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EMPLOYMENT ISSUES IN A POST–COVID19 WORLD

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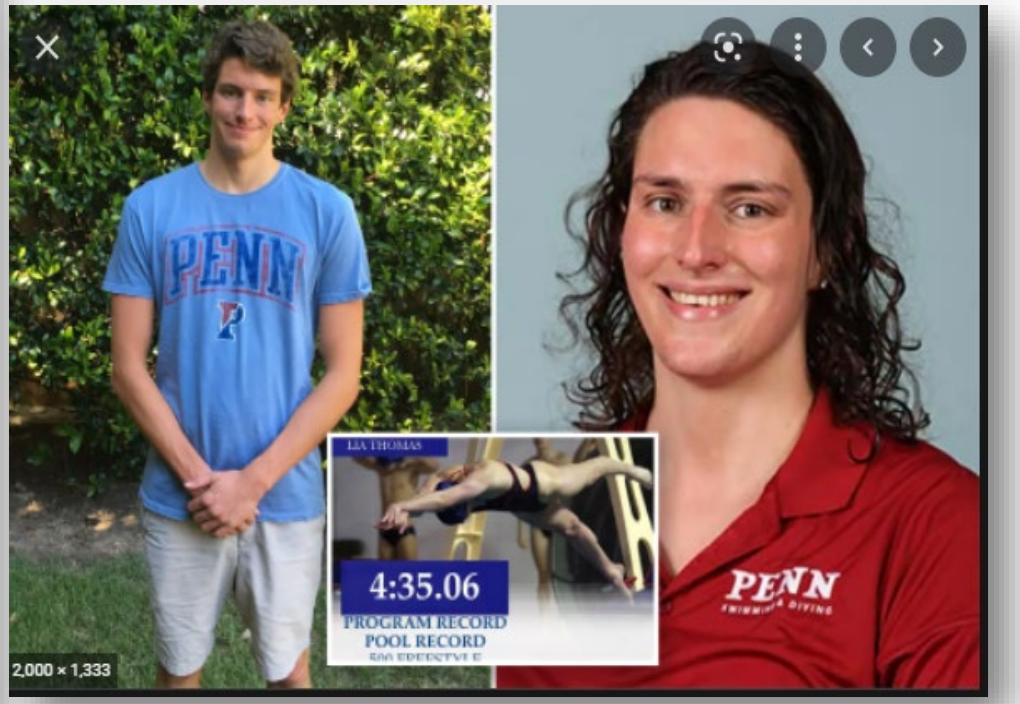
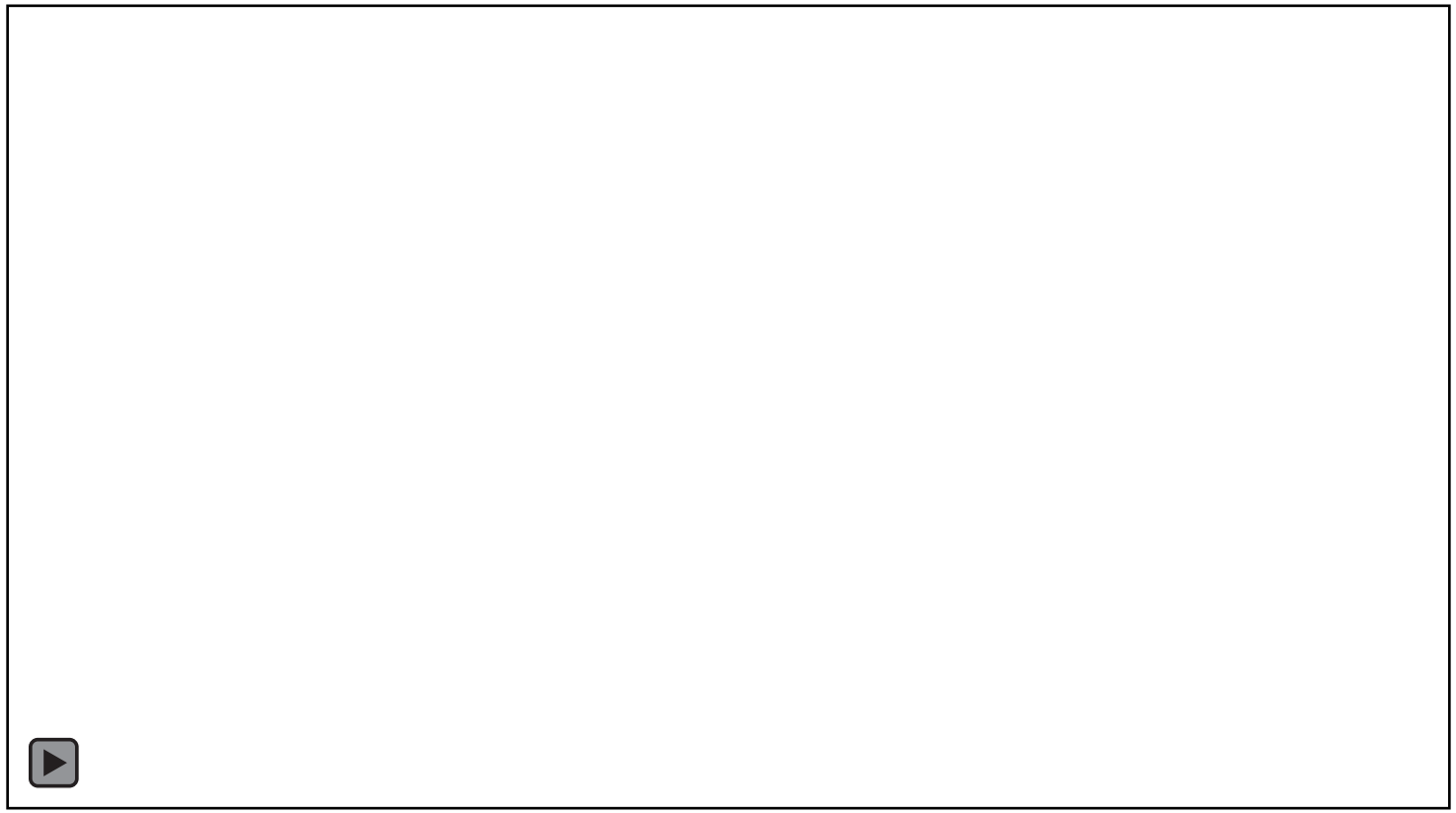


