed laws to substantially limit the permissible scope of NCAs, while the District of Columbia banned NCAs in virtually all circumstances.

Many other states introduced bills that would limit or eliminate NCAs. For example, New Jersey introduced a bill that would eliminate NCAs for a large part of the working population; limit permissible NCAs, both geographically and temporally; and, most importantly, require employees to be paid in full for the duration of the NCA.

Pennsylvania, on the other hand, took a different approach and singled out one category of workers—physicians—and proposed that NCAs not be enforceable against them. While the efforts in these states fell short in 2021, we expect that the legislatures in both states will continue to attempt to restrict or ban NCAs in those states (as well as in other states throughout the country). The efforts on both the state and federal levels are likely to continue into the new year.

We cannot say whether and to what extent these efforts will be successful, but we can say the efforts to chip away at the protections provided by NCAs will undoubtedly continue, and we will follow any relevant developments and update you accordingly. In the meantime, any employer that uses NCAs, or any other type of restrictive covenant (such as a nonsolicitation agreement, anti-piracy agreement, or nondisclosure agreement, etc.), or is contemplating using them, should take steps right now to ensure they have enforceable agreements in place before any changes to the law take effect. Often new laws contain grandfather clauses, which would protect NCAs that are enforceable on the date that the change to the law goes into effect. Be proactive and take steps now, even before the law changes, as today's employees may become tomorrow's former employees.

If you have any questions, or would like more information on how best to protect your business from the potential damage that can be caused by former employees, feel free to contact Tom Muccifori, Chair of Archer's Trade Secret Protection and Non-Compete Group at 856-354-3056 or tmuccifori@archerlaw.com, or any member of the Group at our new headquarters in Voorhees, NJ at 856-795-2121, Princeton, NJ at 609-580-3700, Hackensack, NJ at 201-342-6000, Philadelphia, PA at 215-963-3300, or Wilmington, DE at 302-777-4350.

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Advisory- The Tumultuous Year in Noncompete Agreements and What to Expect in the Year to Come