Trade Secrets/Non-Compete QUARTERLY UPDATE

2023–Q2

Welcome to our Q2 Trade Secret and Restrictive Covenant Update. As you can tell from the update, Q2 was a busy quarter in this space from both a regulatory, legislative, civil litigation and criminal litigation perspective. Multiple states introduced restrictive covenant legislation with one state bill in particular sending shock waves through the legal and business systems, the FTC continues its assault on noncompetes and both civil and criminal litigation over trade secrets remains active.

In This Issue:

TOP STORIES/DEVELOPMENTS

For Q2 "top stories", we start with a relatively new discussion (but one that should have been (and should be) garnering much more discussion and attention) about trade secrets and AI, mention an all too familiar government entity, and end with an interesting article about "global trends" with respect to trade secret or patent protection.

Trade Secrets and AI

To increase efficiency and productivity, businesses are beginning to implement artificial intelligence (AI) solutions, which can generate content much quicker than humans. AI systems are being employed in ever-increasing areas. This new era of technological development is exciting, but AI applications are also a cause for concern.

Possible AI-related data leaks raise concerns over the potential for damaging public disclosure of valuable business secrets. Disclosure of business secrets to a generative AI program may undermine or cancel efforts to safeguard that information legally as a trade secret if the proper precautions are not taken. Contractual and technological protections are not always enough on their own to insulate the trade secret owner. If employees regularly leave computers unprotected, even using passwords and encryption within a firm may not be enough. Generative AI's rapid evolution and technological complexity further complicate the assessment of what protections are appropriate for companies that engage with generative AI.

Any disclosures by the company of a trade secret to a third party that was not required to maintain confidentiality may decrease the success of a trade secret finding. Without a negotiated agreement with the AI program's owner, the program's general license, terms of use, and privacy policies may set forth its contractual obligations regarding its users' data. At the same time, some publicly available licenses and terms of use permit the AI company to employ its users' data as additional training material to improve the AI itself or even to disclose such data to third parties. In such cases, the lack of confidential treatment of users' data, the loss of control over who may access the user's proprietary information, and how the information may be used could work against the efforts to protect that information as a trade secret.

Courts working to determine whether trade secret protections apply will often look at the security measures to protect the trade secret. Using third-party generative AI tools can complicate efforts to maintain adequate technological protections. Even when the trade secret owner has taken appropriate measures internally to protect the trade secret, third-party AI tools' technological protections may also be needed. Even though the program's users do not directly control its data protection measures, courts may search broadly for any security issues that could expose the trade secret to third parties. Companies considering using generative AI tools in connection with trade secrets may want to become familiar with the tools' technological measures to protect user data before use.

SOURCE: *IIC - International Review of Intellectual Property and Competition Law, U.S. Congress, Law.com, KPMG, lawnext.com, University of Maryland*

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The National Labor Relations Board Joins the FTC in its Efforts to Ban Non-Competes

The National Labor Relations Board (NLRB) has begun targeting the use of non-competes as labor law violations. NLRB General Counsel Jennifer Abruzzo sent a memo to all Regional Directors, Officers-in-Charge, and Resident Officers, setting forth her view that the proffer, maintenance, and enforcement of non-compete provisions in employment contracts and severance agreements violate the National Labor Relations Act except in limited circumstances. The memo explains that overbroad non-compete contracts restrict employees from exercising their rights under Section 7 of the National Labor Relations Act, which protects employees' rights to take collective action to improve their working conditions.

"non-compete agreements could be lawful if the provisions clearly restrict only individuals' managerial or ownership interests in a competing business or true independent-contractor relationships." General Counsel Abruzzo said in the memo. The NLRB is well-positioned to conduct similar enforcement. The board's appearance within the non-compete sphere could add staying power to federal oversight of the agreements as the FTC faces the looming threat of lawsuits over its proposed rule.

