Employment Law Updates from the First Quarter of 2023

March 30, 2023

Agenda

1. Confidentiality in Severance Agreements
2. Non-Compete Ban
3. State Laws on Discrimination and Accomodations
4. Questions & Answers

NLRB Limits Confidentiality in Severance Agreements

- On February 21, 2023, the National Labor Relations Board (NLRB) ruled that overly-broad confidentiality and non-disparagement provisions in severance agreements unlawfully require employees to waive rights under the National Labor Relations Act (NLRA).

- Today we'll discuss:
  - the details of the ruling;
  - the NLRB General Counsel's guidance on the ruling;
  - the retroactive application of the ruling;
  - implications for employers; and

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- Non-disparagement and confidentiality provisions in a severance agreement unlawfully interfered with the employee's rights under Section 7 of the NLRA.

- Section 7 rights include the right to:
  - discuss the terms and conditions of employment with co-workers,
  - file unfair labor practice charges,
  - assist other employees in filing charges, and
  - assist the NLRB with investigations.

- These rights also extend to an employee's ability to communicate with third parties like the media and unions about working conditions.

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- ***Confidentiality Agreement.*** The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.

- ***Non-Disclosure.*** At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

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- The heart of the decision:
  - Confidentiality provisions that prohibit employees from disclosing the terms of the severance agreement (including amount) violate employees' NLRA rights
  - Non-disparagement provisions that prohibit criticism of the employer are unlawful.
  - Even proffering an unlawful agreement to an employee is against the law (even if the employee never signs it or the employer never seeks to enforce it)

- Limitations of the decision:
  - It doesn't apply to supervisory or managerial employees, because they don't have rights under Section 7 of the NLRA. If otherwise lawful, employers can continue to use confidentiality and non-disparagement provisions in severance agreements with supervisors.

New Guidance from the NLRB's General Counsel

- Severance agreements are not banned
- Unlawful even if employee requests overly-broad confidentiality terms
- What might be lawful?
  - Confidentiality provisions that prohibit dissemination of trade secrets and other proprietary information
  - Non-disparagement provisions that prohibit defamation ("maliciously untrue")
- Including disclaimer language wouldn't necessarily cure over-broad provisions
- Unlawful provisions are likely severable - rest of agreement can still be enforced
- The decision applies retroactively to severance agreements entered into prior to the *McLaren Macomb* decision

Implications for employers

- Ultimately, federal courts may have the last say if the decision is appealed. So keep an eye on the issue.
- Retroactive - Best practice is to notify ex-employees that the company won't seek to enforce the confidentiality and non-disparagement provisions. At minimum, don't seek to enforce those provisions.
- Although not a complete ban, guts the main purpose for which employers used these provisions.
- Employers with some risk tolerance could continue to include confidentiality and non-disparagement provisions in severance agreements with broad disclaimers, but not clear that would be enough.

FTC Proposes Total Non-Compete Ban

- Response to Biden's July 2021 Executive Order

- The rule:
  - Proposes a categorical ban on worker non-compete agreements, with one exception
  - Covers virtually all workers, including independent contractors
  - Applies retroactively to non-competes already signed
  - Imposes strict notice requirements

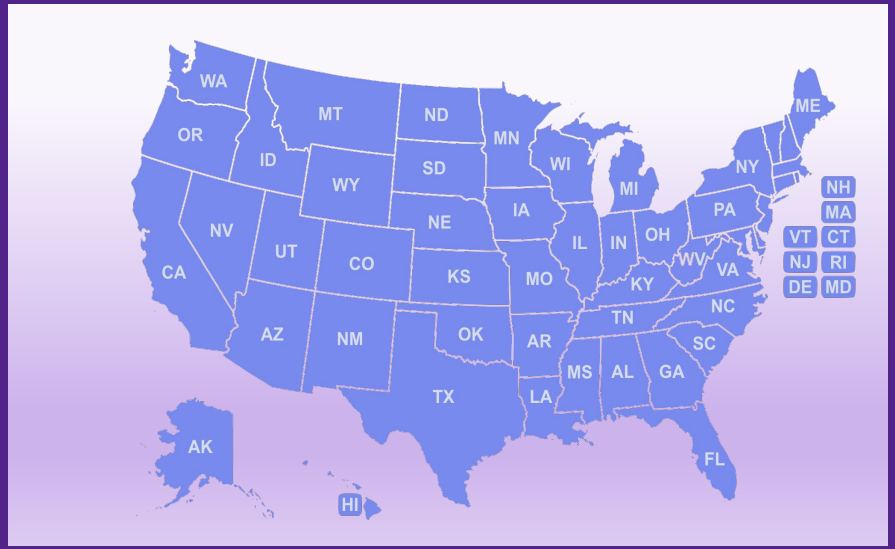
- The FTC has invited comment on various alternatives to a complete ban

