Four Non-Compete and Confidentiality Agreement Issues to Watch in 2016

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As 2015 draws to a close, reflection on the year’s changes and developments in the law governing non-compete and non-disclosure agreements suggests additional issues to be on the lookout for in the coming year. We review four of them below.

1. **Enforceability of choice of law and choice of forum clauses may be questioned.**

   Multistate employers often have looked to choice of law and choice of forum provisions to create consistency and predictability in the enforcement of their post-employment restrictive covenants. However, these clauses may not be the panacea expected.

   Earlier this year, the New York Court of Appeals refused to enforce a Florida choice of law provision. *Brown & Brown, Inc. v. Johnson*, 34 N.E. 3d 35 (N.Y. 2015). The Court described the application of the Florida non-compete statute and its built-in presumptions in favor of enforceability as “obnoxious” to New York law and its public policy. Despite the choice of Florida law provision, the Court would not apply Florida law to the New York employee at issue.

   More recently, the Fifth Circuit Court of Appeals, in New Orleans, likewise refused to follow the parties’ contractual choice of law. *Cardonia v. Prosperity Bank*, 805 F.3d 573 (5th Cir. 2015). The Texas-based bank included Texas choice of forum and Texas choice of law provisions in its post-employment restrictive covenant agreements with Oklahoma-based employees. Although the forum selection clause properly placed the dispute in a Texas court, the Fifth Circuit affirmed the district court’s refusal to apply Texas law regarding the non-compete provision, because Texas law governing non-compete agreements contravened the public policy of Oklahoma (which prohibits traditional non-competition restrictions by statute), where the former employees resided. The Fifth Circuit has jurisdiction over Louisiana, Mississippi, and Texas.

   Together, these cases raise questions about the enforceability of choice of law provisions in particular cases. The New York Court of Appeals and the Fifth Circuit Court of Appeals each acknowledged that parties to restrictive covenants are generally free to reach agreements on the terms they prefer. However, even if the forum selection clause in a restrictive covenant initially prevails in setting the venue for litigation, *Brown & Brown* and *Cardonia* raise the question whether the parties’ contractual choice of law will be a reliable predictor of the case’s outcome.

   Moreover, these cases caution that multistate employers in drafting agreements take care to consider the possibility that the contractual choice of law may not be followed. Similar considerations may affect employers whose employees telecommute in or from a different jurisdiction than the location of the employer, or whose employees work exclusively in a virtual environment.

2. **Adequacy of consideration in exchange for non-compete agreements with current employees is under increasing scrutiny.**

   It is more and more the case that additional consideration is needed in exchange for requiring current employees to sign non-compete agreements. *Socko v. Mid-Atlantic Systems of CPA, Inc.*, 2015 Pa. LEXIS 2672 (Nov. 18, 2015), recently reconfirmed this rule in Pennsylvania.

   The Illinois courts are still trying to cope with the effects of *Fifield v. Premier Dealer Servs.*, 993 N.E. 2d 938 (Ill. App. Ct. 2013), cert. denied, 996 N.E.2d 12 (2013), a decision of the First District of Illinois Appellate Court holding that even new hires must be given consideration in exchange for non-compete agreements, or the employment of an existing employee must continue for at least two years, even if

However, with the adoption of court-made rules in Hawaii and in Wisconsin that continued employment alone constitutes adequate consideration for a non-compete imposed on employees mid-employment, see Standard Register v. Keala, 2015 U.S. Dist. LEXIS 73695 (D. Haw. June 8, 2015); Runzheimer Int'l, Ltd. v. Freidlen, 662 N.W.2d 879 (Wis. 2015) (recognizing that the employer’s forbearance in exercising its right to terminate the at-will employee was adequate consideration, even though the promise not to fire the employee was for an indeterminate period of time), the development of law over a requirement for additional consideration for a non-compete agreement binding on a current employee remains one to watch on a state-by-state basis.

As trends clarify, review of how non-compete agreements are drafted, and how employers with businesses in multiple states intend to implement them, will become increasingly important. Multistate employers, in particular, should pay close attention to what consideration of value will be offered, whether the consideration is identical for all employees, and how the consideration is documented.

3. SEC enforcement activity.

The Securities and Exchange Commission’s increasing attack on confidentiality agreements that appear to prohibit employees from discussing internal investigations participating in a whistleblower complaint is another area to monitor in 2016. The SEC’s April 1, 2015, announcement of its settlement with Texas-based KRB, Inc. created an incentive for all employers to review the confidentiality clauses and release agreements as applied to internal investigations or potential SEC enforcement actions to determine whether they restrict employees from engaging in whistleblowing activity under the Dodd-Frank Wall Street Reform and Consumer Protection Act.