Importantly, the memo itself doesn't create a binding rule for employers. But staff members in NLRB offices nationwide can submit cases to Abruzzo's office challenging non-compete clauses. If a case comes before the five-member board and a majority agrees with her interpretation, the case will become a binding precedent. Board decisions can be appealed to the U.S. Court of Appeals and ultimately to the U.S. Supreme Court. Consequently, the NLRB's, as well as the FTC's efforts will have to survive court scrutiny as business groups sue to challenge both agencies' authority over non-competes. For example, the U.S. Chamber has come out against this memo, calling the GC's interpretation an "extreme and blatantly unlawful overreach," and will initiate a lawsuit against the FTC if/when the FTC enacts its rule.

SOURCE: *Bloomberg Law, NLRB, aboutblaw.com, WSJ, U.S. Chamber of Commerce*

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Safeguarding Trade Secrets

Global legal and economic trends suggest that companies are becoming more reliant on trade secrets than patents, according to an analysis by Financier Worldwide. This is partly due to time and financial savings; no filing, legal, or patent translation fees are attached to trade secrets. They need only be designated as a secret, which takes effect immediately, in contrast to a patent application which may take years. Therefore, companies need to familiarize themselves with the legal constructs around trade secrets for applicable jurisdictions in which they operate, where confidential data is maintained and may be disclosed. Laws are not uniform in defining what constitutes a trade secret and the requirements for protecting that information.

Given the importance of trade secrets to modern businesses, it is unsurprising that related disputes are rising. Intellectual property theft, misappropriation, breach of applicable binding agreements, and corporate espionage are increasingly common themes in litigation. In the future, it seems likely that trade secret litigation will continue to rise. As many states and perhaps even the federal government look to limit non-competes, more companies will rely upon trade secrets and related litigation to prevent the unveiling and exploitation of such assets. Against this backdrop, companies need to know their trade secrets in fine detail and take appropriate steps to maintain their secrecy and avert misappropriation.

SOURCE: *Financier Worldwide*

Non-Compete Agreements: Use is Widespread to Protect Business' Stated Interests, Restricts Job Mobility, and May Affect Wages

According to a GAO report, an "estimated 18% of workers were subject to non-compete agreements (NCAs), and one of the studies examined estimated that 38% of workers had been subject to an NCA at some time in their careers." Of the 446 private sector employees surveyed by GAO, over half reported that some of their workers had been required to sign an NCA. GAO also found that different types of workers are required to sign NCAs, including executives and hourly workers. Furthermore, over 70% of the respondents that use NCAs and employed hourly workers used NCAs for at least some of them.

Employers surveyed by GAO most often reported using NCAs to protect confidential information from competitors, regardless of worker type. However, several stakeholders that GAO interviewed said that lower-wage workers generally do not have access to such information. GAO reported that evidence suggested that workers who sign NCAs often do so as a condition of employment. Evidence also indicated that few workers who sign NCAs negotiate the terms. This is likely because they are unaware of what NCAs are, they want the job regardless, or the NCA is introduced after a job is accepted. GAO found that most surveyed employers reported rarely or never enforcing NCAs in the past five years. Employers that did say that they executed an NCAs stated that they did so for all worker types, though most often for executives and managers.

The studies that GAO reviewed found that NCAs restricted job mobility and may result in reduced wages and decreases in new firm creation. Two studies found that even when NCAs are not legally enforceable in a state, they can still mitigate job mobility and that workers with NCAs are less likely to search for new jobs. The studies also found that NCAs lower workers' earnings, on average, though certain groups like executives may experience mixed effects.

Of the 26 attorney general offices that responded to GAO's survey, six reported not having NCA-related statutes, 3 reported a statute that generally allows NCAs, and one reported a statute that generally does not allow NCAs. In addition, 16 firms reported a statute that allows NCAs, subject to specific provisions.

