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Employee Mobility and Trade Secret Protection 2022

By Jennifer W. Corinis and Andrea E. Nieto| March 22, 2022 | Association of Corporate Counsel Tampa Bay Newsletter

The pandemic changed the labor market in ways that were unimaginable pre-pandemic. What was once coined, "the Great Resignation," in 2020-2021 is becoming "the Great Rehire" in 2022. Workers quit and continue to quit their jobs in record numbers. In 2021, 47.8 million workers quit their jobs, a record year.[1] 4.3 million workers left their jobs in January 2022.[2] Those workers may have left to start their own business, for better-paid more flexible employment, to change careers, or for retirement. Some, however, are staying in the same industry and moving for higher pay, greater flexibility, and/or better benefits. Competition for those workers is fierce and employers are refocusing efforts not only to recruit new workers, but also to retain them.

This increased employee mobility adds new challenges to employers who need to protect their confidential information and trade secrets, including both employers who lost employees subject to non-compete, non-solicitation, or non-disclosure agreements, and those competing for talent who are subject to such agreements. The explosion in remote work also affects employers' ability to protect their valuable information. How is the administration responding to these issues that may impact worker mobility?

[1] *See* March 9, 2022, News Release, Bureau of Labor Statistics, https://www.bls.gov/news.release/pdf/jolts.pdf.
[2] *See id*.

This article will address and provide guidance on these issues facing employers in the Great Rehire.

Protecting Trade Secrets and Confidential Information in 2022

An employer's decision to use non-compete, non-solicitation, and non-disclosure agreements to protect their trade secrets should be guided by the current administration's approach to such agreements. The Biden administration has expressed concern that noncompete and other clauses may unfairly limit worker mobility, and has recently taken steps to limit their use. Further, many states have limited the use and enforcement of non-competes, and may refuse to enforce choice-of-law provisions requiring application of Florida law. In the face of this trend, employers should also focus their attention on protecting trade secrets through nondisclosure and non-solicitation agreements.

On July 29, 2021, President Biden signed an Executive Order titled "Promoting Competition in the American Economy." The Order

- detailed a whole-of-government approach to address overconcentration, monopolization, and unfair competition in the American economy;
- established a White House Competition Council within the Executive Office of the President to coordinate government efforts to promote competition, coordinate legislation, and enforce fair competition, anti-monopolization, and antitrust laws; and
- encouraged agency heads to influence regulations on competition in the industries under their jurisdiction.

Biden also directed the Federal Trade Commission (the "FTC") to use its rulemaking authority to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

Following the Order, the Treasury Department, in consultation with the DOJ, the DOL, and the FTC investigated the effects of a lack of competition on the U.S. labor market. The Treasury Department released its report on March 7, 2022, detailing concerns about restrictive employment agreements.[3] The report recognized that:

- a restrictive term in an employment contract is not automatically enforceable;
- "the degree to which courts will enforce such contract provisions varies between states;"
- enforceability may vary by occupation; and
- "[e]mployers who illegally use restrictive covenants rarely face sanctions[.]"[4]

Following the Treasury Department's report, on March 10, 2022, the Justice Department's Antitrust Division and Labor Department announced that they had signed a memorandum of understanding to "strengthen the partnership between the two agencies to protect workers from employer collusion … and

[3] *See,* The State of Labor Market Competition, https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf
[4] *See id*.

promote competitive labor markets and worker mobility."[5] This collaboration is to further the administration's mission to promote worker mobility.[6] The two agencies intend to "share enforcement information, collaborate on new policies, and ensure that workers are protected from collusion and unlawful employer behavior."[7]

The DOL, will, as appropriate, refer to the Antitrust Division potential antitrust violations it discovers while conducting investigations under its jurisdiction. Similarly, the DOJ will refer labor issues to the DOL that it discovers during the course of enforcing its own statutes. The DOJ also signaled and increased willingness to prosecute perceived wage-fixing and otherwise aggressively enforce antitrust laws to promote and protect competition.

Beyond non-compete clauses, the Biden administration has also expressed concern about non-solicitation and non-disclosure agreements, which are critical for employers wishing to protect their confidential information, as well as valuable customers and employees.

Another area of concern is so-called "no-poach" agreements, where competitors agree not to hire each other's top-level employees. While such agreements have sometimes been used in agreements to resolve disputes over solicitation of employees, the Department of Justice can, and will, prosecute companies and individuals who conspire to suppress competition.

What types of restrictive covenants are enforceable?

