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4 Trends to Watch: Trade Secrets

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The tug of war over noncompete policy will continue. On January 5, 2023, the Federal Trade Commission proposed a broad ban on most employee noncompete agreements. The proposed rule would ban nearly all employee noncompete agreements. It would also require employers to rescind existing noncompete agreement. It could also apply to some nondisclosure agreements that limit employee mobility. The FTC seeks comments on the proposed rule and will likely issue a final rule in 2023.

Due to the proposed rule, and to the growing trend of states to limit non-competes, now is a good time to take a fresh look at agreements, particularly for new employees, and ask the questions: Is this necessary for this particular type of employee? Can it be narrowed in scope or time? Does a non-solicit really suffice to protect our interests?

This is also a good time for employers to examine their trade secret/confidential information protection policies and procedures. If the rule goes into effect, the protection of trade secrets will be more important than ever in order to ensure a legal right to take action against an employee who takes those secrets to a competitor. All companies with significant confidential information should have written policies in place regarding how that information is protected, train employees on those policies, enforce them, and have plans in place for employee departures.

More big damages awards are coming. In 2022, a jury delivered a record damages award in a case of alleged trade secret misappropriation. The award was in excess of \$2 billion. Separately, the Third Circuit affirmed a significant damages award based on an avoided-cost-of-development theory. In recent years, trade secret litigation has continued to grow more sophisticated, and clients are increasingly aware of the significant protections under federal and state law for the protection of confidential business information.

Watch state law developments closely. Several states have recently enacted law (e.g., Massachusetts, Illinois) or are considering new laws (e.g., New Jersey) significantly restricting the use of non-compete agreements. Apart from the fact that many employers may not want to comply with these new laws/requirements, a company's restrictive covenants may be deemed unenforceable overnight leaving employers with little protection of their most important assets.

Expect a significant number of new cases. The "great resignation" of 2021-22 along with continued remote work and access to technology create more opportunities for departing employees to retain and misuse confidential information of their former employers. In the meantime, failed business partnerships tend to lead to disputes over ownership of intellectual property rights. As the macroeconomic effects of the COVID-19 pandemic continue, assertions of trade secret misappropriation are sure to increase.

About the Authors

James N. Boudreau is Co-Chair of Greenberg Traurig's Global Labor & Employment Practice. He represents management in class action and complex employment litigation and devotes the majority of his practice to managing teams of attorneys and paralegals in nationwide class and collective actions from receipt of the complaint through discovery, class certification, and trial.

Gregory S. Bombard is a trial lawyer focusing on trade secret litigation, intellectual property disputes, and other complex commercial disputes. His trade secret practice spans high tech industries, including biotech, medical devices, software, robotics, fintech, and manufacturing. Greg is an author of the ABA's Guide to Protecting and Litigating Trade Secrets, 2nd Ed.

Galit Kierkut is a seasoned litigator and advisor to national and international clients in the areas of restrictive covenants, privacy, and trade secret counseling and litigation, as well as in matters relating to employment discrimination, harassment, whistleblowing, employee leave, and accommodation.