Trade Secrets/Non-Compete YEAR IN REVIEW

2024

Happy New Year and welcome to our 2024 Trade Secret and Restrictive Covenant Year in Review. 2024 was less stressful and dramatic than most people feared at the start of the year, but there still were some significant rulings and results, as well as some moderate statutory changes.

Despite all the noise, not a lot happened with the FTC, and now nothing is going to happen.

The 2024 restrictive covenant spotlight shined on the FTC's attempt to ban noncompetes on a national basis. As expected, on April 23rd the FTC voted 3 to 2, along party lines, to enact its ban and the lawsuits immediately followed. The United States District Court for the Northern District of Texas granted a preliminary and then permanent injunction that prevented the ban from taking effect on September 4th. The United States District Court for the Middle District of Florida soon followed with an injunction of its own and a Pennsylvania plaintiff dropped its attempt to block the ban after the United States District Court for the Eastern District of Pennsylvania declined to issue an injunction. Although the FTC appealed both decisions enjoining the ban, the ban is dead for two reasons. One, both the Fifth and Eleventh Circuit Court of Appeals will uphold the lower court rulings. Two, it is unlikely that the FTC will continue to pursue the ban once President Trump takes office and Andrew Ferguson, one of two FTC Commissioners who voted against the ban, becomes chair of the FTC and current FTC chair and main proponent of the ban, Lina Khan, is replaced with new Republican appointee Mark Meador, a partner at the antitrust law firm, Kressin Meador Powers LLC.

It will be interesting to see if the NLRB attempts to take on a larger role in the restrictive covenant space once the FTC exits the stage. On October 7th, NLRB General Counsel Jennifer Abruzzo took the position that "make-whole relief" that compensates for economic damages is a proper remedy when the NLRB determines an employer utilized an unlawful noncompete. This is a shift from the NLRB's current practice of ordering rescission of unlawful contract terms to remedy unfair labor practices. Make-whole relief would be available if an employee demonstrates: (1) there was a vacancy available for a job with a better compensation package; (2) they were qualified for the job; and (3) they were discouraged from applying for or accepting the job because of the non-compete provision. Abruzzo also recommended that the NLRB amend its standard notice posting to alert employees that they may be entitled to damages and that they should contact an NLRB regional office if their employment efforts were negatively impacted by a noncompete provision.

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Restrictive covenant legislation was relatively light compared to other years but Delaware did give us two interesting cases at the end of 2024.

Looking at the states, the unofficial tally of restrictive covenant bills introduced in 2024 is 92 bills in 39 state legislatures. As is the case every year, most of this legislation never made it out of committee and to a vote, much less to the governor's desk for signature. Of the few bills that were signed by a governor, Maryland banned noncompetes for veterinarians and vet techs, and also restricted noncompetes for physicians and other healthcare providers who make less than $350,000. Rhode Island voided noncompetes for advanced practice registered nurses and Iowa banned noncompetes for a) health care employment agencies and their workers and b) health care technology platforms and their independent nursing professionals. More healthcare-specific noncompete restrictions are on the horizon in 2025, including Pennsylvania establishing a maximum one year restriction for certain healthcare practitioners and Illinois declaring noncompetes unenforceable for licensed health care professionals who treat veterans and first responders.

In addition, almost 20% of states and the District of Columbia now use income thresholds to limit which employees may be subject to certain restrictive covenants. (Colorado – $123,750 for noncompetition and $74,250 for nonsolicitation, D.C. – $154,200, Illinois – $75,000 for noncompetition and $45,000 for nonsolicitation, Maine – $60,240, Maryland – $46,800, Massachusetts – non-exempt employees, Nevada – hourly employees, New Hampshire – $30,160, Oregon – $113,241, Rhode Island – $37,650 or non-exempt employees, Virginia – $73,320, and Washington – $120,560). We anticipate more states will adopt compensation thresholds in 2025.