Lia Thomas
University of Pennsylvania Collegiate Swimmer

Governor Cox (R-Utah) Vetoes Transgender Athlete Bill

- 75,000 high school kids participating in high school sports in Utah
- 4 transgender kids playing high school sports in Utah
- 1 transgender student playing girls sports
- 86% of trans youth reporting suicidality
- 56% of trans youth having attempted suicide[1]

NYC GENDER TRAINING



New York Labor Law §740: Summary of Amendments

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Amendments to NY Labor Law §740

On January 26, 2022 amendments to §740 enhanced employee whistleblower protections and required NY employers to take certain steps to ensure compliance. The amendments:

i. *Expanded who is considered an "employee" to include former employees and independent contractors*

ii. *Broadened the scope of protected activity*

iii. *No longer require the employee to first notify his or her employer in certain situations*

iv. *Expanded the types of actions considered retaliatory*

v. *Expanded employee remedies (including front pay and punitive damages) and entitlement to a jury trial*

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Prohibitions under NY Labor Law §740

Earlier version of §740 prohibited employers from taking retaliatory action against an employee who either;

i. *discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer* ***that is*** *in violation of law, rule or regulation* ***and*** *creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud;*

ii. *provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer; or*

iii. *objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation*

The §740 amendments removed the requirement that an employee's ability to successfully seek recourse depend on both an *actual* violation **and** a substantial and specific danger to the public, and instead relies on the employee's *reasonable belief* that such a broad violation has occurred **or** that such action poses a safety threat to the public.