SOURCE: *GAO*

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New Data on Non-Compete Contracts and What They Mean for Workers

Policymakers at the federal and state levels have taken action to restrict the use of non-competes or their enforceability in court. However, the knowledge of who has these contracts has been limited, with relatively little survey evidence available. Fortunately, the Survey of Household Economics and Decision-making (SHED)—a key Federal Reserve survey conducted annually since 2013—newly includes a question on non-competes. The researchers analyzed the latest release of SHED data from 2022 and found that about one in nine adult workers currently has a non-compete. This rate varies considerably by geographic region and worker age.

Key findings included:

- About one in nine workers reports having a non-compete, according to new Fed data.
- Workers on the West Coast are less likely to have non-competes, while those in South Atlantic states are more likely.
- Data allows researchers to see how non-competes relate to financial well-being and other outcomes.
- The Minnesota Fed found that "workers with non-competes are ten percentage points more likely to ask for a raise or promotion and seven percentage points more likely to apply for new jobs."

Furthermore, the study stated that "The results are somewhat in contrast to findings that non-competes (and/or their stringent enforcement) tend to reduce workers' job-search activity (Prescott and Starr 2021), wages (Lipsitz and Starr 2019), and mobility (Balasubramanian et al. 2022). There does not appear to be a reason to believe these estimates reflect a causal effect of non-competes, but they suggest avenues for deeper investigation." These studies were the very same studies cited by the FTC to support its efforts to ban non-competes.

SOURCE: *Federal Reserve Bank of Minneapolis*

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REGULATION/LEGISLATION

So far this year, 84 restrictive covenant bills have been introduced in 33 states, which is similar to last year at this time (98 restrictive coveant bills in 28 states). Eleven of the bills have already failed. Not surprisingly, the bill with the most attention is the New York bill that effectively bans noncompetes. The bill quietly made it to the Governor's desk but several New York companies and firms are now actively lobbying the Governor to reject or modify the bill. Although it is fair to ask why the companies and firms did not pay attention to the bill when it was still in the legislature, their lobbying actions have left the bill in limbo and it is anyone's guess as to what happens next. We will continue to monitor the bill, as well as all new and remaining bills, and provide updates.

Federal

EPA Grants Expose Cybersecurity, Trade Secrets to Foreign Threat

According to an official with the Inspector General's office, the EPA's internal watchdog is increasingly worried about hostile nations stealing sensitive information from groups that get agency funding. The threat is ramping up because the Environmental Protection Agency is funding tens of billions of dollars in grants under the infrastructure and climate laws—often to groups that have never gotten grants from the EPA before and about whom relatively little is known, Jason Abend, assistant inspector general for investigations at the watchdog's office, said in an interview. For example, the EPA is sending $3 billion under the climate bill to environmental justice groups nationwide. The agency must issue the grants by Sept. 30, 2026.

One top concern is the nation's water infrastructure, which hostile actors could attack for ransom or poison. Around 90% of the nation's waste and drinking water systems are public utilities. Although many water utilities have started to bolster their cybersecurity with grants under the infrastructure law, "the reality is, they're far behind their counterparts" in other critical infrastructure sectors. David Travers, director of the EPA's water infrastructure and cyber resilience division, outlined risks in a recent House Energy and Commerce subcommittee hearing, telling lawmakers that critical water and wastewater systems are being targeted for cyberattacks "with increasing frequency by both state-sponsored actors and criminal groups." Hostile actors have stolen "valuable financial data and customer information, destroyed essential information networks, and disabled communications systems," according to Travers. The exact size of the problem is "unquantifiable" because grant recipients are not required to report the information that would let the EPA assess the risk. Travers said that recovery costs for water and wastewater systems have ranged in the millions of dollars.

In addition to terrorist attacks on infrastructure, the inspector general is also worried about a hostile actor stealing government-funded research, including information that could be commercially valuable. Secretary of Homeland Security Alejandro Mayorkas recently listed Russia, the People's Republic of China, Iran, and North Korea as hostile nations.

