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Top 3 Employee Mobility and Restrictive Covenant Issues to Watch For in 2021

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With 2020 finally in our rearview mirror, we can begin to look ahead to a promising and prosperous 2021. As the cloud of COVID-19 starts to lift (thanks to several vaccines), we expect employers will slowly begin to reopen their offices, employees will travel more, and the job market may revert back to the low unemployment levels that predated the onset of COVID-19 in March 2020. The ever-changing landscape of restrictive covenants certainly could affect all of this employment-related activity, including non-competes and non-solicits. Here are our early predictions for the Top 3 hot-button issues to look out for in the coming year.

1. The Federal Government Will Not Eliminate All Non-Competes in 2021

There has been a lot of discussion recently about the Biden administration's proposal to ban one or more forms of non-competition agreements on a national level. As recently discussed in "Biden Proposes Nationwide Non-Compete Ban," President-Elect Biden released a "Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions," which includes a statement that "Biden will work with Congress to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets, and outright ban all non-poaching agreements." This plan follows several attempts by federal lawmakers to curtail non-compete agreements through legislation, though no such bill has passed either the House or Senate despite bipartisan support in some cases. Among these efforts was the Workforce Mobility Act, reintroduced in October 2019, with both Democrat and Republican support

While President-Elect Biden has made clear his hopes for a federal law largely eliminating non-compete agreements, we do not believe Congress will enact such legislation in 2021. COVID-19 undoubtedly will consume most of the Administration's agenda in 2021. The impeachment of President Trump may also linger well into 2021. That said, Biden may seek to limit or eliminate non-compete agreements by way of regulatory changes (such as through the Federal Trade Commission) or by issuance of an executive order. Federal legislation banning or curtailing non-compete agreements may be enacted at some point in the future, given the support of Biden and many in Congress for such a law, though its success may ultimately depend on narrowing its scope (for example, limiting a ban on non-compete agreements to low-wage earners).

2. States Will Continue to Enact Laws Governing Restrictive Covenant Agreements

The COVID-19 pandemic did not stop lawmakers in 2020 from passing legislation intended to curtail the widespread use of non-competition agreements, particularly for low-wage workers. Virginia, for example, passed a law effective July 1, 2020, that limits the use of non-compete agreements with respect to low-wage workers. That law prohibits employers from entering into, enforcing, or threatening to enforce a non-compete agreement with any "low-wage employee," defined as a worker whose average weekly earnings during the previous 52 weeks "are less than the average weekly wage of the Commonwealth" as calculated pursuant to VA Code § 65.2-500(b) (i.e., about $1,200 weekly or $62,000 annually). Consistent with other similar state laws passed in the last few years, the new Virginia non-compete law does not limit nondisclosure (as opposed to non-compete) agreements intended to prohibit the taking, misappropriating, threatening to misappropriate, or sharing of certain information, including trade secrets, proprietary or confidential information.

We predict that 2021 will follow this same trend. Washington, D.C. is on the verge of enacting a law in early 2021 that would prohibit the use and enforcement of non-compete agreements for D.C.-based employers, except for highly paid physicians and a few other exceptions. On December 15, 2020, the District of Columbia Council voted unanimously to approve the "Ban on Non-Compete Agreements Amendment Act of 2020" (B23-0494). The law is expected to pass in early 2021, and if it does, will have a significant impact on employers and employees because it would render invalid and unenforceable "a provision of a written agreement between an employer and an employee that prohibits the employee from being simultaneously or subsequently employed by another person, performing work or providing services for pay for another person, or operating the employee's own business." In other words, this law essentially would ban the widespread use of non-compete agreements in D.C. Importantly, however, the law would not ban confidentiality agreements that protect an employer's trade secrets and other protectable information and would allow for non-compete agreements in the sale of business context. In addition, the D.C. law does not address non-solicitation agreements, which is a popular form of restrictive covenant used by employers.

3. Remote Workforces Will Continue to Present Some Challenges to Enforcement

Another area likely to continue to be fertile ground for legal challenges and disputes in 2021 will be remote work situations involving geographic-based non-compete agreements. The lines between the "office at home" and the "office at work" have never been so blurry, in light of the ongoing COVID-19 pandemic and the reality that employees will continue to work remotely or in locations outside of his or her employer's headquarters or corporate offices for the near future. See Part 26 of the Restricting Covenant Series: COVID-19 Edition.

Now is a great time for employers to review their existing non-competition agreements to see whether they address remote work situations, and if not, whether to include specific language covering these types of situations.

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