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Retaliatory Actions

The new amendments define retaliatory behavior as, "an adverse action taken by an employer or his or her agent to discharge, threaten, penalize, or in any other manner discriminate against any employee or former employee exercising his or her rights under this section." Such a definition would include:

i. *actions or threats to take such actions that would adversely impact a former employee's current or future employment*

ii. *adverse employment actions or threats to take such adverse employment actions against an employee in the terms of conditions of employment including but not limited to discharge, suspension, or demotion*

iii. *threatening to contact or contacting United States immigration authorities or otherwise reporting or threatening to report an employee's suspected citizenship or immigration status*

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Implications and next steps for employers

Ensure a written notice of employee protections, rights, and requirements is visibly posted

Review existing policies and procedures regarding the management of employee complaints

Train managers and supervisors regarding the whistleblower law and related protections

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Implications and next steps for employers

Written Notice Requirements

Section 740 requires employers to conspicuously post a notice of employee rights, obligations, and protections in an easily accessible, well lit place frequented by employees and applicants for employment. The New York Department of Labor has issued a model notice for employers to use. (www.labor.ny.gov)

Division of Labor Standards
Harriman State Office Campus
Building 12, Albany, NY 12226

WE ARE YOUR DOL

NEW YORK STATE | Department of Labor

www.labor.ny.gov

Notice of Employee Rights, Protections, and Obligations Under Labor Law Section 740

Prohibited Retaliatory Personnel Action by Employers
Effective January 26, 2022

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Implications and next steps for employers

Internal Policy Review

Employers should be prepared to handle a broad range and high volume of grievances given the potential surge in potential protected complaints. If policies and procedures for investigating and responding to complaints are not already in place, employers should develop and adopt them as soon as possible.

Employers should expect a significant increase in litigation and legal risk as a result of these changes. Failure to abide by uniform and consistent internal policies with regard to the review of complaints by both current and former employees, and in the administering of adverse employment actions (including demotion, failure to promote, reduction in pay, suspension, termination, negative references, etc.) will leave employers with heightened litigation risk.

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Implications and next steps for employers

Supervisor Training

Supervisors should be aware that former employees and contractors are also covered under the new amendments, and that adverse actions include threats of action that may affect an employee's current or future employment. Particular attention should also be made to ensure supervisors understand:

i. All internal policies on responding to complaints and the importance of adhering to them
ii. What constitutes an adverse employment action
iii. The importance of maintaining written records of complaint responses and disciplinary actions
iv. All internal policies on administering disciplinary action

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Conducting an Internal Investigation in Response to an Employee Complaint

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Better Call Saul

Overview of Conducting Internal Investigations

Internal Investigation Planning

The effectiveness of any internal investigation will depend on the ability of employers to properly control for varying factors. Prior to an investigation, employers should determine the category of the complaint to be investigated. The most common complaints typically relate to:

- ***Workplace discrimination, harassment, and retaliation***
- ***Wage and hour violations***
- ***Workplace safety and health***

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Overview of Conducting Internal Investigations

Internal Investigation Planning

Prior to starting an investigation, counsel should determine:

- When to conduct the investigation and who to assign to the investigation
- The proper scope of the investigation and policies for collection of information
- Categories of actions to be taken in response to the results of the investigation

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Attorney Client Privilege and Work Product Doctrine

Attorney Client Privilege

When planning and conducting an investigation, counsel should endeavor to preserve and maintain all applicable protections. Attorney client privilege allows counsel to protect materials generated during an investigation from third party or government access so long as:

- *The company tasks inside or outside counsel with conducting the investigation*
- *Counsel is in control of the direction and supervision of the entire investigation*
- *The investigation is sufficiently related to providing legal advice as opposed to business or other nonlegal advice*

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Attorney Client Privilege and Work Product Doctrine

