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# EMPLOYMENT LAW BULLETIN

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## THE GOOD, THE BAD AND THE UGLY ABOUT THE FTC PROPOSED BANNING OF NON-COMPETE AGREEMENTS

The "bad" is that on January 5, 2023, the Federal Trade Commission (FTC) proposed a rule that would ban most non-compete agreements with limited exceptions, assuming the rule becomes final in its present form. The federal rule would not only ban non-competes but also "de facto" non-competes, which the FTC said could include other types of contracts such as non-disclosure agreements if they are applied so broadly as to function like a non-compete. The FTC could determine that the contract provisions serves as such a de facto non-compete by effectively "prohibiting a worker from seeking or accepting employment with a person or operating a business" at the end of the worker's employment. This could theoretically include overbroad non-solicit agreements or repayment provisions for training costs as well. The proposed rule would also apply to independent contractors and anyone who works for an employer.

The rule would require employers to rescind any existing non-compete clauses and to notify employees who have been subject to such clauses of the recission, in writing, within 45 days of the recission. The only non-competes exempted would be those in connection the sale of business or sale of an ownership interest, where the person to be banned owns at least a 25% interest in the company.

The rule could go into effect 60 days after it becomes final, and employers would have 180 days after publication of the final rule in the Federal Register to comply.

While the proposed rule is Draconian, there is still some relatively "good" news to report. First, the FTC in its invitation for public comments suggests that it might be likely to scale back its proposal before issuing a final rule. The FTC invited comments on possible alternatives to the ban such as a requirement that employers give job candidates advance notice that they will be asked to sign a non-compete, and also raise the possibility of treating non-competes for executives differently from other workers.

Since the FTC has requested comments on alternatives to the proposed rule, it is hoped that it will scale back the rule before making it final. Comments may be submitted within 60 days from the date the notice is published in the Federal Register. The required notice of proposed rulemaking for the proposed rule, which sets out the rule and FTC's rationale, and discusses how to file comments on the rule, is available at https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.

For example, some may propose as alternatives applying the provisions only to low-wage workers, banning overly broad non-competes, or disclosing the requirement of a non-compete in advance.

Many believe that the FTC does not have the authority to issue such rules on employee non-competes, at least outside a merger situation. The U.S. Chamber of Commerce has called the proposed rule "blatantly unlawful." Any final rule is subject to challenge in court, with some chance of success under Supreme Court doctrine limiting the authority of federal agencies. Perhaps the final piece of relatively "good" news is that the FTC rule can only be enforced by the FTC, so private parties will not be able to initiate litigation. The FTC has limited resources to initiate broad enforcement of such a rule. One wonders, however, whether courts interpreting state non-compete rules will adopt some of the provisions of the FTC rule in their own application of non-compete concepts.

Now on to the "ugly." The main problem is an increased degree of uncertainty about the use and enforceability of non-compete agreements going forward. This writer believes that the proposed FTC rule is so Draconian that it will be scaled back, either by the FTC itself or by court litigation. Nevertheless, employers wishing to plan ahead and "plan for the worse" may want to consider other measures to protect themselves should their non-competes be deemed unenforceable.

An obvious starting point is to evaluate using alternative non-compete provisions that are less likely to be successfully challenged, including non-disclosure agreements, customer and employee non-solicitation provisions, "garden leave" clauses, clawback and forfeiture-for-competition provisions, or reasonable advance notice of resignation requirements, and others.

The bottom line is that there is no need for immediate panic, but employers that vitally depend on non-compete agreements should begin assessing their current agreements and how alternatives to those agreements could change in approach should it be necessary in the future.

## PREGNANT WORKERS MUST NOW BE ACCOMMODATED, AND ANOTHER NEW LAW EXTENDS RULES REGARDING EXPRESSING MILK

A couple of new laws were passed by Congress at the end of the year that have not been widely publicized. The Pregnant Workers Fairness Act (PWFA) was passed as an amendment to the $1.7 trillion government funding bill. This law takes effect on June 27, 2023. Specifically, the PWFA would require employers with 15 or more workers to grant temporary and reasonable accommodations for pregnant workers, including job applicants and employees with conditions related to pregnancy or childbirth. The distinction from the existing Pregnancy Discrimination Act is that the PWFA requires employers to provide reasonable accommodations. As pregnancy had not been considered a per se disability, neither the existing pregnancy nor disability laws required such accommodations for pregnancy. The new law adopts the same definition of a "reasonable accommodation" as does the Americans with Disabilities Act (ADA), as an arrangement that does not impact essential functions of the job. The PWFA explicitly provides that if an individual is temporarily unable to perform an essential function, the person is still "qualified" if they would be able to perform the function again in the near future and a reasonable accommodation is otherwise available.

