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The Proskauer Brief: In a World Without Non-Competes

The Proskauer Brief on **November 6, 2023**

In this episode of The Proskauer Brief we are joined by Daryl Leon, one of the leads of Proskauer's Restrictive Covenants, Trade Secrets and Unfair Competition Group and Edna Guerrasio, senior counsel in the Labor & Employment Law Department. Along with partner Steve Pearlman, Daryl and Edna recently published an article in Legal Drive that discusses methods and strategies employers can use to bulk up their protections for trade secrets and human capital in a world where non-competes are becoming less and less viable. Tune in as they build on the topics covered in that article and discuss in greater depth what options are available to employers.

Daryl Leon: Welcome to The Proskauer Brief: Hot Topics in Labor and Employment Law. I'm Daryl Leon, one of the leads of Proskauer's Restrictive Covenants, Trade Secrets and Unfair Competition Group. And on today's episode, I'm joined by my colleague, Edna Guerrasio, senior counsel in the Labor & Employment Law Department. Along with our colleague Steve Pearlman, Edna and I recently published an article in Legal Drive that discusses the methods and strategies that employers can use to bulk up their protections of trade secrets and human capital in a world where non-competes are becoming less and less viable. Today, we're going to build on the topics covered in that article and discuss the options available to employers in greater depth. Edna, thanks for joining me today.

Edna Guerrasio: Happy to be here.

Daryl Leon: So, Edna, I think it's safe to say that non-competes are under siege on multiple fronts.

Edna Guerrasio: Definitely. The legal landscape in this area has been undergoing change for quite some time, but I think the summer of 2021 is when we saw the tide really start to turn here.

Daryl Leon: Yeah, for sure. And I think what you're referring to was President Biden's executive order on promoting competition in the American economy. So in the order, the President encouraged the chair of the Federal Trade Commission to consider working with the rest of the Commission to exercise the FTC statutory rulemaking authority to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility. So, we saw that encouragement come to fruition in January 2023, when the FTC proposed a sweeping ban on non-competes.

Edna Guerrasio: That's right. But it isn't just the FTC. We're also seeing states and courts becoming increasingly hostile to non-competes. This year alone, Minnesota passed a ban on non-competes and the New York legislature passed a bill that would ban all non-competes. While as of the time of this recording that bill still hasn't been sent to the governor's office, and there's a lot of skepticism that she would sign such a sweeping prohibition, the fact that New York lawmakers are considering that level of attack on non-competes is a significant data point that New York employers need to consider when crafting non-competes and making enforcement decisions.

Daryl Leon: That's right. And courts, we can't forget, are getting in on the action as well. And of note, the Delaware Court of Chancery, which is a venue that has been well regarded previously as pro-business, pro-contract, and generally tolerant of non-competes, issued a number of decisions over the past year that nullified non-competes. So in and of itself that isn't particularly noteworthy, but what makes these cases notable is that they involve non-competes in the sale of a business context or forfeiture for competition, both of which involve sophisticated parties. These are types of cases that are typically viewed with greater leniency than traditional employer/employee non-competes. And yet we now see courts taking a hard line against non-competes even in this context. What's also interesting to note about those Delaware decisions, which we've noted on our Proskauer blog, is that the Vice Chancellor in those cases refused to blue pencil the agreements and struck them down entirely, which is another data point that employers should take note of.

Edna Guerrasio: So with that context, and looking to a future where non-competes may not be enforceable in the jurisdiction where an employer is located, what can employers do to protect their workforce and trade secrets?

Daryl Leon: I think a key thing to remember is that non-competes were only ever one of many tools in an employer's tool belt that they should use to protect their business interest. So, let's walk our listeners through some of the other options available to employers.