Work Product Doctrine

In addition to attorney client privilege, the work product doctrine may also be invoked to prevent third party and government access to investigation related documents, and extends to work product created by non-attorneys so long as:

- *The company was either in or anticipated litigation when the document was created*
- *The document's creation was primarily motivated by the litigation rather than by some other purpose*
- *The documents would not have been created absent any anticipated or pending litigation*
- *The documents were not created due to a government regulation or internal firm policy*

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Waiving Protections

Who may assert and waive privilege

An organization's management typically controls the attorney-client privilege for the organization. An employee cannot:

- *Assert the organization's privilege if the organization waives it*
- *Waive the organization's privilege if the organization asserts it*

Involuntary waivers of privilege

Even if an investigation-related document initially qualifies for protection under the attorney-client privilege, an organization waives the privilege when an otherwise privileged communication is shared with someone outside of the attorney-client relationship. Additionally, sharing information with certain nonattorney third parties acting as consultants or other advisors may not constitute a waiver so long as third party's support is necessary to counsel's provision of legal advice (i.e., translators and accountants).

Work product protections are waived when disclosed to adversaries or to third parties who may share the work product with the adversary.

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Upjohn Co. V. United States, 449 U.S. 383, 390-95 (1981)

Upjohn Co. V. United States

In Upjohn Co. v. United States, the Supreme Court held that the attorney-client privilege and the work product doctrine apply in internal investigations, including during the interviews of current employees. The Court noted that the attorney-client privilege exists to protect both the advice an attorney provides and the information a client provides so that the attorney can provide sound and informed advice.

A company may assert the attorney-client privilege over communications between its lawyers and current employees, regardless of the employees' position, where:

- To secure legal advice for the company, company superiors directed the employees to communicate with the company's in-house or outside counsel.
- The employees were sufficiently aware that they were being questioned so that the company may obtain legal advice.
- Counsel was acting in a legal capacity on the company's behalf.
- The communication concerns matters within the scope of the employees' duties and is not available from upper-echelon management.
- The employees understood at the time that the communications were confidential.

In re Kellogg, Brown & Root, 756 F.3d 754, 758-59 (D.C. Cir. 2014)

In re Kellogg, Brown & Root

In In re Kellogg, Brown & Root, the D.C. Circuit reaffirmed Upjohn as the standard to determine the application of the attorney-client privilege in internal investigations. The D.C. Circuit overturned the district court's decision and held that:

- Having in-house counsel conduct an internal investigation does not dilute the attorney-client privilege.
- The attorney-client privilege protects communications made by and to non-attorneys serving as agents of attorneys in internal investigations.
- *Upjohn* does not require the interviewer to use magic words in the interview for the attorney-client privilege to apply.
- *Upjohn's* protections apply if one of the significant purposes of the internal investigation is to provide or garner legal advice regardless of whether a statute or regulation required the company to conduct the internal investigation.

Sample UpJohn Warnings

Before we begin, I need to provide you with some standard legal information that we tell everyone we interview. It is important, so I ask you to listen to it carefully.

We are attorneys from ABC Law Firm. Your Company has retained us to investigate an employee complaint. We represent the Company. We do not represent you or any other Company employees.

We are speaking with you and other Company employees to learn information that we can use to provide legal advice to the company to respond to the employee's complaint and defend the company against any potential lawsuit relating to the employee complaint.

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Sample UpJohn Warnings

Our meeting is protected by the attorney-client privilege, meaning no one can require you to disclose what we talk about. The Company, however, controls the privilege. This means that the company can decide to disclose the information learned in the interview to anyone, including the government without informing you first or receiving your consent.

To maintain the Company's attorney-client privilege over our meeting, you should keep our discussion confidential and not discuss it with anyone, including your supervisor and any other employees, except that you can discuss it with your attorney. Keeping our discussions confidential also protects you if the complaining employee deposes you.

Do you understand what I just explained? Do you have any questions before we start? If you have any questions at any time during the interview, please let me know and we will address them.