The EPA has taken recent steps to address the problem, according to an agency spokesperson. For example, the EPA's Office of Research and Development, which oversees and administers most of the EPA's research grants, now requires grantees to provide updates if there are changes to their current and pending support disclosures, she said. Grant investigators are required to certify that that information is accurate and complete. The inspector general has also strengthened its capacity, bringing eight senior special agents on board to investigate fraud.

Separately, the watchdog has been trying to connect more closely with the EPA's Office of Cybersecurity.

SOURCE: *Bloomberg Law*

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FTC Acts Against Another Company That Imposed Harmful Non-compete Restrictions on Its Workers

The Federal Trade Commission ordered manufacturing company Anchor Glass Container Corp. to drop non-compete restrictions imposed on its workers, the fourth time this year that the agency has acted against companies that use harmful non-competes.

In a complaint against Anchor and its owners, Lynx Finance GP, LLC, and Lynx Finance L.P., the FTC claimed that Anchor had illegally imposed non-compete restrictions on more than 300 workers across various positions. According to the complaint, the company-imposed restrictions on employees that barred them for one year from working with another employer in the United States to provide "rigid packaging sales and services which are the same or substantially similar to those in which Anchor deals," and from selling products or services to "any customers or prospective customers of Anchor with whom the worker had any interaction."

The case against Anchor came roughly two months after the FTC sued three other companies (two of which were other glass manufacturers) and two individuals, forcing them to drop non-compete restrictions imposed on thousands of workers.

In June 2023, the Federal Trade Commission finalized a consent order settling charges that Anchor Glass Container Corp. illegally imposed non-compete restrictions. The consent order bans Anchor Glass from entering, maintaining, enforcing, attempting to enforce, or threatening to enforce non-compete restrictions on relevant workers. The company is also forbidden from telling a relevant employee or other employers that the employee is subject to a non-compete.

SOURCE: *FTC*

FTC's Khan Pressed by House GOP on Non-Compete Proposal, Meta, and Twitter Actions

The head of the FTC, Lina Khan, faced a challenging round of questioning from the Republican-led House committee. The hearing came after a major loss for the FTC against Microsoft over the purchase of Activision Blizzard, a major video game company. Khan faced critiques from the House over anti-trust lawsuits that the organization has pursued against major companies such as Meta and Illumina.

Additionally, Khan was questioned about the proposed non-compete ban. The commissioner told the committee that the agency has received more than 24,000 comments and is considering all input; however, the ban would apply to the "vast majority of non-competes."

SOURCE: *IP Watchdog*

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State

Connecticut, Feds Seek Limits on Non-Compete Agreements Across Industries

In Connecticut, the General Assembly is again looking to limit the use of non-competes. This year's proposal, House Bill 6594, would ban non-compete agreements for anyone earning less than three times the minimum wage and independent contractors earning less than five times the minimum wage. Connecticut's minimum wage is $14 an hour and will increase to $15 an hour on June 1. Outside those cases, the legislation would require agreements to be provided to employees sufficiently early in the hiring process—rather than after they have accepted an offer—and it would place other restrictions, such as time limits on the agreements. It would not change existing non-compete rules for physicians, physical therapists, and broadcasters, nor does it change non-solicitation rules governing the home healthcare sector. (The Public Health Committee proposed a separate bill restricting non-compete clauses in physician and registered nurse contracts.)

SOURCE: *CT Mirror*

Minnesota Bans Non-compete Agreements on July 1st— What Companies Need to Know (and Do)

The Minnesota Legislature passed a bill that voids all future covenants not to compete, with limited exceptions for agreements in connection with the sale or dissolution of a business. A copy of the Omnibus bill SF 3025 can be found here. The bill becomes law as of July 1, 2023.