Reasonable accommodations might include, for example, an extra bathroom break, a stool to sit on, limiting contact with certain chemicals, and a reduction in lifting requirements. Of particular interest to employers may be the new law's effect on light duty programs, often limited to workers' compensation claimants. While many courts have held that employers may restrict light duty work only to workers injured on the job and covered by workers' compensation programs, this limitation may no longer apply to pregnant workers who are entitled to light duty, in addition to transfers, breaks, preferential scheduling, and other accommodations under the PWFA. As with the ADA, the duty to accommodate is subject to limitation in case of extreme hardship.

A second law was also passed as part of the Appropriations Act just before the end of the year, the Providing Urgent Maternal Protections (PUMP) Act. Under existing law, in the Fair Labor Standards Act, employers were required to provide eligible employees with reasonable break time to pump breast milk for a nursing child for one year after birth. Among other changes, the PUMP Act extends to all employees the same lactation break rights the earlier law provided to non-exempt employees. It also requires employers to designate time and space for nursing employees to pump during the day, and the time spent pumping counts as hours worked if the employees are doing their jobs at the same time. The break time to express breast milk may be unpaid provided that the employee is completely relieved from their duties during such time and other laws do not otherwise require compensation. It requires employers to provide somewhere private for a nursing employee to pump, and the PUMP Act clarifies that "somewhere" cannot be a bathroom. Before an employee may pursue a claim for failure to provide the appropriate lactation accommodation space, the employee must notify the employer of the violation and provide the employer with 10 days to cure. There is a very limited exception for employers with less than 50 employees if compliance would cause the organization undue hardship.

The PUMP Act's obligation for private employers to provide a lactation space and break times to all employees (including exempt employees) went into effect immediately upon President Biden's signing of the law on December 29, 2022.

## ANOTHER NEW FEDERAL LAW BANS NON-DISCLOSURE - CLAUSES AND NON-DISPARAGEMENT CLAUSES IN SEXUAL HARASSMENT AGREEMENTS PRIOR TO THE DISPUTE

Another new law, known as The Speak Out Now Act, was signed into law by President Biden on December 7, 2022. It supplements a prior law known as the Ending of Forced Arbitration of Sexual Assault and Sexual Harassment Act, which prohibits mandatory arbitration for sexual harassment and sexual assault disputes, that President Biden signed earlier in 2022.

The new act explicitly bans all non-disclosure clauses and non-disparagement clauses regarding a sexual assault or sexual harassment dispute that is "agreed to before the dispute arises. . . in which conduct is alleged to have violated Federal, Tribal, or State law." The effect of the law is that as of December 7, 2022, all such clauses are unenforceable. The prohibition applies to all agreements, regardless of when they were signed, as long as the sexual assault or sexual harassment dispute was brought on or after December 7, 2022.

The statute does contain a provision indicating that nothing in it prohibits an employer and an employee from protecting trade secrets or proprietary information. Further, it only applies to a sexual assault or a sexual harassment dispute. Thus, the law does not apply to such non-disclosure clauses and non-disparagement clauses as part of a settlement agreement after a sexual harassment or sexual assault dispute arises. This new law does not supersede more restrictive state laws, however.

## DESIGNING AN ACTIVE SHOOTER PLAN

Various online resources are available to design an active shooter plan, including the FBI Active Shooter Resources (https://www.fbi.gov/about/partnerships/office-of-partner-engagement/active-shooter-resources) web page and the U.S. Department of Homeland Security's Active Shooter: How to Respond booklet (https://www.dhs.gov/xlibrary/assets/active_shooter_booklet.pdf). Strategy includes approaches like the following:

- Premises security - fences, locked doors, entry card systems, alarm systems.
- Evacuation plan - particularly evacuation routes.
- Good lighting systems - easier to observe intruder and for employees to see what is going on.
- Hallways and doorways - wide enough for evacuation.
- Having visible security measures - such measures serve as a deterrent, such as security officials.
- Training - most commonly once a year active shooter response training.

## COMPLIANCE ISSUES OVERWHELM HR DEPARTMENTS

Recent studies suggest that regulatory and legal compliance takes more than half of the time of HR departments. One of the greatest attributes any HR official can have is the ability to anticipate legal and compliance issues so that they can be addressed, either by talking to others in the organization or outside counsel. One way to deal with HR personnel with their compliance support is through the regular memos or newsletters (like this one!) updating them on current issues. Readers, therefore, are urged to let us know the email addresses of their managers and supervisors whom you believe would be helped by receiving emailed newsletters at least once a month, plus more extensive articles on matters of interest. If you will provide those email addresses to us, we would be pleased to add them to our mailing list free of charge. In addition, if there are other employers in your area that you think would enjoy these newsletters, we would love to add them as well if you will give us their contact information.

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