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Get Our House In Order-Make Sure Our Confidential Information Is Treated As Confidential

- Control access, e.g., locked file cabinets, passwords, customer lists on restricted computer;
- Can we show how much it costs (*or has already cost*) to develop lists and contacts;
- Set up agreements with customers re: shared protected information from unauthorized disclosure
- Use "CONFIDENTIAL" stamps;
- Who is in the line of "need to know" persons with regard to company business information;
- Differentiate between publicly accessible information and trade secrets;
- Use memos/e-mail to reinforce confidentiality internally (e.g., have employee confirm receipt of confidential information in writing and/or electronically);
- Control how and where employees are allowed to maintain confidential information (e.g., use memos to employees for rules to keep in proscribed forms-no extra copies; include "CONFIDENTIAL" electronic headers on all confidential information that is being distributed to employees via email, etc.; and
- Use printer and copier logs, if at all feasible.

Document Governance and Data Security

- What are the out of the box, default settings: short answer – Almost None
  - We can find out what an employee has been up to forensically, but it's tedious and expensive.
  - Better, easier, and less expensive to set up some common sense auditing policies:
    - Who is accessing the data?
    - What are they accessing?
- Retention Policies – Part of a comprehensive Data Governance Policy
- Policies start with management working with IT and legal resources to ensure data remains available when you need it and is removed when it is no longer useful or needed.
- Need to classify documents and emails accordingly
- Don't Forget paper! How long have those bankers' boxes full of documents been in storage?
- Litigation Holds – when you need to suspend the policy – MAKE SURE IT STAFF OR VENDOR KNOWS!

Mobile Device Management

- Mobile devices – smart phones and tablets are an extension of your IT infrastructure.
- Employee owned vs. Employer owned devices

Before the Employee Comes on Board

- Request copies of any and all non-competition, confidentiality/non-disclosure and/or other restrictive covenant agreements/provisions (whether self-standing or as part of Employee's Employment Agreement with prior employer);
- Offer Letter: Make sure to include the key provisions necessary to bolster enforceability of your own restrictive covenants.

Employee Comes on Board

- Make sure candidate not subject to non-competition agreements from former employer;
- Determine whether non-compete, non-disclosure or other restrictive covenants/agreements are appropriate to the position for which candidate is being hired;
- If so, customize agreements to individual or at least position-it's not one size fits all;
- What is the recognizable proprietary/legitimate business interest at issue?
  - If it is confidential information-take the steps we just discussed and reference the particular category of confidential information in agreement (but don't limit the confidential information to that category (e.g., "For example, …", "By way of example only …", "Including, but not limited to …", etc.).

Is it Customer Goodwill?

- What customer information does/should the Company provide to which employees?-condition providing it when you do provide it-get acknowledgment from employee, etc.
- Are there pre-existing customers for employer or employee-distinguish and compensate or exclude from coverage; and perhaps consider length of customer relationship.
- Clearly communicate interest for each disbursement for customer development.
- Account for good will when transferring accounts to employee-acknowledge long-term value is not definable; make clear that assignment of an account to employee *does not make the customer the "employee's account."*

Time to Draft Agreement

- Issues-less is almost always more-
  - What are geographic limits of employee activity-what are limits of interest being protected by employer-which is more narrow?;
  - What is time limitation on interest being protected-i.e.,
    - Confidential info-how long before it goes stale?;
    - good will-how long to re-establish relationship through another employee;
    - specialized training-how long to train a replacement, how long before technology or substance of training goes stale?

What is scope of activity being restrained?

- How can this particular employee be most narrowly restrained?
- What is it exactly you don't want employee to do transaction-wise?
  - Should it be/is it limited to a specific product, service or business line?
  - What is the narrowest protectable aspect of the job (i.e., selling Yankees merchandise).

What substantive restraints should we put in agreement?