The insertion of "reasonable" into the sale/dissolution of a business exemption is significant and signals that companies should be prepared to analyze and evaluate non-compete restrictions involving the sale or dissolution of a business through the same lens that they evaluated employee non-compete agreements before the ban. Put another way, companies should not expect the same level of flexibility and deference Minnesota courts previously provided when enforcing non-compete agreements arising from the sale or dissolution of a business.

Outside of the sale/dissolution of a business exception, the bill provides that any "covenant not to compete contained in a contract is void and unenforceable." The bill defines a "covenant not to compete" as an agreement between an employer and an employee "that restricts the employee, after the termination of the employment, from performing:

- Work for another employer for a specified period.
- work in a specified geographic area; or
- work for another employer in a capacity similar to the employee's work for the employer that is party to the agreement."

Notably, a "covenant not to compete" does **not** include non-disclosure, confidentiality, trade secret, or non-solicitation agreements and, unlike some other state statutes and the proposed FTC rule banning non-compete agreements, notes explicitly that restrictions concerning the ability to use client contact lists and/or solicit customers are still enforceable in Minnesota. The bill is also not retroactive but, following a trend seen in other state legislatures prohibits employers from requiring Minnesota residents to litigate claims outside of Minnesota and/or be subject to another state's law concerning a controversy arising in Minnesota. Importantly, this ban on foreign choice of law and forum provisions applies to all forms of employment agreements, not just non-compete agreements.

SOURCE: *Benesch*

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Missouri Passes Bill Restricting Non-Solicitation Agreements

Missouri lawmakers passed Senate Bill 103, limiting the time and scope of covenants between a business entity and an "owner" in which the owner promises not to solicit or interfere with the business's employees and customers after the owner's relationship with the business ends. Typically, this scenario only occurs when a business is purchased or sold. Still, as the bill does not define "owner," it could apply to individuals who partially own a business.

Specifically, SB 103 would presume the enforceability of:

- A reasonable, written non-solicitation or noninterference agreement that requires a promise "not to solicit, recruit, hire, induce, persuade, encourage, or otherwise interfere with … the employment of one or more employees or owners of a business" if the covenant is not for more than two years following the end of the owner's relationship with the business.
- A reasonable, written non-solicitation or noninterference agreement that requires an owner to promise "not to solicit, induce, direct, or otherwise interfere with, directly or indirectly, a business entity's customers, including any reduction, termination, or transfer of any customer's businesses" for purposes of competing with the business. This applies if the covenant is limited to customers with whom the owner dealt and did not last for more than five years following the end of the owner's relationship with the business.
- A written provision by which an owner promises to provide prior notice of an intent to sell or dispose of an ownership interest in the business.

The bill requires courts to modify a covenant that is found to be "overbroad, overlong, or otherwise not reasonably necessary" to protect the interests of the business and enforce the revised version. Still, courts would be limited to providing "only the relief reasonably necessary to protect such interests."

The bill states that it does not "limit an owner's ability to seek or accept employment with another business entity immediately upon" or sometime after the end of the business relationship, whether that end was "voluntary or involuntary." Further, the bill would not "otherwise affect the validity or enforceability of non-compete agreements, non-disclosure agreements, confidentiality agreements, or other types of restrictive covenants."

The bill was sent to the Governor on May 30. If passed, the law will come into effect on Aug. 28.

SOURCE: *SHRM*

New York State Ban on Non-Competes Heads to the Governor

The New York state legislature passed a bill banning non-compete agreements for all workers, joining states restricting such activity. The bill, S3100A/A1278, would ban the use of non-compete agreements in every circumstance.

- Unlike the FTC's near-total ban, the New York bill does not explicitly provide for any exceptions. Language in the bill could, however, arguably provide for exceptions in the case of business sales, although it is currently unclear.
- The law will only prohibit non-competes entered into after the law's effective date.
- Finally, the bill would provide employees with a statutory right to bring civil actions against employers who attempt to require or enforce non-compete agreements.

