October's Spookiest Restrictive Covenant Developments: An Employer's 5-Ingredient Witches' Brew to Ward Off Harm

Insights
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"Magic words," "TRAPs," and the federal non-compete ban rising from the dead? October had several spooky developments in restrictive covenant law, but no need to be frightened! We've got you covered with updates, insights, and protective magic spells, powered by Blue Pencil Box.

1. **FTC's Non-Compete Ban Rising from the Grave?** A Texas federal judge banished the Federal Trade Commission's non-compete ban to the shadow realm back in August. But the FTC has appealed that decision and another employer-friendly ruling from Florida, seeking to bring the ban back from the dead. The twin appeals set up a potential split between the 5th and 11th Circuits, with a final SCOTUS showdown looming. Last week, the Florida employer sought to postpone the 11th Circuit appeal, arguing that the real fight should happen in the 5th Circuit alone. The FTC has its work cut out for it either way, but it can't be pleased with the specter of having all its candy in the 5th Circuit basket.
2. **Look Out for TRAPs!** The National Labor Relations Board General Counsel issued a new memorandum cracking down on so-called "stay-or-pay" provisions, including sign-on bonuses and what she refers to as TRAPs (**t**raining **r**epayment **a**greement **p**rovisions). She claims "stay-or-pay" provisions are presumptively unlawful as applied to covered employees, and employers can only rebut the presumption if they satisfy a new legal standard created by the GC in the memo. She threatens retroactive prosecution over all agreements entered before October 7, unless employers "cure" the agreements before December 6. The memo creates several real-world traps for unwary employers, so you should discuss with your counsel well before the December deadline if you use these provisions.
3. **Restrictive Covenants Appearing Out of Thin Air.** The "inevitable disclosure" doctrine can prevent trade secret thieves from working for competitors or soliciting customers, even if they didn't have a non-compete or non-solicitation agreement. Not all courts adhere to this theory, but "it's alive!" in Illinois. An Illinois federal judge recently blocked an employee from soliciting the plaintiff's existing customers for a year as a remedy for trade secret misappropriation, despite not having a non-solicitation agreement. The court cited evidence suggesting it found the employee less than credible, including the employee's contention that she accidentally dropped the plaintiff's laptop in the bathtub.
4. **Speak Now or Forever Lose Your Claims.** The bankruptcy process frees debtors from the shackles of outstanding debts and shuts out claimants who don't play by the rules. An employer

recently learned this lesson the hard way in Ohio. The employer sued a former employee for breach of contract and trade secret misappropriation, and the employee filed for bankruptcy. But the employer failed to initiate an adversarial proceeding in the bankruptcy case, arguing (incorrectly) that debts arising from "willful or malicious injury" are categorically nondischargeable. The court disagreed, concluding the bankruptcy process put the final nail in the coffin on all the employer's claims, and granted judgment for the employee.

5. **"Magic Words" Unnecessary in Nebraska.** Generally, so-called "non-competes" are only enforceable in Nebraska if they prohibit the employee from "working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and had personal contact." (Despite the nomenclature, these aren't "non-competes" in the traditional sense.) But a Nebraska federal judge recently held "an employer is not required to use magic words," so long as the restriction is reasonable. The court held the employee did not persuasively demonstrate that a customer non-solicitation provision targeting customers with whom the employee had "material contact" was unlawful under Nebraska law. The court also held a "catch-all" prohibiting the employee from "otherwise interfer[ing]" with customer relationships was not facially overbroad under Nebraska law, either.

An Employer's 5-Ingredient Witches' Brew

Employers can use these five ingredients to brew up a plan to ward off liability and unfair competition.

- **Diligence**. Stay on top of the FTC appeals to see if the ban rises from the dead by making sure you are subscribed to Fisher Phillips' Insight System.
- **Strategy.** Work with counsel to determine what changes, if any, need to be made to your "stay-or-pay" agreements in light of the NLRB GB's new memo.
- **Zeal.** When someone steals your trade secrets then tries to cover their tracks, zealously protect your assets. Use all available legal arguments, including the "inevitable disclosure" doctrine where appropriate, to get as much relief as possible.
- **Knowledge**. What you don't know can hurt you. Work with experienced counsel who can guide you safely through the labyrinth of unfair competition litigation.
- **Creativity**. The concept of "reasonableness" is rarely subject to bright line rules. Creatively and persuasively argue why your covenant is necessary to protect your legitimate interests.

Conclusion

We constantly monitor new cases, legislation, and regulatory developments to keep you at the cutting edge of the law. Make sure you are subscribed to Fisher Phillips' Insight System to gather the most up-to-date information directly to your inbox. Check out Blue Pencil Box for our daily updates on restrictive covenant law. If you have questions, please contact the author of this

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