A New Era for Noncompetes

Historically, employers have used noncompete agreements to prevent competition or dissemination of confidential information when an employee leaves a company. However, the last few years has seen the erosion of their enforceability across the country. Frequent readers of our legal updates will recall that on July 9, 2021, President Biden issued an executive order directing the Federal Trade Commission "to curtail the unfair use of noncompete clauses and other clauses or agreements that may unfairly limit worker mobility." (See our legal update here.) State legislators and courts have begun restricting the noncompete before the federal government has had time to act.

Since President Biden's executive order, several states have passed laws severely limiting the enforcement of noncompetes. Effective January 1, 2022, the Illinois Freedom to Work Act bans noncompetes for Illinois employees making less than $75,000 per year. The Act also dictates enhanced employee notice requirements, including a 14-day waiting period and written notice that the employee should consult with an attorney before entering the agreement. Similar laws have been passed in Washington D.C., Oregon, and Nevada, and are being considered in New York, Connecticut, and West Virginia. Other states, including California, Oklahoma, and North Dakota, already banned or restricted noncompetes and other contractual restrictions on employee mobility.

But the trend towards statutorily restricting noncompete is not the only threat to the status quo: the explosion of work-from-home policies in the wake of the COVID-19 pandemic also presents a challenge for their enforcement. If an employee enters a noncompete agreement in a different state than the employer, then a dispute could arise over which state's law controls the enforceability of the noncompete. This will prove to be even more of an issue for businesses that operate in states with disparate policies. A "choice of law" provision in the contract may not resolve the dilemma, as many states explicitly ignore them when reviewing noncompete provisions that are contrary to the state's declared public policy. In states that do enforce them, a common requirement for enforceability is a reasonable geographic limitation – but employers with remote employees throughout the country may encounter issues determining what limitations are reasonable, and which state's laws will apply.

Employers should prepare to revisit their standard noncompete agreements as the laws surrounding them change. The geographic scope of remote employees' work should be established as clearly as possible at the outset of the employment relationship, and changes in location could merit an update to any noncompetes that might exist. It is also worth exploring alternatives to the noncompete. If certain employees can no longer enter a noncompete in their state, similar results could be achieved by crafting nondisclosure agreements protecting valuable trade secrets or confidential information. These agreements would not cover the same scope of behaviors as noncompetes, as they would not generally prevent an employee from leaving employment for a competitor, but

they may protect the employer's valuable information from being shared by an exiting employee. If you have concerns about your current noncompete agreements, or what other steps you might take to protect your business, you should reach out to the team at Stokes Wagner with your questions.