- Non-disclosure.
- Non-compete-garden leave, upon termination for cause or resignation; pay not to compete; limit to particular companies, geographic regions inevitable disclosure.
- Non-solicitation of customers. Do we identify specific customers? Top 10 customers?
- Non-solicitation of employees. Include appropriate limitations.
- Social media obligations on Linked-In, etc.
- Damage clauses-liquidated damages vs injunction/irreparable harm
  - What is most practical.
  - What have courts recently done on Long Island.

End of Employment

- Retrieve company property, documents and information;
- Exit Interview-
  - try to ascertain employee's plans.
  - reiterate post-employment obligations *and* include post-employment obligations in a document issued to employee during exit interview (or as soon after as possible, if no exit interview, or if employee refuses/declines to take a copy), and have employee sign acknowledgment of such obligations at exit interview.
  - be prepared to discuss what company property/information employee has in possession.
  - make arrangements to have information on home computer deleted under company supervision.
  - preserve company issued computer and e-mails-perhaps make mirror image of company hard drive.
  - preserve copier *and printer* access records, copier and print logs, expense records, phone records, building and security logs.
- Coordinate very carefully with customers, business contacts and co-workers. Be careful not to defame.

Severance Agreement

- Severance Agreement-**make sure it does not have an integration/zipper clause which would void any prior non-compete, non-solicitation or confidentiality agreements**;
- Letter to employee and future employer (if, but only if, employee has gone to a prohibited competitor) reminding of post-employment obligations-include as courtesy copy of agreement-avoid assumptions or unfounded allegations-you do not want to invite a tortious interference with contract claim or defamation claim. Use the approach of-"if the facts were to show you disclosed our confidential information you and your employer could be liable, etc. Seek assurances everyone is in compliance;
- Notice to preserve evidence if wrongful conduct is suspected.

General Types of Restrictive Covenants

- Non-Compete Provision
- Non-Solicitation Provision
- Non-Solicitation of Employees/Ant-Raiding Provision
- Confidentiality Provision
- "Garden Leave" Provision

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Types of Agreements That May Contain Them

- Employment Agreements
- Stock Grant Agreements
- Shareholder Agreements
- Severance Agreements

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General Considerations

- Protecting against restraint on trade and employment
- Protecting the legitimate interests of the employer
- Protecting the freedom to contract
- Law varies from state to state
- Scope and reasonableness of restrictions
- Choice of law and/or forum clauses

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State Statutory Frameworks

- Certain states have enacted statutes that provide a framework as to when restrictive covenants will be enforceable, setting forth particular requirements, presumptions, and/or defining "reasonable" time periods for restrictions.
- Other state statutes include technical requirements for enforcement.
- Others have moved away from a prior public policy against restrictive covenants with statutes that allow more leeway.

States Prohibitions and/or Limiting

- Certain states prohibit nearly all non-compete agreements, subject to very limited exceptions. They may still enforce certain non-disclosure agreements (for example, if the information is akin to a trade secret) and non-solicitation of employee (anti-raiding) agreements. The most well-known such state is California. By statute and as a matter of public policy, California prohibits nearly all non-competition agreements.
- The most obvious trend is the banning of non-competes when it comes to low-wage workers. 10 states have some kind of ban or restriction for this class of workers. They are: Illinois, Maryland, Maine, Massachusetts, Oregon, Nevada, New Hampshire Rhode Island, Virginia and Washington.
- Others states impose strict requirements, usually through statutes, and rarely uphold non-compete agreements.

Federal Action

- Federal legislation to restrict non-competes have not gone anywhere. For instance, the ***Workforce Mobility Act of 2021*** **(H.R. 1367)** and ***Senate bill 483*** after being introduced on February 25, 2021, have not gone anywhere.

- Likewise, ***The Freedom to Compete Act (S. 2375)*** that was introduced in the Senate in July 2021 would ban FLSA defined non-exempt workers, has similarly been stalled.

- Thus, President Biden in July of 2021 issued an Executive Order that was meant to encourage the Chair of the Federal Trade Commission to institute rules to "curtail the unfair use of non-compete clauses or agreements that may unfairly limit worker mobility." As of this date the FTC has not taken action on instituting a rule and what the potential scope of that rule would be, including, its interaction with any relevant state law. ***Section 5(g) of the Executive Order*** states:

  - [T]he Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.

