

Update Regarding Non-Competition Agreements - FTC, NLRB, AND STATE LEGISLATURES

Insights

June 14, 2023

The first half of 2023 has seen a steady stream of new and proposed laws and regulations regarding non-competition provisions in employment agreements, both at the federal and state level. This client alert highlights several recent noteworthy developments in this area.

Federal Agencies:

As we [reported back in January](#), the Federal Trade Commission (FTC) proposed a new rule that would ban most post-termination non-compete provisions in employment agreements. After a comment period and hearing, during which more than 27,000 comments and arguments were submitted on both sides of the issue, the FTC has taken the proposed rule under advisement. While it is unclear when the FTC will act next, Bloomberg recently reported that the agency is not expected to vote on the final version of that rule until **April 2024**.

Another federal agency appears to be targeting non-compete agreements, but on a more expedited basis. On May 30, 2023, Jennifer Abruzzo, the General Counsel of the National Labor Relations Board (NLRB) issued a [memo](#) asserting that nearly all post-termination non-compete agreements with non-management employees constitute unfair labor practices under the National Labor Relations Act (NLRA). This interpretation of the NLRA is a significant expansion of past interpretations and applications of the NLRA, and has been called a “blatantly unlawful overreach” by the U.S. Chamber of Commerce. Significantly, the GC’s memo does not have the weight

of law, but calls upon regional NLRB offices to take immediate action against employers that maintain overly broad non-competes. The GC specifically directs the regions to “seek make-whole relief for employees who, because of their employer’s unlawful maintenance of an overbroad non-compete provision, can demonstrate that they lost opportunities for other employment, even absent additional conduct by the employer to enforce the provision.” Conceivably, any employer that maintains a non-compete with an employee is at risk of an enforcement action by the NLRB. Whether the results of that action would withstand legal scrutiny is far from clear.

We will continue to monitor developments from the FTC and NLRB and provide additional updates as they become available.

State Laws:

Since the beginning of 2023, several states have passed new laws restricting the use of non-compete provisions, or are actively considering such laws. For example:

- Minnesota: Effective July 1, 2023, Minnesota will ban all post-termination non-compete provisions in employment agreements. Minnesota joins California, Oklahoma, and South Dakota as the only states that outright prohibit the use of non-competes in all employment agreements. Minnesota’s law does not apply retroactively and does not apply to non-solicitation provisions or non-disclosure agreements.
- New York: On June 7, 2023, New York’s State Senate passed a bill banning non-competes in nearly all employment agreements. To become law, the pending bill would need to be passed by the New York State Assembly and signed by Governor Kathy Hochul, who has made past statements that suggest that she could be amenable to curbing the use of restrictive covenants. The Assembly is expected to consider the bill later this month.
- Maryland: Effective October 1, 2023, Maryland will increase the minimum salary an employee must earn before an employer can impose a non-compete provision. Maryland’s annual threshold salary will increase from \$31,200 to 150% of minimum wage, *i.e.*, \$19.88/hour (for nearly all employers).
- Dozens of other states are considering laws that would impose bans or restrictions on non-competes.

We will continue to monitor the progress of these state bills and laws, and will provide updates as necessary.

In the meantime, if you have questions regarding this update, contact your Gunderson employment attorneys.

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