Finally, and as we have discussed in previous articles, Delaware continues to be (and will continue to be) a primary focus of noncompete law. In Q1 of 2024, a Delaware Court, in the case of *Cantor Fitzgerald v. Ainslie*, determined that a forfeiture clause relating to a restrictive covenant violation should be analyzed "under a more deferential, contract law standard that respects the mutual intent of willing, competent parties" instead of the "public policy against noncompete agreements" and the requirement that the restrictive covenant meet the Delaware court's definition of "reasonableness." Consequently, a company's determination that a former employee violated a restrictive covenant clause and, in doing so, forfeited certain compensation (bonus, stock options, grants, deferred compensation, etc..) will be upheld absent "unconscionability, bad faith, or other extraordinary circumstances." A request for injunctive relief, however, will still be subject to the normal review of "reasonableness." Given the Court's ruling, a company could succeed on clawing back or declaring a forfeit of the departing employee's compensation even if the company is unsuccessful in obtaining injunctive relief.

On December 18th, the Delaware Supreme Court made clear that the *Cantor Fitzgerald* ruling applies to all types of forfeiture-for-competition provisions, including RSU awards. In doing so, the Delaware Supreme Court relied on Delaware's support for freedom of contract and again differentiated forfeiture-for-competition provisions from the types of restrictive covenants typically found in employment agreements. The key difference: forfeiture-for-competition provisions do not restrict the ability of employees to work for a competitor.

The Delaware Supreme Court, in *Sunder Energy, LLC v. Tyler Jackson, et al*., also affirmed a lower court's decision to not blue pencil an overbroad noncompete even though the former owner/employee was directly and actively competing with Sunder. In a not so nice shot at Sunder, the Delaware Supreme Court noted that Sunder's noncompete would prevent "Jackson's daughter from selling Girl Scout cookies" and essentially accused Sunder of acting in bad faith by:

- Not involving Jackson, who was a minority owner of the acquired company, in any negotiations or discussions concerning the restrictive covenants;
- Acknowledging that its members would not have been able to understand the restrictive covenants without the help of legal counsel;

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- Sending Jackson the restrictive covenant agreement on New Year's Eve and encouraging Jackson to sign the agreement "before midnight." (Jackson signed the agreement less than an hour after receiving it); and
- Jackson received "minimal-to-no separate compensation" in exchange for being bound by the restrictive covenants.

Given these facts, the Delaware Supreme Court reasoned that blue penciling the restrictive covenants would "create perverse incentives for employers drafting restrictive covenants," and cause employers to "be less incentivized to craft reasonable restrictions from the outset." Accordingly, and as we have cautioned in prior articles, companies should no longer assume that Delaware Chancellors will automatically favor businesses when examining a restrictive covenant.

A couple of big trade secret verdicts but the "mother of all trade secret verdicts" gets tossed.

As with previous years, a couple of massive trade secret verdicts were issued in 2024. Massachusetts-based Insulet won a $452 million trade secrets verdict after jurors found that a South Korean company stole its trade secrets for a wearable insulin pump patch. In California, Propel Fuels won a $604.9 million trade secrets verdict against Phillips 66 for Phillips 66 allegedly stealing Propel's trade secrets when it was looking to acquire Propel. Propel also filed a motion for an additional $1.2 billion in exemplary damages since, according to Propel, Phillips 66's trade secret theft was willful and malicious. The court has yet to rule on Propel's motion.

Yet, the biggest trade secret verdict in 2024 was a 2022 verdict that was tossed by the Virgina Court of Appeals. The Appeals Court reversed a $2 billion trade secrets verdict for Appian Corp. against rival software company Pegasystems Inc. The verdict was the largest jury award in state history. According to the Appeals Court, the trial court erred when it a) issued a jury instruction relieving Appian of its "proper burden to prove causation between the alleged misappropriation and any damages" and b) allowed Appian to rely on Pegasystems' total sales in order to prove unjust enrichment damages. Appian has appealed the Appeals Court's decision to the Virginia Supreme Court. Interestingly, Appian allegedly had the judgment insured for between $500 million and $750 million. Thus, Appian may still be entitled to a huge recovery even if the Virginia Supreme Court declines to accept the case or upholds the Appeals Court's decision.

CONCLUSION

Benesch's Trade Secret, Restrictive Covenants and Unfair Competition Group will continue to monitor important activities in, and changes to, the trade secret and restrictive covenant space. The Group will provide periodic updates regarding new statutes, government actions and case opinions that may impact the ability to enforce restrictive covenants or protect trade secrets. The Group is also flat fee review of restrictive covenant agreements to assess whether the agreements comply with the recent changes to restrictive covenant law. If you would like to hear more about these offerings, please contact SCOTT HUMPHREY at 312.624.6420 or shumphrey@beneschlaw.com.