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Federal Attack on Non-Competes Likely Another Casualty of Election

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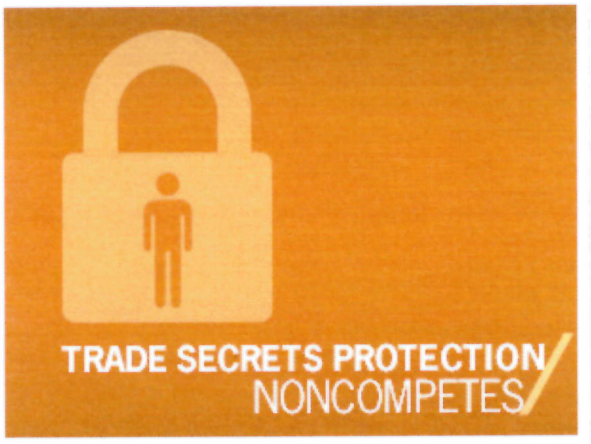

As our readers are aware, employers can expect that the Trump administration will usher in a plethora of changes in terms of federal employment law policy and enforcement. One particular area in which the new administration may do an about-face is its position on enforcement of non-competition agreements.

The Obama administration has coupled its support of the federal Defend Trade Secrets Act (which creates a federal enforcement scheme to protect against the loss of intellectual property through trade secret theft) with a rebuke of non-competition agreements. In May 2016, it published a report largely condemning the use of non-compete agreements and just recently issued a "State Call to Action on Non-Compete Agreements," advocating that states restrict the scope of non-competes, increase transparency, and employ a "red pencil" approach which entirely voids non-compete agreements that contain any invalid clauses.

Like other aspects of the Obama administration's labor agenda, this initiative may be in peril. While President-Elect Trump's position on non-competition agreements is not yet clear, it seems likely that the businessman will support the freedom to enter into such agreements. In fact, during the election cycle, the Trump campaign itself required employees and volunteers to sign a non-compete agreement that was criticized by some for its breadth. And President-elect Trump has promoted the use of non-disclosure agreements to prevent leaks by federal employees. Therefore, from

a federal perspective, proponents of restrictive covenants likely will enjoy the added protection of the Defend Trade Secrets Act, while avoiding the countervailing attempt to limit non-competes.

However, before restrictive covenant fans get too excited, we must recognize that non-compete enforcement has always been, in the end, a state issue. Expect certain states that supported the Obama administration call to action (e.g., Connecticut, Hawaii, Illinois, and New York) to keep the wheels in motion. Likewise, several states' attorneys general (e.g., Illinois and New York) recently have targeted employers with enforcement actions for using overly broad non-competes.

In short, employers should continue to: (1) follow evolving state law developments; (2) fine-tune their non-compete agreements so that they are only as broad as is necessary to protect their legitimate business interests (e.g., protecting confidential information or customer relationships).

TAGS: CALL TO ACTION ON NON-COMPETE AGREEMENTS, RESTRICTIVE CONVENANTS, TRUMP ADMINISTRATION