- There's significant uncertainty about what the final rule will look like and whether it will survive legal challenges

Current Non-Compete Landscape

Patchwork of state laws:

- Banned in CA, OK, and ND
- Wage Thresholds in 11 states and D.C.
- All states require non-competes to be reasonable in their limitations.
- 24 states with 64 bills *this year*
- Four bills in Congress



The Ban

1 Worker Non-Competes Prohibited

- "Non-compete" is any agreement that prevents worker from accepting new job or operating a business, no matter the label
- Requiring repayment of training costs is a "non-compete" unless payment is reasonably related to the costs incurred
- Exception: in the context of a sale of business, a seller who owns at least 25%

2 Retroactive

- Applies to all agreements going forward and existing agreements
- Within 180 days of the final rule's effective date, employers must rescind all existing non-compete clauses

3 Notice Requirements

- If company rescinds existing non-compete, it must provide notice to worker within 45 days of rescission that the non-compete is no longer in effect
- Notice must be provided to current and former workers who are still under a non-compete
- FTC provides model notice language that complies with the rule

Possible Alternatives

Rebuttable Presumption

- Worker non-competes are presumed unlawful unless employer shows by clear and convincing evidence that:
  - the non-compete has no anti-competitive effect

  OR

  - there's no other way to protect the company's legitimate business interest

Worker Categorization

- Rebuttable presumption of unlawfulness for senior executives, highly skilled workers, and/or highly paid workers
- A rebuttable presumption could be based on
  - job function
  - earnings
  - combination of job function and earnings

What's Next?

- We don't know what the final rule will look like. Complete ban? Alternative proposal? Something else?

- Whatever the final rule looks like, it will be challenged.
  - Does the FTC have the authority to issue the non-compete rule?
    - Congress and the US Chamber of Commerce have already taken steps to challenge this authority.
  - Because the rule has such great economic and political significance, is this an area where Congress (rather than an executive agency) must act?
  - Potential to end up in front of the Supreme Court
    - Even getting here could take years working through lower courts

- Even if the categorical ban goes into effect and survives legal challenge, expect years of litigation determining ambiguities in the rule (i.e., what is a "non-compete," really?)

Best Practice:

- Review your employee handbook every month for updates
  - Consider any new laws, states, and employee counts
  - Depending on your company complexity you may need to make many or no changes
  - A little time each month saves you a lot of time down the road
- A lot can change in a month
  - SixFifty Employee Handbook Update for February 2022 →

- **San Francisco**, California passed new military leave requirements which we covered in last month's update. They have now released FAQ's to help employers calculate and understand the new leave.
- We reviewed the **Delaware** Voting Leave policy and updated it to account for employees working as election official as well as those going to vote. Users with employees in Delaware should consider generating an updated Voting Leave Policy.
- **Minnesota** updated its Human Rights Act to define "race" as including "traits associated with race, including but not limited to hair texture and hair styles such as braids, locs and twists." Minnesota is now the 20th state to pass a CROWN Act law. The EEO and Anti-Discrimination Policy has been updated to reflect this change.
- **St. Paul**, Minnesota amended its Sick and Safe Time law to change parts of rollover and frontloading leave. Employers who frontload leave must now provide 48 hours of leave during the employee's first year and 80 hours of leave each subsequent year. Employers may now set their year as either calendar or fiscal, but this must be clearly communicated to employees. Employers who switch from accrual to frontloading or vice-versa are only allowed to do so at the beginning of the year. Employers must carry over unused hours when switching. The amendment also clarified that employees are entitled to leave even if their employer does not have a physical location in the city. The Sick Leave Policy has been updated accordingly.
- **Bloomington**, Minnesota amended its upcoming Sick and Safe Time law. This amendment includes a new requirement that accrued leave amounts appear on paystubs and allows employers to have employees accrue leave on a pro-rata basis. This law does not go into effect until July 1, 2023. The Employee Handbook will be updated closer to the effective date of the law.

