

ATTACKS AGAINST LOW LEVEL NON-COMPETE AGREEMENTS

What Employers Need to Know

Non-competition agreements are commonplace for many employers. Employers have traditionally utilized such agreements for a variety of legitimate reasons,

including the preservation of client relationships, retention of employees, prevention of unfair competition, and the protection of trade secrets. However, a

recent increase in government attention and court action surrounding non-competes suggests that a new wave of challenges may be on the horizon for employers, particularly with respect to non-competes for low-



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level employees.

In March 2016, the Office of Economic Policy of the United States Department of Treasury ("Treasury") issued a report titled *Non-Compete Contracts: Economic Effects and Policy Implications*¹. In its 26-page report, the Treasury examines with skepticism the effect of non-competes on worker mobility and economic growth. Specifically, the report highlights what the



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Treasury perceives as burdens faced by workers who execute these agreements, such as a lack of understanding as to terms, reduced bargaining power, and forced withdrawal from job opportunities in a particular occupation. The report also seriously questions the relationship between non-competes and the protection of trade secrets, noting that "less than half of workers who have non-competes ... report possessing trade secrets"². It concludes with three recommendations: greater transparency and communication with employees when presenting non-compete agreements; encouraging the use of enforceable non-compete contracts; and providing financial consideration in

exchange for executing and complying with non-compete agreements.

A mere two months later, in May 2016, the White House issued its own report on the topic styled *Non-Compete Agreements: Analysis of Usage, Potential Issues, and State Responses*.³ This report is likewise critical and explicitly questions the rationale behind non-competes, specifically, with respect to lower level employees, which it defines as 14% of workers earning less than \$40,000. In challenging the justification of non-competes, the report notes that these workers are unlikely to ever access or be exposed to actual company trade secrets. The report

also highlights these workers' lack of bargaining power, stating that 37% of employees were asked to sign non-competes only after accepting job offers and 90% of workers never negotiated their terms. The transparent disdain for non-competes is evident in the report, which further emphasizes that "non-competes can reduce the welfare of workers and hamper the efficiency of the economy as a whole by depressing wages, limiting mobility, and inhibiting innovation."⁴ In conclusion, the White House states that reform must come from the individual states and state legislatures, and further vows to continue to work with the Treasury and the Department of Labor to "facilitate discussion" on non-compete issues.⁵

Taking this cue, many state legislatures have recently proposed and/or enacted legislation to reform the scope and reach of non-compete agreements. For example, Illinois enacted the *Illinois Freedom to Work Act*, which expressly prohibits employers from entering into non-competes on or after January 1, 2017 with low-level employees earning \$13 per hour or less.⁶ In March 2016, Utah passed the *Post-Employment Restrictions Act*, which prohibits non-competes from exceeding one year and requires an employer to pay all litigation costs incurred by an employee for non-competes found unenforceable.⁷ The Massachusetts House of Representatives and Senate similarly attempted to pass legislation to severely limit the scope of non-competes, but were unable to reach agreement before the end of the legislative session in August 2016.⁸ New Jersey and Maryland proposed legislation that would prohibit enforcement of non-compete agreements for anyone receiving unemployment, but the bills did not make it out of committee.⁹ Washington and Idaho also introduced bills limiting the reach of non-compete agreements to only "key employees" with inside knowledge and/or trade secrets.¹⁰

Several companies have also reacted to the increased scrutiny surrounding non-compete agreements. For example, Amazon withdrew its policy of having hourly and seasonal workers sign non-compete agreements after negative media attention.¹¹ Law360, a subscription based legal news service, agreed to discontinue use of mandatory, one-year non-compete agreements, except for top editorial executive and senior non-editorial employees.¹² This occurred after New York Attorney General Eric T. Schneiderman conducted an investigation into Law360, concluding the non-compete agreements were too broad.¹³

Perhaps the most notable example of a company backing away from non-competes for low-wage employees is Jimmy John's, the fast-food sandwich franchisor. Jimmy John's required employees to sign non-compete agreements banning them from working for competitors for two years.¹⁴ Competitors included any business that sold submarine, deli-style, pita, or wrapped sandwiches within two miles of any Jimmy John's in the United States.¹⁵ After an investigation by Schneiderman, Jimmy John's agreed to not enforce the non-compete agreements and to cease making employees sign the agreements.¹⁶

What does this all mean for employers? To the extent that reform is not already underway in your state, you should expect to see increased lobbying efforts and possible legislation mirroring that which has been implemented or proposed in other states. Such increased attention toward non-competes also serves as an important reminder to review your company's existing non-compete agreement and analyze the implication of any proposed or recently implemented state laws. While the recent election of Donald Trump may alter the federal government's view of non-compete agreements with low wage workers, the states are likely to continue legislating in this arena.

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¹ <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>

² Id.

³ https://www.whitehouse.gov/sites/default/files/non-competes_report_final2.pdf

⁴ Id.

⁵ Id.

⁶ <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=099-0860>

⁷ <http://le.utah.gov/~2016/bills/static/hb0251.html>

⁸ <http://www.massachusettsnoncompetelaw.com/2016/08/ma-legislative-session-ends-without-noncompete-compromise/>

⁹ White House Report at 8-9.

¹⁰ Id.

¹¹ <http://www.cbsnews.com/news/should-low-wage-workers-have-to-sign-non-compete-agreements/>

¹² <http://www.law360.com/articles/807290/law360-reaches-noncompete-settlement-with-ny-ag>

¹³ Id.

¹⁴ http://www.law360.com/articles/809676/jimmy-john-s-nixes-ny-noncompetes-in-agreement-with-ag?article_related_content=1

¹⁵ <http://fortune.com/2016/06/22/jimmy-johns-non-compete-agreements/>

¹⁶ Id.