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Lessons for Employers from Obama's Push Back Against Noncompetes

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Too many employers overuse noncompete agreements. For example, high-profile companies have recently received negative press for forcing low-level employees, often with limited or no access to proprietary information, to sign noncompete agreements.

Statistics show that this problem goes beyond the stories reported in the media. According to the White House, 20 percent of U.S. workers are subject to noncompete agreements, including 14 percent of workers earning less than $40,000 per year.

Against this backdrop, President Barack Obama issued a "State Call to Action on Non-compete Agreements" on Oct. 25. The president's position is clear: "Most workers should not be covered by a noncompete agreement." Instead, noncompetes should be "the exception rather than the rule."

Because state law primarily regulates noncompete agreements, Obama wants state legislatures to amend the statutes governing these agreements. For example, he supports legislation banning noncompetes for employees under a certain wage threshold, working in occupations that promote health and safety, or who are laid off or terminated without cause. Additionally, the president wants states to require disclosure of a noncompete requirement before an applicant accepts a job. Finally, Obama would like to see states implement the "red pencil" rule, under which noncompete agreements with unenforceable provisions are void in their entirety.

Under Donald Trump's incoming administration, this federal focus on narrowing noncompete agreements is not likely to continue. But since these agreements are governed under state law, lobbying may continue in the individual states. Regardless, it is worth considering the merits of the president's proposals.

Rewrite Time?

Some of these policy objectives make sense. For example, it is absurd that so many low-wage employees are bound by a noncompete. But at the same time, companies need tools to protect their trade secrets and proprietary information. Thus, noncompete agreements are appropriate in many circumstances. This requires a case-by-case analysis. The more senior the employee and the more access the employee has to proprietary information, the more likely a noncompete is appropriate.

There is room for common-sense legislation to protect vulnerable workers from unnecessary noncompete agreements. Too many companies force noncompetes on lower-level workers, without regard for whether the company needs that level of protection.

In Florida, we have an employer-friendly noncompete statute, Florida Statute Section 542.335. The president's recommendations are at odds with much of the statute and would require a wholesale rewriting of the applicable law. I do not believe that is necessary. Implementing all of these recommendations would prejudice companies' ability to shield their proprietary information and trade secrets from unauthorized use or disclosure.

Instead, I favor a rebuttable presumption that an employer does not have a legitimate business interest — a prerequisite to enforcing a noncompete agreement — when the employee makes under a certain amount per year, say $40,000. I would not apply this presumption to nonsolicitation or nondisclosure agreements, which are far less onerous on employees.

Overuse

Regardless of whether Florida law changes, employers need to think carefully about when to require noncompete agreements. When making this determination, resist using a one-size-fits-all approach. Often, nonsolicitation and nondisclosure agreements will be sufficient to protect the company, particularly for lower-level employees.

Companies need to work with their attorneys to analyze their workforce and

determine what contractual protections are necessary and reasonable for their various categories of workers, keeping in mind the degree to which employees have access to trade secrets and proprietary information.

Otherwise, companies risk overusing noncompetes. Overuse makes it more difficult to recruit employees, affects employee morale, risks bad P.R., and could be counterproductive. For example, judges may react poorly to a company that forced low-level employees to sign noncompete agreements. These negative consequences can be easily avoided by proactive work with an attorney to appropriately use the various contractual protections available to protect proprietary information.

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