Pregnancy & Lactation Accommodation

Pregnant Workers Fairness Act (PWFA)

- Employers with 15+ employees must make reasonable accommodations related to pregnancy, childbirth, or related medical conditions.

Providing Urgent Maternal Protection for Nursing Mothers Act (PUMP Act)

- Employers must provide lactating employees with reasonable break time and a private location to express milk for up to one year following childbirth
- Employers with less than 50 employees may be exempt if complying would cause "an undue hardship imposing significant difficult or expense."

New York expands Lactation Accommodation Requirements

- Location provided must be in close proximity to the work area, well lit, shielded from view, free from intrusion from other persons, and must include certain amenities
- Changes effective June 7, 2023

Protected Characteristics & CROWN Act

California - reproductive health decision-making

New York - citizenship and immigration status

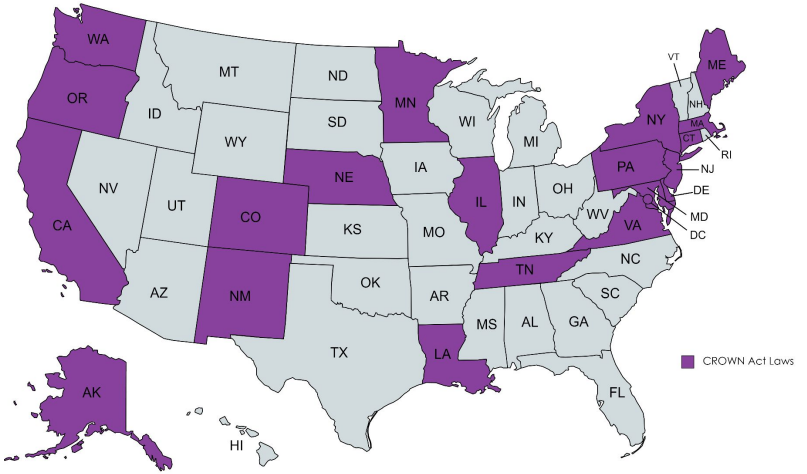
Seattle - caste discrimination

Pennsylvania - sexual orientation and racial hairstyles (CROWN ACT)

Minnesota - racial hairstyles (CROWN Act)

Michigan - sexual orientation and gender identity or expression

Utah - restricting the use of vaccination or immunity status in employment decisions



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CROWN Act Law States

(20 states & DC)

Illinois

One Day in Seven Rest Act Amendment

Employees must have 24 consecutive hours of time off "**every consecutive seven-day period**"

Replaces "every calendar week" rule

Review your Workweek and Work Schedules Policies

Meal and Rest Break Expansion

Employees entitled to a 20-minute meal break if they work more than 7.5 hours

Employees now entitled to an additional 20-minute meal breaks for every additional 4.5 hours worked past the first 7.5 hours

Illinois Paid Leave for All Workers Act

40 hours of paid leave for any reason during a 12 month period

Effective date January 1, 2024

3rd state to pass Paid Leave for any reason

California

- SB 1044 – Employees rights during emergency conditions
- AB 1041 – Designated Person for CFRA
- AB 1949 – Unpaid Bereavement Leave

Stalled (Awaiting Referendum Vote)

- AB 257 – Fast Food Accountability and Standards Recovery Act

Thank you!

Scan to see SixFifty's Employment Tools