KBR required employees being interviewed during internal investigations to sign a non-disclosure agreement prohibiting them from discussing any matter related to the investigation with anyone outside the company. The SEC appeared to believe that such an agreement literally precluded employees from discussing these matters with the SEC and, therefore, impeded whistleblowing under the Dodd-Frank Act. From this fact-specific settlement, however, came a sweeping statement that the SEC will look very closely at all confidentiality provisions in release agreements as well as in employment agreements.

The SEC said in its press release:

SEC rules prohibit employers from taking measures through confidentiality, employment, severance, or other type of agreements that may silence potential whistleblowers before they can reach out to the SEC. We will vigorously enforce this provision.

According to the SEC’s order instituting a settled administrative proceeding, there are no apparent instances in which KRB specifically prevented employees from communicating with the SEC about specific securities law violations. However, any company’s blanket prohibition against witnesses discussing the substance of the interview has a potential chilling effect on whistleblowers’ willingness to report illegal conduct to the SEC.

[...] Other employers should similarly review and amend existing and historical agreements that in word or effect stop their employees from reporting potential violations to the SEC.


The SEC’s enforcement efforts appear to be focused on employees of financial sector employers, though all publicly traded companies should be sure that their release and non-disclosure agreements avoid creating a culture of silence or having a “chilling effect” on employees. While the SEC, like the Equal Employment Opportunity Commission and the National Labor Relations Board, has an interest in conducting investigations of compliance with the laws they are charged with enforcing, companies also have a right to keep their business information and trade secrets confidential. Employers would benefit from guidance by the SEC on the types of restrictions that would satisfy the agency.


The federal Computer Fraud and Abuse Act ("CFAA") imposes both criminal and civil liability on an
individual who intentionally accesses a computer “without authorization” or “exceeds authorized access” and, thereby, obtains information from the computer. “Without authorization” is not defined in the statute. “Exceeds authorized access” is defined in the statute to mean accessing a computer with authorization and using such access to obtain or alter information in the computer that the person accessing it is not entitled to obtain or alter.

Federal appellate courts are split on whether these terms should be interpreted broadly or narrowly. In United States v. Valle, 2015 U.S. App. LEXIS 21028 at *4 (2d Cir. Dec. 3, 2015), the Second Circuit, in New York, held that an individual “exceeds authorized access” only when he obtains or alters information on a computer that he does not have authorization to access for any purpose. In so doing, the Court joined the Ninth and Fourth Circuits in adopting a narrow interpretation of the civil and criminal statute. In these circuits, employers’ claims under the CFAA are limited. They must be based on the actions of employees who lack permitted access to information on computers, not the actions of employees who exceed a permitted use of employers’ information under company policies. However, employers may assert traditional state law claims against employees for breaching restrictive covenant agreements and misappropriating trade secrets. In contrast, the First, Fifth, Seventh, and Eleventh Circuits have adopted a broad construction, allowing CFAA claims alleging an employee misused employer information that he or she was otherwise permitted to access.

In Valle, the Second Circuit found the intended scope of the statute was in doubt. The Court said “authorization” could refer broadly to the purposes for which one is authorized to access a computer or more narrowly to the particular files or databases in the computer to which one’s authorization extends. The Court reviewed the legislative history and motivating policies of the statute and found support for both broad and narrow interpretations of the statute. Under a rule of lenity, which favors those charged under criminal statutes susceptible to harsher or more lenient interpretations, the Court determined that doubts about the scope of the statute should be resolved in favor of the defendant.

The Court in Valle further noted that a broad interpretation of the CFAA would allow private parties to manipulate their computer-use and personnel policies to turn their relationships into ones policed by the criminal law. Consequently, any employee who, for example, checked sports scores in violation of his employer’s use policy could be left without any authorization to access his employer’s computer systems and be subject to criminal penalties. In effect, the Court declined to rely on prosecutors or employers to determine responsibly whether to prosecute or sue individuals for computer activities at work that may range from innocuous (e.g., checking Facebook) to nefarious (e.g., downloading customer lists). A narrow construction of the statute, the Court said, ensures that every violation of a private computer-use policy does not become a federal crime or lawsuit.

Given the split of the decisions from the Circuit Courts of Appeal, review by the U.S. Supreme Court may be on the horizon.

Please contact a Jackson Lewis attorney if you have any questions about these or other workplace issues.

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