Absent any countervailing federal rules, Florida courts continue to find valid and enforce non-compete provisions, covenants preventing solicitation of customers and employees, and non-disclosure of confidential information where a legitimate business interest underlying those covenants is identified. Fla. Stat. Ann. § 542.335 (West). Those legitimate business interests include:

- Trade secrets;[8]
- Customer goodwill associated with an identifiable business practice, geographic, or marketing area;
- Valuable confidential information, such as intellectual property, business processes and strategies, sales plans and marketing material, detailed information about customers and sales, and internal financial information;

[5] *See* March 10, 2022, Press Release, https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers

[6] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

[7] *See* March 10, 2022, Press Release, https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers

[8] (4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:
(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Fla. Stat. Ann. § 688.002 (West)

- Substantial relationships with specific prospective or existing customers, patients, or clients; and
- Employees with extraordinary or specialized training.

Non-compete agreements generally will be enforced in Florida to prevent unfair competition if the restriction is reasonable in time, geography, and related to the employer's type of business. Employers should also employ non-disclosure and non-solicitation agreements to protect trade secrets and confidential information.

Other state courts, however, may refuse to enforce a restrictive covenant with a choice of law provision choosing Florida as conflicting with that state's public policy.[9] And, Federal courts applying Florida law do not always give employers the benefit of deeming irreparable harm as established when deciding whether to grant injunctive relief.[10]

What types of restrictive covenants should be avoided?

Employers should avoid no-poach agreements, covenants that are overbroad in time and geographic limitations and unrelated to the employer's business, and agreements that are in conflict with the public policy of the state where an employee resides.

- **No-poach agreements.** DOJ is willing to prosecute competitors who enter into no-poach agreements, and has done so. In July 2021, a federal grand jury in Colorado returned two criminal antitrust indictments against a kidney dialysis center operator, Da Vita and Kent Thiry, its former CEO, accusing them of conspiring with a third-party, Surgical Care Affiliates, LLC "to suppress competition between them by agreeing not to solicit each **other's senior-level employees."**
- **Overbroad agreements.** Non-compete agreements that impose broad geographical areas outside of employee's regular scope of work, such as a nationwide restriction when the employee works in a 2-mile radius from the employer's location, unreasonably long restrictions, such as restrictions for more than 2 years, or are unrelated to the employer's business, such as prohibiting selling widgets when the employer sells gadgets, will likely be unenforceable.
- **Florida choice-of-law provisions where the employee's resident's state public policy conflicts with Florida law.** Other state courts will refuse to enforce Florida law non-compete law where Florida conflicts with that state's public policy. Courts in Georgia, New York, and

[9] *See Burbach v. Motorsports of Conyers, LLC*, No. A21A1420, at *4 (Ga. Ct. App. Mar. 10, 2022) (enforcement of the restrictive covenants under Florida law would contravene Georgia public policy); *Brown & Brown, Inc. v. Johnson*, 34 N.E.3d 357, 359 (N.Y. 2015) ("applying Florida law on restrictive covenants related to the non-solicitation of customers by a former employee would violate the public policy of this state"); *Brown v. Mudron*, 379 Ill. App. 3d 724, 728 (Ill. App. Ct. 2008) ("Florida law, which specifically prohibits considering the hardship a restrictive covenant imposes upon an individual employee, is contrary to Illinois's fundamental public policy.");

[10] *Blue-Grace Logistics LLC v. Fahey*, 8:21-cv-2523-KKM-CPT, at *11 (M.D. Fla. Feb. 7, 2022) ("The Court concludes that § 542.335(1)(j)'s presumption of irreparable harm conflicts with traditional federal equity practice and does not govern in a federal diversity action for a preliminary injunction."); *but see TransUnion Risk 8c Alt. Data Sols., Inc. v. MacLachlan*, 625 Fed.Appx. 403, 406 (11th Cir. 2015) (per curiam) (unpublished) ("we find that section 542.335(1)(j) of the Florida Statutes does not conflict with federal procedure codified in Rule 65").

Illinois have found that Florida law on restrictive covenants violates the public policy of those states.

Conclusion

The FTC has engaged in informal fact-finding through virtual workshops regarding competition in labor markets.[11] But any action by the FTC has likely been delayed due to a vacancy on the five-person commission. Biden's nominee, Alvaro Bedoya, was approved by the Senate Commerce Committee in the beginning of March and awaits confirmation by the Senate. Absent action by the FTC, Congress may act on the bi-partisan Freedom to Compete Act co-sponsored by Senator Marco Rubio which would amend the Fair Labor Standards Act of 1938 to prevent employers from using non-compete agreements in employment contracts for certain non-exempt employees which was referred to committee in July 2021. We can expect additional federal action in the future and employers should ensure that future restrictive covenants protect an employer's trade secrets while not overtly prohibiting competition.

[11] *See* https://www.ftc.gov/news-events/news/press-releases/2021/12/ftc-doj-announce-agenda-dec-6-7-workshop-making-competition-work-promoting-competition-labor-markets