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FTC's Proposed Noncompete Ban Delayed Again

It appears that the Federal Trade Commission (FTC) is hitting the pause button on its proposed rule banning noncompetes. On January 5 the FTC came out with a stunningly broad rule, which would ban all noncompetes for all employees. Further, the proposed rule would be retroactive and would void all existing noncompetes.

The rule's initial public comment period was to expire in March; that was extended to April due to the massive amount of comments from both opponents and proponents of the rule. Most observers predicted that the agency would fast-track the rule as soon as the comment period closed. However, it now appears a final version of the rule won't be coming any time soon.

Bloomberg Law has reported that the FTC's vote to formally ban noncompete clauses in most employment agreements won't take place until April 2024, leaving employers in an extended period of limbo.

The decision to delay the vote was triggered by the overwhelming number of public comments – approximately 27,000. While many feared the FTC would give short shrift to the comments, it appears that it is, in fact, taking them seriously. Bloomberg reported that the agency retained several dozen personnel, who have spent 6,000 hours on the process, suggesting that that the comments are receiving a great deal of attention.

The FTC had specifically requested comments on potential variations to the rule, including whether it should only apply to certain categories of employees (lower level) or to employees earning below a certain compensation threshold. This type of rule would be more in line with the trend in state legislation.

Employers should use the delay to their advantage by taking inventory of all existing restrictive covenant agreements, including those that currently restrict former employees; implementing a method to track all noncompetes they put into effect in the coming months so there is a complete list when the proposed rule is finalized; evaluating whether their interests can be protected with customer non-solicitation or confidentiality agreements, which would survive the rule; and solidifying their trade secret protections and protocols so enforcement actions can focus on trade secrets if necessary.

While the FTC is slowing down in its action, states continue to focus on noncompetes. New York's state senate has become one of the latest to enter the fray with a proposed bill that mirrors the FTC's approach and would entirely ban noncompetes for workers. The bottom line: Employers should continue to watch the noncompete landscape closely.

Proving "Misappropriation"

The first hurdle in prevailing in trade secret litigation is establishing the existence of a trade secret, but it can also be a challenge to demonstrate that the trade secret has been **used.** Many cases are more nuanced than a former employee copying the employer's documents or processes directly into a computer issued by her new employer and blatantly using them. Some recent case law illustrates that circumstantial evidence can provide a successful pathway in an enforcement action.

In *Oakwood Lab'ys LLC v. Thanoo*, a pharmaceutical company sued a former product development employee and his new employer for misappropriation of trade secrets in violation of the Defend Trade Secrets Act (DTSA). The plaintiff alleged that shortly after the employee was hired, his new employer developed products that were substantially similar to and competitive with the plaintiff's product using its trade secrets.

The district court dismissed the plaintiff's complaint for failure to state a claim, holding that the plaintiff failed to identify which one or more of its trade secrets the defendants misappropriated. The district court also held that the plaintiff did not establish an "improper acquisition, disclosure, or use of a trade secret without consent." It reasoned that the plaintiff needed to demonstrate that the corporate defendant copied the plaintiff's project to satisfy the DTSA's "use" requirement. The Third Circuit disagreed, finding that the "use" of a trade secret encompasses all the ways one can take advantage of trade secret information to obtain an economic advantage, including using it to assist or accelerate research or development.

The Third Circuit also held that the plaintiff sufficiently alleged misappropriation based on circumstantial evidence. The court found that indirect use of trade secrets can be inferred from facts such as the timing of a defendant employee's hire or deception surrounding the employee's departure or a corporate defendant's lack of experience in the industry, low financial investment or quick success with a new potential product. This reasoning is helpful in cases where defendants do not leave clear tracks revealing their use of exploited trade secret information.

Establishing Damages in Trade Secret Cases

Proving damages in a trade secret misappropriation case can be difficult absent such evidence as loss of accounts or market share. Under a relatively new damage theory, the Third Circuit held that cost savings can be recoverable.

In that case, the defendant, a Chinese auto glass maker, was accused of hiring a former employee of the plaintiff, a U.S.-based global manufacturer, and asking him to share his former employer's trade secret information regarding the development of new plastic for airline windows. The defendant allegedly wanted to develop the same product for similar customers. The plaintiff learned of the situation from a vendor the defendant had asked to make the same molds as the vendor made for the plaintiff.

The defendant did not initially participate in the litigation, and the court eventually entered a default judgment. The defendant jumped into the case at that point, but the default judgment stood. The court then awarded the plaintiff damages based upon the plaintiff's calculation of the money the defendant would have saved by skipping the research and development process to create its own similar product.

On appeal, the defendant argued it had never won a contract for the product, and thus it was not unjustly enriched and the plaintiff had not suffered any loss. The Third Circuit rejected that argument and agreed with the district court's ruling that the defendant had in fact been unjustly enriched because of the R&D cost savings.

FOR MORE INFORMATION

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