Employers Should Revisit How They Draft and Present Certain Provisions in Their Employment Agreements

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Employers should revisit their practices in drafting and presenting restrictive covenants in employment agreements in light of actions by Congress and New York State courts. In 2016, the Defend Trade Secrets Act (DTSA) took effect and created a federal cause of action for the protection of trade secrets. On a state level, the Supreme Court in Erie County refused to partially enforce a non-solicitation provision in the closely watched *Brown & Brown v. Johnson* case due to the employer's bad faith.

Defend Trade Secrets Act

Employers can now turn to federal law in their fight to defend against the misappropriation of trade secrets instead of relying on state law from the relevant jurisdiction. While the DTSA is notable for many reasons, including allowing employers to seek a civil seizure of stolen trade secrets in extraordinary circumstances, the statute also requires employers to update their employment agreements if employers wish to avail themselves to the statute's generous damages provisions. Specifically, in any agreement that governs the use of a trade secret, employers must provide notice to employees and contractors regarding immunity for lawful disclosures of trade secrets to, among others, government officials. Failure to include this notice provision in an employment agreement will preclude an employer from recovering exemplary damages or attorneys' fees in an action under the DTSA.

Presentation of Restrictive Covenants

Most businesses are aware that non-competition and non-solicitation provisions must be drafted reasonably in terms of the geographic scope, time duration and the breadth of what is being restricted. A recent court decision has also been instructive as to the importance of how restrictive covenants are communicated with the prospective or current employee for the purposes of enforcing them. In *Brown & Brown v. Johnson*, the Erie County Commercial Division was asked to "sever" or "blue pencil" an over broad non-solicitation provision to make it reasonable. After trial, the Court denied this request because of the employer's actions in presenting the employment agreement containing the non-solicitation provision.

Employers should keep in mind the following when they seek to impose restrictive covenants:

- For new employees, are they made aware of the covenants when the job offer is made or is the agreement not presented until after the offer has been accepted -- or even more problematic, on the employee's first day of employment?

- Is the agreement specifically brought to the attention of the new employee or is it in the middle of a stack of on-boarding documents that the employee must sign in the presence of the company's HR personnel?
- Is the employee given sufficient time to review and consider the agreement before signing it?

Consideration should be given to these questions before restrictive covenants are provided to prospective or current employees. Otherwise, the presentation of the agreement could undermine the enforceability of the restrictive covenant in the same way as that of a poorly drafted or overly broad covenant.

We anticipate continued attention on restrictive covenants as New York State's Attorney General continues to be aggressive in his efforts to have New York State employers eliminate the use of restrictive covenants and to push legislation prohibiting employers from entering into restrictive covenants for employees who do not meet a certain wage threshold among other proposed conditions.

Amy Habib Rittling or Vincent Miranda will keep you updated on New York State efforts to further limit restrictive covenants and are able to discuss the notice provisions of the DTSA and assist employers in drafting, editing and presenting their employment agreements. Click here to read other developments in labor and employment law at the New York Employment Law Update.