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The Biggest Noncompete Developments Of 2018

By **Braden Campbell**

Law360 (December 17, 2018, 3:37 PM EST) -- This year saw courts continue to look skeptically on broad noncompete agreements, while Massachusetts passed first-of-its-kind legislation limiting what businesses can block their ex-workers from doing.

Here, Law360 looks at four developments from 2018 that lawyers who handle restrictive covenants need to know about.

Massachusetts Gets Tough on Noncompetes

While California's blanket ban on noncompete agreements makes it the friendliest state for workers who jump ship, a new law enacted in August in Massachusetts has the Bay State hot on California's heels.

The Massachusetts Noncompetition Agreement Act, which applies to every agreement signed Oct. 1 or later, places several limits on post-employment restrictive covenants. Chief among them is a requirement that employers pay workers half their salary or some other negotiated compensation during the period they're barred from work for competitors. Although several states have laws limiting the use of noncompetes, Massachusetts' is the only one that makes employers give workers so-called "garden leave."

Other provisions of the bill block employers from signing low-wage workers, university students and minors to noncompetes and enforcing agreements against workers laid off or fired without cause. It also limits the pacts' duration to a year and requires that they be "no broader than necessary" to protect certain "legitimate business interests," such as trade secrets or confidential information.

Peter Steinmeyer, an employee mobility attorney at Epstein Becker Green, said the Massachusetts law is "reflective of this trend against noncompetes" in courts and state legislatures, noting New Jersey, Pennsylvania and Vermont are considering anti-noncompete measures.

Jason Schwartz, a Gibson Dunn & Crutcher LLP trade secrets litigator, said Massachusetts' law makes it that much harder for large employers to have a blanket noncompete policy.

"It continues to be a real challenge, if you're a nationwide employer, to come up with some sort of uniform, one-size-fits-all noncompete program," Schwartz said. "You really can't do it."

The 'Janitor Rule' Makes a Ruling

Noncompete attorneys often trot out what's known as the "janitor rule" to test whether a given employment agreement will hold up in court. The rule is premised on a question: Is the agreement so overbroad that it would prevent someone from working as a janitor for a competitor? If yes, the agreement probably won't be enforced.

This year, an Illinois federal judge endorsed the rule — obliquely, at least — in a noncompete row between staffing company Medix Staffing Solutions Inc. and a former director.

Medix alleged the ex-exec, Daniel Dumrauf, joined a direct competitor in violation of a noncompete agreement barring him from working for nearby companies "engaged directly or indirectly in the business of Medix." But U.S. District Judge Sara Ellis in April said the contract was overbroad and therefore unenforceable, citing Dumrauf's argument that the agreement would bar him "from even working as a janitor at another company." The judge called the example "far-fetched" but not "an inaccurate statement of its prohibitions."

Steinmeyer, a self-proclaimed "noncompete nerd," called the ruling his favorite of the year for its citation of the janitor rule. It's also yet another testament to the principle that employers shouldn't overreach with their noncompetes, he said.

"As long as you draft narrowly, you really can meet your need," Steinmeyer said. "But if you just put out some blunderbuss noncompete … a judge is going to throw it out and they're not going to enforce it at all."

California Courts Skeptical of Nonsolicitation Pacts?

While California law bars businesses from making workers sign noncompete agreements, the Golden State has long let employers stop their ex-employees from poaching former colleagues. But a recent ruling has shown employers don't have an absolute green light to make workers sign non-solicitation deals.

In AMN Healthcare v. Aya Healthcare, a California state appeals court in November affirmed a ruling blocking temporary health care worker provider AMN from enforcing a non-solicitation agreement against workers who joined competitor Aya.

Gibson Dunn's Schwartz said some have billed the ruling as "the death knell for employee nonsolicitation agreements." But that's a stretch, he said.

"I don't think that's right at all," Schwartz said. "I think the case is unique to its facts."

These facts include that the workers were recruiters who placed temp nurses, meaning that to bar them from soliciting AMN clients was to bar them from doing their jobs, Schwartz said. He said this effectively made the deal a noncompete agreement under California law, which says employers can't restrain their former workers from "engaging in a lawful profession, trade or business."

Debra Fischer, a Los Angeles-based trade secrets attorney with Morgan Lewis & Bockius LLP, said she'll be watching to see whether other courts interpret the ruling to bar non-solicitation provisions altogether. She's skeptical they will.

AMN “can easily be limited to its facts, and as practitioners we should be cautious in overstating the meaning of this case,” Fischer said.

Can Choice of Law Provisions Beat California Protections?

Three years ago, the Delaware Chancery Court said California’s presumption against noncompete agreements beat out a Delaware choice of law provision in a dispute between Delaware limited-liability corporation Ascension Insurance Holdings and a California resident who left the company. But this year, the same judge opted to apply Delaware law to a similar dispute involving biotech company NuVasive Inc.

Vice Chancellor Sam Glasscock’s September ruling denying ex-NuVasive worker Patrick Miles summary judgment cited a recent change in California law known as Section 925, which automatically nullifies non-California venue provisions in employment contracts except when the covered worker was “represented by legal counsel” when they negotiated the deal.

Morgan Lewis’ Fischer said California passed the law to “be protective over employees who had no negotiating power” and cut back on courts’ discretion over venue disputes. But the NuVasive ruling went “one step further” than directed by Section 925 by inferring that California’s presumption against noncompetes is not as strong as it was. Because of this, employers should be careful about citing NuVasive to justify asserting non-California choice of law provisions against California workers.

“It is not at all clear that the California legislature, by enacting this law, intended to allow employees, simply because they are represented by counsel, to waive fundamental rights they have as California residents, including freedom from post-employment covenants not to compete,” Fischer said.

--Editing by Pamela Wilkinson and Adam LoBelia.

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