Edna Guerrasio: Sure. I think the first place to start is non-solicitation and confidentiality obligations. While neither of these will prohibit an employee from going to work for a competitor, they do impose contractual obligations that provide protections to the former employer, such as an obligation not to raid the former employer's workforce, steal their clients, or use any confidential information at their new employment. Those are powerful protections, and if violated they can still give rise to injunctive relief or monetary damages. While non-solicitation and confidentiality agreements may at some point in the future also be a focus of the FTC and the courts, for now these agreements are generally accepted and not subject to the same level of scrutiny.

Daryl Leon: So, Edna, what specifically can an employer do to effectively utilize a non-solicitation or confidentiality clause as tools to protect their valuable information, clients or resources?

Edna Guerrasio: Sure. So with respect to non-solicit agreements, employers should ensure their employee and client non-solicitation agreements are appropriately tailored both in geographic and temporal scope to protect their personnel and client relationships from being lured away by departing employees. For confidentiality obligations, employers should consider conducting an audit of the confidentiality measures already in place to ensure they are using all available tools to secure their confidential information and have the provisions drafted more appropriately for the venue where the employer and employee are located. These policies need to be regularly updated and recirculated with employers requiring that their employees acknowledge and reaffirm their obligations.

Daryl Leon: That’s right. And beyond just contract drafting, employers may also want to consider the way that their organization treats confidential information. For an example, an employer may consider restricting access to sensitive information by using password protection or file sharing software that restricts access to only those individuals who have a need to access or know about the materials. They can also implement security measures such as prohibitions against using a USB drive or other portable drives, prohibiting downloads of work files to personal devices, requiring that employees work exclusively on company devices or remote desktop services, or use a VPN, a virtual private network, when accessing company servers. At the time of an employee’s departure, employers should also consider whether it’s appropriate to conduct an audit to check whether there has been any suspicious download activity, and to confirm that the departing employee has deleted all business information from their personal devices. So Edna, and are there any other ways that employers can and should protect their workforce and trade secrets?

Edna Guerrasio: Absolutely. Remember, you don’t need to worry about the loss of intellectual property or competitors raiding your workforce if employees are happy and want to stay with the company. Employers should consider ways to retain their workforce and keep their employees happy and working rather than just relying on restrictive covenants.

Daryl Leon: So what are some examples of things they can do?

Edna Guerrasio: That’s a great question, Daryl. This is something that is often changing and may be employer or industry specific. A decade ago, it may have been a free lunch or some sort of an activity like a ping pong table in the break room. Now we’re seeing that employees want more flexible work schedules, including options to work exclusively from home or hybrid scenarios. For some employers, the answer may be offering paid sabbaticals or other ways for employees to get a meaningful break while still keeping their job and benefits, rather than feeling that the only option they have is to quit in order to get that reset.

Daryl Leon: These are great strategies, and if a great employee just needs a break, employers shouldn't force them to leave so that they get those two weeks off between their jobs. Give the employee the extra time and they may come back refreshed and ready to keep working. In my practice, I'm also seeing financial incentives like deferred compensation bonuses, stay bonuses, or even educational stipends or tuition repayment programs, which can be conditioned on length of service. So, I'll avoid the trope of trying to gamify everything, but if employees feel fulfilled and are rewarded for good long-term employment, they may well decide that they want to stay around longer and keep progressing within an organization rather than leaving for new opportunities.

Edna Guerrasio: Exactly. And these benefits aren't one-size-fits-all. Just like the restrictive covenants we talked about earlier, these should be tailored to the employer and its workforce, and its incentives can be molded to fit the employee population that the employer is most concerned about.

Daryl Leon: Absolutely. Edna, thank you for joining me today to discuss this topic. I know that's one that you and I are both really excited about and would be happy to work with any of our listeners on developing a program that works for their workforce.

Edna Guerrasio: Of course. Thank you, Daryl. And to those listening, thank you for joining us on The Proskauer Brief today. Stay tuned for more insights on the latest hot topics in labor and employment law. And be sure to follow us on Apple Podcasts, Google Podcasts and Spotify.

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