The Majority of States – "Reasonableness Rule"

- The majority of jurisdictions in the United States will enforce restrictive covenants to the extent they are "reasonable" under the circumstances. New York is one of these states.
- Courts in certain states will engage in a fact-specific, case-by-case analysis as to reasonableness. New York is one of these states. Other states have enacted statutes which provide "presumptions" or other clear guidelines as to reasonableness for courts.
- Reasonableness Test
- Generally, a restrictive covenant will be found reasonable if:
  - It is no greater than is required for the protection of the employer's legitimate business interest;
  - It does not impose an undue hardship on the employee; and,
  - Is not injurious to the public.
    - *See, e.g., BDO Seidman v. Hirschberg*, 93 N.Y.2d 382 (1999).

Industry-Specific and "Profession" Considerations

- When evaluating non-compete agreements, courts will consider the specific industry, the nature of the profession or work at issue, and the nature of the public interest.
- Health Care Industry/Professionals
- Certain states have enacted statutes rendering non-compete agreements in the medical and healthcare industry unenforceable.
- Certain courts apply a stricter scrutiny, citing the patient-physician relationship and/or drawing upon state antitrust statutes that are not aimed specifically at physicians, while other courts apply the same standards applicable to the commercial context.

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New Development

- **Garden Leave Provisions**
  - Relatively recent import from United Kingdom and other European countries
  - Most commonly in written employment agreement
- **What They Typically Require**
  - Require departing employees to provide notice of resignation (typically between 3 and 6 months)
  - Employee remains employed during notice period, receives full salary and other benefits, but after giving notice, are not required to perform any further (or only limited) services for the company.
  - The justification is that, because the employee remains employed by the company, he/she continues to owe a duty of loyalty to the employer and is not free to work for any other employer.

Choice of Law

- What law applies if employees are working remote or have moved during the course of their employment. Although, some states have statutory authority for when and under what circumstances a state's law will apply, i.e. Massachusetts law which looks at where the employee worked in the last 30 days of employment.
- In *Medtronic v. Walland,* 2021 U.S. Dist. LEXIS 172235 (S.D.N.Y. Sep. 10 2021) the Court was faced with a conflict of law question as to whether California or New York law would control in the enforcement of the non-competition agreement for its CEO. During his tenure he lived in both states. He was living in California when he entered into the agreement and at the time he resigned. For a period of time in between he worked in New York. The court analyzed the CEO's contacts with each state during his employment, ultimately finding that California law applied and his non-compete was not enforceable. This was even though the agreement had a New York governing law provision.

Takeaways

- Know the law in the governing state jurisdiction
- Include a choice of law clause and forum selection clause
- Know your industry and any public policy considerations that may apply to the industry
- Stay abreast of state-by-state legislative developments.
- Employers/companies operating in multiple states may require multiple agreements to comply with applicable laws in each jurisdiction, if choice of law is not possible.

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HYPOTHETICAL

- ABC Accounting Firm has every accountant sign a non-solicit restrictive covenant that restricts the accountants from soliciting firm clients upon their separation from the firm. Historically, ABC Accounting Firm has never enforced the non-solicit and many accountants have left ABC Accounting Firm to join another competing firm or started their own firm without incident. Recently, ABC Accounting Firm merged with XYZ Accounting Firm. Accountant Joe Smith does not like the new company dynamic and decides to semi-retire and continue to service a handful of his long term clients. Before Joe Smith resigns, he seeks legal consultation. How would you advise Joe Smith?

HYPOTHETICAL

- Richard is a salesman for a pharmaceutical company. He decides to accept an offer from a competitor. To get a head start at his new job, he takes a copy of his customer list with him so that he can immediately contact his old customers to sell them drugs produced by his new company. Can Richard use the customer list at his new position?