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Developments In Employee Mobility: California's SB 699, New York's 203-f and FTC/DOL Collaboration

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Employers take note: a series of recent developments could impact employment agreements across the country.

SB 699: A New Addition to California Non-Compete Law

Under California Business and Professions Code Section 16600, and subject to specified statutory exceptions, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." This statute declares certain covenants not to compete void under California law.

Signed by Governor Gavin Newsom shortly before the end of the legislative session, SB 699 adds section 16600.5 to the California Business and Professions Code. It is effective January 1, 2024.¹

SB 699 focuses on contracts that are void under Section 16600. It discusses an employer's ability to enter and enforce such agreements, regardless of location.

More specifically, SB 699 first declares that any void contract under Section 16600 "is unenforceable regardless of where and when the contract was signed." Second, SB 699 states that employers "shall not attempt to enforce" such a void contract, "regardless of whether the contract was signed and the employment was maintained outside of California." Third, SB 699 states that an employer shall not "enter" a contract with either an employee or prospective employee that has a provision that is void under Section 16600. Fourth, SB 699 makes any attempt by an employer to enter or enforce such a void contract a civil violation. Finally, employees who bring a civil action to enforce these rights may seek injunctive relief, damages, and attorney's fees and costs.

SB 699's legislative findings note that "as the market for talent has become national and remote work has grown, California employers increasingly face the challenge of employers' [non-compete agreements]." Questions have arisen regarding the scope of SB 699 and the extent to which it is consistent with the dormant commerce clause.² Whether, and to what extent this law may regulate out-of-state agreements will likely be decided by the courts in the months and years to come. In the meantime, employers can take steps to protect their legitimate business interests, ranging from

appropriate contractual restrictions, to policies and practices designed to safeguard intellectual property and other valuable assets and relationships.

New York Law Limits Assignment of Inventions to Employer

A recent New York law stands to impact invention assignment agreements with employees. On September 15, 2023, New York Governor Kathy Hochul signed into law Section 203-f of the New York Labor Law, clarifying the scope of an employer's ownership of intellectual property created by its employees. Specifically, Section 203-f generally prohibits the enforcement of any provisions that require an employee to assign to the employer any rights to an invention that was developed using the employee's own property and time. The New York State Assembly memorandum states that the provision is meant to "both protect employees and increase incentives for innovation."³

The new law carves out exceptions for inventions that "relate . . . to the employer's business, or actual or demonstrably anticipated research or development of the employer[]" and "result from any work performed by the employee for the employer."⁴ These exceptions codify language that is often included in invention assignment and confidentiality agreements. With the passage of this law, New York joins California, Delaware, Illinois, Kansas, Minnesota, Nevada, New Jersey, North Carolina, Utah, and Washington in protecting intellectual property created by employees.

FTC Now Formally Collaborating with DOL in Focus on Non-Competes and Other Employment Practices

In yet another recent non-compete development, on September 21, 2023, the Federal Trade Commission (FTC) and the Department of Labor (DOL) signed a Memorandum of Understanding (MOU) to outline how the two agencies will work together on common regulatory interests, including increased scrutiny of non-compete agreements.

The MOU is intended to "strengthen" the partnership between the FTC and DOL "through greater cooperation and coordination in information sharing, investigations and enforcement activity, training, education, research, and outreach."⁵ The MOU details how the FTC and DOL plan to advance their shared "interest in protecting and promoting competition in labor markets" by "protecting workers who have been harmed or may be at risk of being harmed as a result of unfair methods of competition . . . includ[ing] collusive behavior; . . . misclassification of employees; illegal claims and disclosures about earnings and costs associated with work; *the imposition of one-sided and restrictive contract provisions, such as non-compete and nondisclosure provisions*; the extent and impact of labor market concentration; and the impact of algorithmic decision-making on workers."⁶

The FTC's collaboration with the DOL as to non-compete agreements is the latest demonstration of the FTC's skepticism over such agreements. As we described in [our previous client alert](#) earlier this year, the FTC announced a proposed regulation that would ban non-compete agreements with some limited exceptions. The FTC already has a similar MOU with the National Labor Relations Board (NLRB), which highlights the increased scrutiny of non-compete and nondisclosure provisions.⁷

Conclusion

Each of these three recent developments is poised to impact employee mobility. Accordingly, employers should consider what steps they might take to ensure that their agreements remain enforceable and conduct a careful review of the wording of their restrictive covenants and assignment invention provisions, and the business rationale for these clauses in light of the legal risks. Paul Hastings'

Employee Mobility and Trade Secrets Practice Group has particular expertise in this area and is here to assist.

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¹ Cal. Const. art IV, § 8 (c)(1).

² See *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369–70 (2023).

³ [New York State Assembly Justification](#).

⁴ SB S5640, 2023 Leg., 246th Sess. (N.Y. 2023).

⁵ [Mem. of Understanding Between The U.S. Dep't of Lab. & the FTC \(Aug. 30, 2023\)](#) at 1.

⁶ *Id.* at 1-2 (emphasis added).

⁷ [Mem. of Understanding](#) at 1.

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