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Client Bulletin

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Do You Have Non-Compete Agreements With Your Employees?

All employers who currently have non-compete agreements with their employees should stay tuned to a newly proposed law. The Federal Trade Commission ("FTC") opened a public comment period on a proposed new rule that would ban employers from imposing non-competes on their workers. The rule would make it illegal for an employer to enter into or attempt to enter into a non-compete with an employee, maintain a non-compete with an employee or represent to an employee, under certain circumstances, that the employee is subject to a non-compete. It would apply to independent contractors and anyone who works for an employer, whether paid or unpaid. The proposed rule would also require employers to rescind existing non-competes and inform workers that the non-competes are no longer in effect. The FTC added that the proposed rule would "generally not apply to other types of employment restrictions, like non-disclosure agreements" but said "other types of employment restrictions could be subject to the rule if they are so broad in scope that they function as non-competes." If the proposed rules are adopted, they would not become effective for at least 240 days, and then will most likely face a number of legal challenges.

Nonetheless, employers should start preparing to see some form of non-compete legal reform. Employers should carefully consider who they give non-competes by analyzing whether the agreement is really necessary to protect business interests. This advice is particularly true for employers who maintain non-compete agreements with low- or entry-level employees. Employers should ask questions such as, "Is the employer going to make substantial investments in training the covered employees?", "Will covered employees have access to trade secrets and other sensitive information that could be misused by competitors?", and "Do covered employees possess significant goodwill with clients and customers?" Employers might consider whether other types of agreements will serve the same goal without preventing individuals from working in the same industry. For example, non-solicitation or non-disclosure agreements may substantially serve the same need to protect employer interests. Considering these alternate agreements may make it easier for employers to deal with non-compete legal reform that is most likely going to appear in the near future. Employers should also make sure that any agreements they have with employees have strong severability provisions in those agreements. Severability provisions prevent an entire agreement from becoming invalidated by the illegality or unenforceability of a particular provision in the agreement.

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Pregnant Workers Fairness Act Creates New Obligations on Employers

While federal law already prohibited employers from discriminating against pregnant employees, the law did not clearly require employers to provide reasonable accommodations to pregnant employees. The Pregnant Workers Fairness Act ("PWFA") now requires employers with 15 or more employees to make reasonable accommodations for employees and applicants for employment with limitations related to pregnancy, childbirth, or related medical conditions. Many employers are familiar with the interactive process under the Americans with Disabilities Act, which requires employers to engage in a dialogue with employees when employees indicate that they have a disability that necessitates an accommodation in the workplace, or the disability is obvious to the employer. That dialogue must result in the employer providing a reasonable accommodation to the disabled employee, if one exists. The PWFA expands the interactive process requirements to require employers to engage in the interactive process with employees in need of an accommodation because of a limitation related to pregnancy, childbirth, or related medical conditions. If employers are not already doing so, they need to revise their practices to ensure that supervisors are engaging in a dialogue with pregnant employees who request pregnancy-related accommodations at work.

Stacy V. Pollock, of Counsel

Safety Net Expanded for Errors at the Closing Table

Anyone who has closed on a real estate transaction within the last few years can attest to the mountain of paperwork to be executed at the closing table. With every new or amended law, policy change, lawsuit, etc., the stack continues to grow. As the paperwork multiplies, so too does the chance for human error. Fortunately, Ohio law provides grace when certain technical errors are made. For example, if an executor, administrator, guardian, assignee, or trustee making the instrument signed or acknowledged the same individually instead of in a representative or official capacity, Ohio law provides that the validity of the conveyance *cannot* be affected (Ohio Revised Code § 5301.071). In other words, the conveyance is still valid despite the error.

With the recent passage of Ohio Senate Bill 202, the Ohio legislature expanded this protection to conveyances in which an "attorney in fact" (person who holds a power of attorney) inadvertently signs an instrument in an individual capacity, rather than a representative capacity. SB 202 was signed by Ohio Governor Mike DeWine on January 2, 2023, and goes into effect on April 3, 2023.

While this is not an earth-shattering change in the law, it is a good reminder to pay attention when signing documents in a representative capacity. If you happen to forget, however, there is now a wider safety net thanks to SB 202.

Elizabeth A. Miceli