



Trade Secret Quarterly

July 2021

Is the Fed Poised to Prohibit Noncompetes?

On July 9, President Biden issued an executive order that could threaten the viability of employee noncompete agreements. His sweeping “Executive Order on Promoting Competition in the American Economy” (“Order”) calls for 72 separate initiatives to tackle what Biden describes as “some of the most pressing competition problems in the American economy.” One of those initiatives takes aim at employee noncompete agreements.

In the Order, Biden, who has long been a critic of noncompetes, cites them as tools companies use to “stifle competition.” The Order notes that up to 60 million employees are bound by noncompete agreements and blames them for restricting employees’ ability to demand higher wages.

The Order does not issue any actual restrictions; rather, it simply “encourages” the Federal Trade Commission (FTC) to “ban or limit non-compete agreements.”

The trend in many states has been to restrict the use of noncompete agreements for employees above a certain income threshold. It remains to be seen if the FTC might follow that lead if it indeed issues any regulations.

The Order does not mention the use of nonsolicitation or confidentiality agreements, nor does it address whether the White House seeks to have a limitation or ban applied retroactively.

This marks the most concerted federal action to date to restrict the use of noncompete agreements. There remains much uncertainty as to whether the FTC would issue

regulations that track the White House’s desires and whether any such regulations would survive the certain legal challenges. However, it is certainly a warning to employers that now is the time to implement or revamp agreements with key employees so that they are best structured to protect the employers’ interests in the event of a federal crackdown.

When Is Enough Enough?

Trade Secret Quarterly has previously addressed the balancing act required when filing a misappropriation of trade secrets claim: How much trade secret information must you disclose in a public filing to avoid a potential dismissal for failing to identify the trade secrets at issue with specificity? A new case from the United States Court of Appeals for the Third Circuit provides some guidance.

The dispute involved a lawsuit by a pharmaceutical company, Oakwood Laboratories, LLC (“Oakwood”), against its former vice president of product development and his new employer. Oakwood alleged that the defendants misappropriated its technology surrounding sustained release injectable drugs using microsphere systems, in which Oakwood had invested more than \$130 million over two decades. Oakwood alleged that the defendants used its technology to jump-start a competing technology.

The District Court dismissed four successive versions of Oakwood’s complaint, finding that it failed to state a claim. First, the court found that Oakwood had adequately pled the existence of trade secrets but failed to identify which ones were misappropriated. Second, it found that Oakwood failed to allege how the defendants misappropriated its trade secrets because it did not provide direct proof of how trade

secrets were used in the competitor's product development. This finding was particularly problematic, as these specifics often are not clear until discovery can be conducted.

The Third Circuit held that the District Court had erred in applying these heightened standards. Regarding the identification of trade secrets, the Third Circuit held that the District Court correctly found that information alleged to be trade secrets must be identified with sufficient specificity to put the defendant on notice of the basis of the claim. However, it found that a plaintiff does not need to "spell out the details of the trade secret to avoid" dismissal. Instead, the requirement the plaintiff must meet is to describe the trade secret "with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade, ad to permit the defendant to ascertain at least the boundaries within which the secret lies."

The Third Circuit also rejected the District Court's heightened standard in requiring specifics about how the defendants allegedly used the trade secrets. It held that the factual allegations were sufficient because the defendants' use of Oakwood's trade secrets could be inferred from the circumstantial evidence, including the competitor's lack of experience in the specialized field of microsphere technology, the timing of the former employee's move to the competitor, the former employee's deception regarding his work with the competitor, and the competitor's rapid success in developing a technology that it took Oakwood 20 years and a significant financial investment to develop.

Finally, the Third Circuit held that the fact that trade secrets are misappropriated is harm in and of itself and that the District Court had erred in rejecting Oakwood's complaints for failing to demonstrate harm.

It remains to be seen whether other circuits will follow these pleading standards outlined by the Third Circuit. However, it certainly will be helpful for trade secret plaintiffs who cannot meet the exacting level of detail that is difficult to outline at the early stage of litigation.

Supreme Court Refines Application of CFAA

The Computer Fraud and Abuse Act (CFAA) often provides the source for companion claims in trade secret disputes when an individual defendant has accessed a company's computer system without authorization. Last month, the U.S. Supreme Court issued a decision in *Van Buren v. United States* that places some important parameters around the definition of "unauthorized access."

The court held that the statute requires a "gates-up-or-down inquiry," meaning that an individual either can or cannot permissibly access a computer system or authorized areas within the system. In other words, an individual cannot be deemed to sometimes be authorized to have access and sometimes not. This has several implications.

First, this ruling means that individuals who have permission to use a company's computer system to access email and internet functions will likely not be deemed to have "exceeded authorized access" if they sometimes use those functions for personal use. Sending personal emails, checking Facebook or doing online shopping on the company computer might violate internal policies but would not be a violation of the CFAA.

More importantly, the ruling means that employers may need to revamp their computer and system use policies. Current restrictions that provide only general warnings about use may not be sufficient to protect key electronic information under the CFAA. Instead, if an employer has electronically stored information that should be accessed only by a specific, limited group of employees, it should consider segregating the information into separate, password-protected files or folders. This puts the gate "down," so that if an unauthorized employee obtains access to those files, a CFAA sanction may apply.

New Florida Trade Secrets Law: Tool or Trap?

Florida has passed new trade secret legislation directed at hacking by China and other foreign agents. However, some are arguing that the law is too sweeping and could have unintended consequences in routine trade secret cases in the employment context.

The law creates new criminal offenses for theft and trafficking of trade secrets. Anyone who willfully and without authorization steals, or attempts to steal, a trade secret and use it for their own benefit could face a five-year prison term. Individuals who attempt to sell stolen trade secrets could face a 15-year sentence.

Critics point out that the legislation's language does not limit its application to the intended target of foreign nationals and complain that it increases the risk for employees who take materials, either purposely or inadvertently. They also point out that it creates heightened risk for an ex-employee's new employer, because the legislation impacts anyone who obtains the trade secret, even if it is not used.

While that may be true, the law does give employers and state prosecutors an additional weapon to use in prosecuting trade secret actions. In addition, it adds a civil right of action for an injunction or royalty against the offender. These remedies are already available under the Florida Uniform Trade Secrets Act, but companies can now bring claims under both statutes to broaden their chances of success.

FOR MORE INFORMATION

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