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Client Advisory

Obama Administration Pushes for Employee Non-Compete Reform

Many U.S. employers use non-compete agreements to protect their sensitive proprietary information. These agreements establish a “buffer” time period during which a departing employee is prohibited from taking a job with a competitor, often within a defined geographic area. While non-compete restrictions were once linked primarily with highly compensated executive employees, a report issued by the U.S. Treasury Department earlier this year indicates that 18 percent of all workers and 15 percent of all employees without a college degree are currently bound by a non-compete agreement. Workers unlikely to have access to sensitive employer information or trade secrets, such as sandwich makers, temporary warehouse staff and hairstylists, are increasingly being asked to sign non-compete agreements. Concerns about the increase in, and unfair use of, non-compete agreements in employment contracts prompted the White House, on October 25, 2016, to issue a “Call to Action” on non-competes to all state legislators, encouraging them to ban or significantly reform the use of employee non-compete agreements.[i]

Citing the chilling effect that the use of non-compete agreements can have on the economy, and the harm that can be caused to workers with diminished job mobility, the White House called on states to enact non-compete reforms, including one or more of the following:

1. Ban non-compete clauses for certain categories of workers, including workers under a certain wage threshold; workers in certain occupations that promote public health and safety; workers who are unlikely to possess trade secrets; or individuals who may suffer undue adverse impacts from non-competes, such as workers laid off or terminated without cause.
2. Improve transparency and fairness of non-compete agreements by, for example, disallowing non-competes unless they are proposed before a job offer or significant promotion has been accepted (because an applicant who has accepted an offer and declined other positions may have less bargaining power); providing consideration over and above continued employment for workers who sign non-compete agreements; or encouraging employers to better inform workers

about the law in their state and the existence of non-competes in contracts and how they work.

3. Incentivize employers to write enforceable contracts, and encourage the elimination of unenforceable provisions by, for example, promoting the use of the “red pencil doctrine,” which renders contracts with unenforceable provisions void in their entirety.

In addition to asking the states to take action, the Obama Administration also urged Congress to pass federal legislation which would eliminate completely the use of non-compete agreements for workers under a certain salary threshold.

The White House Call to Action is a policy initiative, not a law, so it does not trigger any immediate changes to the regulation of non-compete agreements. However, this is certainly an issue that employers who use non-compete agreements will need to watch moving forward. Currently, three states (California, Oklahoma, and North Dakota) consider non-compete agreements generally void and unenforceable. The remainder of the states use a complex combination of statutes and/or federal and state court decisions to regulate employee non-compete agreement practices.[ii] The general trend in recent years has clearly been towards less enforcement of employee non-compete contracts and the White House Call to Action may spur additional states to more strictly limit, or ban, the use of non-compete agreements by employers. Courts, when evaluating the reasonableness of a challenged non-compete agreement, may also be influenced by the White House directive and more mindful of policy considerations surrounding the perceived harm caused by overbroad non-compete restrictions.

With this changing landscape in mind, it is more important than ever to draft employee non-compete agreements that are demonstrably reasonable and specifically tailored to protect the legitimate interests of the employer. In addition, the White House’s position on employee non-compete agreements does not appear to extend to other methods available to an employer to protect its proprietary information, including trade secret protections (such as developing and implementing security measures, policies, and procedures to maintain the privacy of

sensitive information and requiring employees and others to abide by contractual restrictions governing the manner in which such information can be accessed, used and disclosed), non-solicitation agreements, or confidentiality/non-disclosure agreements. In light of the increased scrutiny of non-compete agreements, employers should also consider using one or more of these additional available protections to safeguard their sensitive proprietary information and legitimate business interests. Finally, the trend reflected by the White House Call to Action and certain similar state initiatives should be taken into consideration when employers have a need to enforce a non-compete agreement or desire to hire an individual who is bound by a non-compete agreement with a present or past employer.

We will be monitoring the federal and state legislative response to the White House Call to Action on non-competes and providing periodic updates with respect to any significant legislative (or judicial) developments.

If you have questions about the White House Call to Action or the best methods of protecting your company's proprietary information, please contact [Deborah Hays, Esq.](#), [Thomas Muccifori, Esq.](#) or [Robert T. Egan, Esq.](#), or any other member of Archer's [Trade Secret Protection and Non-Compete Group](#), in Haddonfield, N.J., at (856) 795-2121, in Princeton, NJ, at (609) 580-3700, in Hackensack, NJ, at (201) 342-6000, in Philadelphia, PA, at (215) 963-3300, or in Wilmington, DE, at (302) 777-4350.

[i] State Call to Action on Non-Compete Agreements, The White House, October 25, 2016, available at <https://www.whitehouse.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf>

[ii] For further detail on current state policies as of October 2016, see Non-Compete Reform: A Policymaker's Guide to State Policies, The White House, available at https://www.whitehouse.gov/sites/default/files/competition/state-by-statenoncompetesexplainer_unembargoedfinal.pdf

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