On the Horizon

Covenants Not to Compete and Trade Secrets

Prepared by:
Kenneth P. Carlson Jr.
Constangy, Brooks, Smith & Prophete, LLP

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On the Horizon.

A. The Movement Toward Statutory Restrictions.

In addition to the statutes and proposed legislation previously mentioned in this material (*see* Section I.B.7.), there are three proposed bills in Congress that, if ever passed, could greatly affect the law of covenants not to compete and trade secrets – at least among low wage earners and, interestingly enough, the grocery store industry. So far in the current Congress these bills appear relatively inactive, but needless to say stay tuned:

1. Mobility and Opportunity for Vulnerable Employees (MOVE) Act, S. 1504

Introduced by Senator Al Franken (D-Minn.), and Sen. Chris Murphy (D-Conn.) on June 4, 2015, the MOVE Act would prohibit employers from using covenants not to compete with any employee earning less than $15 per hour, whose annual compensation is $31,200 or less, or who satisfies another definition of "low-wage employee" under the Act. Simply stated, it's an overt reaction to the public outcry over one of the most far-reaching noncompetition agreements in recent years to garner national attention – a noncompete used by the Jimmy John's restaurant franchise that essentially prohibits hourly workers and delivery drivers from working for any sandwich maker within a three-mile radius of any Jimmy John's location in the country for two years after employment ends.

Although Jimmy John's in April 2015 obtained a court dismissal of the noncompete claim and certain class action allegations based on a lack of standing or other legal grounds, the public attention against a perceived abuse of enforcing unfair competition rights against low-wage employees was so loud and sustained that it helped lead to the MOVE Act and other unwanted attention. Regardless of their position on that specific noncompete agreement, critics of the proposed Act have said that courts and juries tend to do the "right thing" anyway by narrowly construing noncompete agreements, which makes the Act unnecessary, and there are certainly instances where lower wage workers are still entrusted with enough customer contact and confidential information to warrant noncompete protections despite their more limited earnings. That being said, critics have also used the Jimmy John's noncompete matter to remind employers how even the appearance of being unreasonably broad in the drafting *and usage* of covenants not to compete can not only lead to enforcement issues, but also to an ever-widening door of potential adverse publicity. *See, e.g.*, Brunner v. Liautaud, 2015 WL 1598106 (N.D. Ill. April 8, 2015) (memorandum opinion granting in part and denying in part various motions to dismiss by defendants, including Jimmy John's, LLC).

The MOVE Act has been read twice on the Senate floor and referred to the Committee on Health, Education, Labor, and Pensions where it currently sits. No further action is expected in the foreseeable future, especially under the Trump administration.

2. Limiting the Ability to Demand Detrimental Employment Restrictions (Ladder) Act, H.R. 2873

Introduced by Rep. Joseph Crowley (D-NY) on June 2, 2015, the Ladder Act is similar to the MOVE Act in terms protecting low-wage employees from covenants not to compete. It was referred to the Subcommittee on Workforce Protections on November 16, 2015 where it still resides. As described by its summary on www.congress.gov:

> "This bill: (1) prohibits employers from entering into not to compete covenants with low-wage employees engaged in commerce or in the production of goods for commerce, and (2) requires an employer of such employees to post notice of such prohibition in a conspicuous place on the employer's premises.
>
> The bill defines "low-wage employee" as an employee who earns less than the greater of $15 per hour or the state or local minimum wage.
>
> In order for an employer to require such an employee who is not a low-wage employee to enter into such a covenant, the employer must have disclosed the requirement for entering into such covenant before hiring such employee.
>
> The Secretary of Labor shall: (1) enforce a complaint of a violation of this Act in the same manner as a complaint of a violation of the Fair Labor Standards Act of 1938, and (2) impose a civil fine on any employer who violates this Act."

3. Freedom for Workers to Seek Opportunity Act, H.R. 4254

Introduced by Rep. Derek Kilmer (D-Washington) on December 15, 2015, this interesting act would prohibit grocery stores from using covenants not to compete with employees. It has been referred to the Subcommittee on Workforce Protections (within the Committee on Education and the Workforce) where it currently sits. As described by its summary on www.congress.gov:

> "This bill: (1) prohibits employers from entering into not-to-compete covenants with any grocery store employees engaged in commerce or in the production of goods for commerce, and (2) requires an employer of such employees to post a notice of this prohibition in a conspicuous place on the employer's premises.
>
> No employers who own or operate at least one grocery store may, in conjunction with the purchase of one or more grocery stores owned or operated by another employer, include in any agreement between such

employers any provision that restricts either employer from hiring a grocery store employee of the other employer.

An employer who acquires the operation of another employer and retains in employment a grocery store employee of the former employee at the same grocery store of the former employer shall continue to recognize, for all employment purposes, the seniority of that grocery store employee, and, to the extent practicable, make available to such employees any benefits made available by the former employer.

The Secretary of Labor shall: (1) enforce a complaint of a violation of this Act in the same manner as a complaint of a violation of the Fair Labor Standards Act of 1938, and (2) impose a specified civil fine on any employer who violates this Act."

B. "Hot Topic" Restrictive Covenant Issues.

- Case law developments that increasingly limit the enforcement of covenants not to compete.

- Statutes that prohibit or limit the use of covenants not to compete or other restrictive covenants with certain categories of employees (such as with hourly or "low wage" earners), or in certain industries (such as health care).

- Especially with nonsolicitation or anti-piracy / non-poaching agreements, the potential impact of social media postings and communications, such as on LinkedIn, with a company's customers or employees.