The bill passed both chambers of the New York state legislature and is expected to be signed into law by Governor Kathy Hochul (D). The law would become effective 30 days after the Governor's signature.

SOURCE: *HR Policy Association*

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Wall Street Is Fighting New York's Ban on Non-Compete Agreements

In June, law makers in New York approved an aggressive ban on non-competes in the state. The finance industry and other business associations have since formed lobbying groups pushing for exceptions to the rule. Opponents of the ban argue that non-competes and similar clauses protect intellectual property, trade secrets, and investments made in the workforce. Supporters of the ban say that these clauses are forcing gardening leave or time out of work for employees, negatively impacting career progression, and preventing workers from earning higher wages. Roughly 44% of New York's workforce has been subject to non-competes, particularly in financial firms.

The lobbying groups argue that the bill currently has no room for exceptions. In at least eleven states where similar bans have passed, they focused on preventing employers from imposing non-compete contracts on employees who earn below a certain income but have not put a full ban. Four states (California, North Dakota, Minnesota, and Oklahoma) have all put bans in place that allow for minimal exceptions.

It should be noted that not all business groups are in opposition to the ban. For instance, the Tech industry in the state favors the ban as it believes it will help the tech startup sector.

If passed, the bill would apply to contracts signed or modified only after the law is in place and doesn't prohibit the use of confidentiality or non-solicitation agreements. Upon examining the bill, legal professionals have pointed out a number of vagaries in the language, including if it could be applied to terms within non-solicitation and non-disclosure agreements or to deferred compensation. Furthermore, the definition of individuals covered under the bill is very broad in its language as it includes people with "economic dependence" on a job.

SOURCE: *BNN Bloomberg*

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LITIGATION

On the civil front, an interesting win against the government, inevitable disclosure remains alive and well in Illinois, Ohio reminds parties that injunctive relief and monetary damages are appropriate in trade secret cases, Alabama reminds companies to sign on the bottom line and even law firms can have trade secrets. Yet, perhaps the most significant case is Georgia's ruling that employee nonsolicits need to have geographical restrictions. On the criminal front, the DOJ continues to prosecute trade secret cases and launches a Disruptive Technology Task Force.

Civil

Vanda Pharmaceuticals Sues U.S. Over Drug Trade Secrets

Vanda Pharmaceuticals Inc. sued the federal government in Washington, D.C., federal court over accusations that the U.S. Food and Drug Administration shared trade secrets about its schizophrenia drug Fanapt and Sleep-disorder medication Hetlioz with generic competitors, including Lupin Ltd, Apotex Inc, and Teva Pharmaceutical. Vanda said the agency disclosed confidential details from its applications for FDA approval to companies seeking to make generic versions of its drugs. Vanda also asserted that the FDA "routinely" reveals confidential information about brand-name drugs to generic drug applicants.

SOURCE: *Reuters*

Illinois Trade Secret Dispute Proceeds on Theory of Inevitable Disclosure

In *Marquis Procap Systems LLC v Novozymes North America Inc*, the Central District Court of Illinois allowed both misappropriation and breach-of-contract claims to proceed under a theory of inevitable disclosure.

The Plaintiff, Marquis Procap Systems, a renewable energy company in Illinois, filed a trade secret misappropriation action against one of its suppliers, *Novozymes North America Inc* (CD Ill, no 20-cv-1020, DI 1, 14 January 2020). The suit was prompted by *Novozymes'* announcement of an "exclusive partnership and commercialization agreement" with one of Marquis' competitors. Earlier this year, and after years of discovery, Marquis sought to amend its complaint to allege that it is entitled to relief—not just for any actual misappropriation but also for the future threat that the defendant would inevitably use or disclose its trade secrets (Id, DI 290, 14 February 2023, amended complaint). In spring 2023, facing a motion to dismiss, Marquis acknowledged that it had no direct evidence to show that *Novozymes* ever shared its trade secrets with the competitor. Nonetheless, *Novozymes'* motion to dismiss was denied because Marquis had brought claims under the federal Defend Trade Secrets Act and the Illinois Trade Secrets Act, both of which allow for injunctions for threatened misappropriation (*Id,* DI 359,1 May 2023, order, and opinion on the defendant's motion to dismiss).

