WHITE HOUSE URGES STATES TO REFORM NON-COMPETITION LAWS

Labor & Employment Alert
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On October 25, 2016, the White House published a *State Call to Action on Non-Compete Agreements* urging states to reform their non-competition laws. The call to action follows an earlier report from the White House which concluded that non-competition agreements may have a detrimental effect on workers by limiting their mobility and inhibiting innovation. In its call to action, the White House recommends that state lawmakers adopt best practice policy objectives to reduce the misuse of non-compete agreements, including:

- banning non-compete clauses for categories of workers, such as workers under a certain wage threshold; workers in certain occupations that promote public health and safety; workers who are unlikely to possess trade secrets; or those who may suffer undue adverse impacts from non-competes, such as workers laid off or terminated without cause;
- improving transparency and fairness of non-compete agreements by, for example, disallowing non-competes unless they are proposed before a job offer or significant promotion has been accepted (because an applicant who has accepted an offer and declined other positions may have less bargaining power); providing consideration over and above continued employment for workers who sign non-compete agreements; or encouraging employers to better inform workers about the law in their state and the existence of non-competes in contracts and how they work; and
- incentivizing employers to write enforceable contracts, and encouraging the elimination of unenforceable provisions by, for example, promoting the use of the "red pencil doctrine," which renders contracts with unenforceable provisions void in their entirety.

Responding to the White House's call to action, New York Attorney General Eric T. Schneiderman announced that he would introduce legislation in 2017 "to curb the rampant misuse of non-compete agreements, which depress wages and limit economic mobility." Called the "nation's most comprehensive bill to curb widespread misuse of non-compete agreements," Schneiderman's proposed bill would:

- prohibit the use of non-competes for any employee below the salary threshold set by Labor Law Section 190(7), currently $900 per week;

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- prohibit the use of non-compete agreements that are broader than needed to protect the employer's trade secrets or confidential information;
- require non-compete agreements to be provided to employees before a job offer is extended;
- require employers to pay employees additional consideration (monetary) if they sign non-compete agreements;
- limit the permissible duration for non-compete agreements; and
- create a private right of action with remedies including liquidated damages for violations.

Further, the Department of Justice and Federal Trade Commission published the ***Antitrust Guidance for Human Resource Professionals***, outlining an aggressive policy to investigate and punish employers and individual human resources employees who enter into unlawful agreements concerning employee recruitment or retention. Specifically, the guidance explains that agreements among employers not to recruit certain employees or not to compete on terms of compensation are illegal. The Department of Justice announced that it would criminally investigate "naked wage-fixing or no-poaching agreements" that are unrelated to legitimate collaboration between businesses.

Employers that use non-competition agreements should pay careful attention to these quickly developing events. If some of the suggested restrictions are adopted, employers may be barred from using non-competition covenants with certain categories of employees simply because they are not paid enough. Additionally, drafting non-competition agreements could become an even more complicated and uncertain process. While many states already require employers to establish a legitimate business interest that supports the use of a non-competition clause, and prohibit overbroad restrictive covenants, the proposed changes would impose significant costs on employers that utilize restrictions that are subsequently found to be overbroad.

We will provide more information on these developments as they become available. If you have any questions about restrictive covenants, contact any one of our labor and employment attorneys.