State Attorneys General on the Attack Against Noncompete Overuse

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Too much of a good thing can be bad – a maxim that some employers have historically ignored by requiring entire workforces, including rank-and-file employees, to submit to post-employment noncompete obligations as a condition of continuing employment. In recent months, however, state attorneys general, specifically in New York and Illinois, have put significant heat on employers that have engaged in this practice and, in doing so, appear to be opening a new front in the battle over noncompete agreements. For example:

- In June, Illinois Attorney General Lisa Madigan filed a lawsuit against a national sandwich chain, seeking to invalidate form noncompete agreements that indiscriminately applied to all franchise employees, including sandwich makers and delivery persons, and purported to bar them from subsequent employment with competing sandwich shops.

- Later that same month, and following a lengthy investigation by New York Attorney General Eric Schneiderman, that same national sandwich chain agreed to stop using its form noncompete agreement in New York.

- In July, following an investigation by Schneiderman’s office, a national legal publisher agreed to stop using noncompete agreements that purported to bar editorial employees from joining direct competitors in the legal news reporting
arena.

- Also in July, a local chapter of the Office & Professional Employees International Union reportedly wrote both Madigan and Schneiderman to complain about a shared workspace company that purportedly was requiring all its employees to submit to one-year post-employment noncompete obligations.

- Last week, Schneiderman’s office extracted a settlement from a Texas-based medical information services company, which agreed to stop using noncompete agreements for most of its New York employees (excluding top executives) whose jobs involved travel around the state to give routine exams, draw blood, and collect laboratory specimens.

- The unprecedented activity by these attorneys general apparently also has prompted action by Congress, where the Senate is now considering the Mobility and Opportunity for Vulnerable Employees (MOVE) Act, a proposed amendment to the Fair Labor Standards Act that would, among other things, ban the use of noncompete agreements for employees who make less than $15 per hour.

How did we get here? Post-employment noncompetes and other restrictive covenants like non-solicitation provisions are valuable tools that can serve to protect an employer’s legitimate business interests (e.g., confidential proprietary information and goodwill). For this reason, employers generally like noncompetes and other restrictive covenants. However, because these restraints can limit an individual’s ability to find new work, states — as a matter of public policy and by statute or common law — have limited their use (see, e.g., New York) or even prohibited them in all but limited circumstances (see, e.g., California).

Seeing the value in restrictive covenants, employers (either ignorantly or intentionally) may fail to heed the limitations created by various state laws and require all their employees to submit to noncompete obligations, including low level employees, who upon departure may not pose any threat to the employer’s legitimate and otherwise protectable business interests. Employers that do this intentionally may calculate that the benefit – deterring employee movement – outweigh the risks. Indeed, these employers often realize that they will never actually spend the money and time trying to enforce the noncompete, but having the restraints in place offers some sense of security with no significant downside risk.

Now, apparently, this risk calculus must change – employers may have overplayed their noncompete hand and, inadvertently, exposed the use of restrictive covenants to a wholly new type of government scrutiny. Where and how far such scrutiny may reach is hard to tell. Rather than risking a breach of a noncompete or negotiating for a release from the contractual obligation, aggrieved employees may instead turn to sympathetic state enforcement officers to apply pressure to undo the restraint. It is not unreasonable to speculate that employees might seek this help even where an employer only uses noncompetes selectively within its workforce.

What should employers do in light of these developments? Those employers who indiscriminately require all employees to sign noncompete agreements, now more than ever, should consider abandoning that wholesale practice. In addition, all employers who hope to reap the full potential value of any noncompete agreement
should consider, on an individualized basis, whether the restriction is permissible in
the relevant jurisdiction, is needed to protect a legitimate business interest, and is
reasonable in scope. This is hardly unfamiliar, groundbreaking advice, but it is worth
considering and implementing before an AG comes knocking on the door to do the
same.

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