The court concluded that this case was not necessarily one in which a competitor directly copied trade secrets but where it might still substantially benefit from possessing trade secret knowledge, specifically, the "years of expensive trial and error" work that the plaintiff undertook when developing its product. In addition to allowing the misappropriation claims to proceed, the court also allowed Marquis' breach-of-contract claim to move forward because the agreement explicitly allowed for remedies to enjoin an actual or "threatened breach" of it.

Source: *IAM Media*

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Ohio Appeals Court Revives Logistics Co.'s Non-compete Suit

Total Quality Logistics LLC should have been allowed to keep fighting for an injunction blocking its former employee Christopher Johnson from misappropriating its trade secrets and competing against it with his own company, Patriot Logistics LLC, the Twelfth Appellate District panel said.

According to the opinion, while Total Quality was arguing at the federal level that its complaint should stay in an Ohio court, the company had agreed to accept $75,000 at most in monetary damages—an amount beyond which federal jurisdiction would apply—but it never said it would forgo injunctive relief. According to the opinion, the trial court interpreted Total Quality's stipulation from the federal court level to mean that the $75,000 payment would also satisfy its want for injunctive relief. The panel disagreed, saying the payment was to settle claims for Johnson and Patriot Logistics' past alleged misconduct, whereas the injunction looked forward instead.

SOURCE: *Law 360*

Sign on the Line: Alabama Supreme Court Requires Employer Signatures on Non-Competes

The Alabama Supreme Court recently ruled on a case that further clarified Alabama's non-compete statute. In the case, the employee signed an employment contract that contained two addenda. The employer had signed the first addenda but not the second, which included the non-compete. Nearly two years later, the employee left the company to work for a competitor. The employer sought to enforce the non-compete; however, the Alabama Supreme Court ruled that for it to be enforceable, all parties must have signed a non-compete. The Court clarified that in this instance, the employer had not physically signed the addendum, which contained the non-compete, making it unenforceable. This decision means that other arguments over what constitutes as "signed by all parties" will likely not be considered, and physical signatures will now be the best practice.

Georgia Appellate Court Says Employee Non-Solicitation Covenant Not Enforceable Without Express Geographic Limitation

The Georgia appellate panel recently decided that employee non-solicitation covenants that limit what parties can do after a business relationship has concluded must have an explicit geographic limitation to be enforceable under state law. In North American Senior Benefits, LLC v. Wimmer, the panel ruled that the non-solicitation clause was not enforceable under the Georgie Restrictive Covenants Act because the clauses lacked explicit geographical limitations, and the act does not authorize courts to read a limitation into such a clause to make it enforceable. In a 2-1 ruling, the panel denied an argument that a geographic limitation was implied where the clause applied only to the former employer's employees nationwide. The court also stated that it was "of no consequence that there are strong policy arguments for a different rule or that those policy arguments had been adopted in judicial decisions that preceded the Act." Interestingly, the state's restrictive covenants authorize the courts to use discretion to modify overbroad restrictive agreements to make them enforceable. In this instance the court decided not to do so, stating that the act does not allow courts to supply new terms where they are not present.

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Court of Appeals Rules on Law Firm Trade Secrets Claim

The Washington Court of Appeals recently issued a relatively rare decision involving a trade secret claim by a law firm against a departing lawyer. Hudson v. Ardent Law Group, PLLC, 2023 WL 2859334 (Wn. App. Apr. 10, 2023) (unpublished), involved a firm focused on representing clients in real estate timeshare disputes. The firm had developed tailored forms and collected a large amount of electronic data to handle client work. While still employed by the firm, a lawyer secretly copied the firm's entire client database. The lawyer then left the firm to start a competitive agency and used the information to recruit clients.

Litigation followed. The law firm pursued, among other counts, a trade secrets claim against the lawyer centered on the client database. A jury ruled that the lawyer had misappropriated the firm's trade secrets and the Court of Appeals affirmed.

SOURCE: *NWSidebar*

Criminal

Defending Remaining No-Poach Case, DOJ Assails Loss

DOJ Antirust Division prosecutors have so far failed to win a single jury conviction on any of the no-poach or wage-fixing criminal charges the agency began filing in late 2020. The only "wins" so far for the agency has been a conviction for lying to investigators and a pair of plea deals. Another separate wage-fixing case, over Las Vegas home health agency nurses, is currently set for trial in March 2024. Another significant loss occurred in June when U.S. District Judge Victor A. Bolden stopped a no poach case from going to the jury before closing arguments. In doing so, the judge ruled that no reasonable juror could convict based on the evidence presented by prosecutors.

SOURCE: *Law 360*

Ex-NASA Contractor Gets 20 Months in China Export Case

A California federal judge sentenced a former employee of a NASA contractor who smuggled aeronautics software to a sanctioned Chinese university to 20 months in prison, saying, "This is a big crime, in my opinion, a dangerous one." Jonathan Yet Wing Soong, 35, admitted in January that while he was a program administrator for a research firm contracted with NASA, he used an intermediary to covertly sell flight control software used by the U.S. Army to a Beijing university violating export control laws.

SOURCE: *Law 360*

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Justice Department Announces Five Cases as Part of Recently Launched Disruptive Technology Strike Force

The Justice Department today announced criminal charges in five cases and four arrests from five different U.S. Attorney's offices in connection with the recently launched multi-agency Disruptive Technology Strike Force. The Disruptive Technology Strike Force is co-led by the Departments of Justice and Commerce to counter efforts by hostile nations to illicitly acquire sensitive U.S. technology (i.e. trade secrets) to advance their authoritarian regimes and facilitate human rights abuses. The Strike Force's work has led to the unsealing of charges against multiple defendants in five cases.

Two of these cases dealt with the disruption of alleged procurement networks that assist the Russian military and intelligence services in accessing sensitive technology violating U.S. laws. In the Eastern District of New York, a Greek national was arrested on May 9 for federal crimes in connection with allegedly acquiring more than ten different types of sensitive technologies on behalf of the Russian government and serving as a procurement agent for two Russian Specially Designated Nationals (SDNs) operating on behalf of Russia's intelligence services. In the District of Arizona, two Russian nationals were arrested for their involvement in a procurement scheme to supply multiple Russian commercial airline companies—which were subject to bans from engaging in certain types of commercial transactions—with export-controlled parts and components, including braking technology.

Two other cases charged former software engineers with stealing software and hardware source code from U.S. tech companies on behalf of Chinese competitors. In the Central District of California, a senior software engineer was arrested on May 5 for theft of trade secrets for allegedly stealing the source code used in in "smart" automotive manufacturing equipment. In the Northern District of California, a citizen of the People's Republic of China (PRC) and former Apple engineer is accused of stealing thousands of documents containing the software and hardware source code for Apple's autonomous vehicle technology. This defendant fled to China and is believed to be working for a PRC-based autonomous vehicle competitor.

SOURCE: *Department of Justice*

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 also provide periodic updates regarding new statutes, government actions, and case opinions that may impact the ability to enforce restrictive covenants or protect trade secrets. For the third quarter of 2023, the Group is offering CLE seminars on best practices for handling a trade secrets audit, drafting restrictive covenant agreements, and preparing for, or defending against, a restrictive covenant and/or trade secret case.

If you would like to hear more about these offerings. Please contact **SCOTT HUMPHREY** at 312.624.6420 or shumphrey@beneschlaw.com