EMPLOYMENT LAWSCENE ALERT: WHAT DOES PRESIDENT BIDEN'S EXECUTIVE ORDER ON NON-COMPETES MEAN FOR WISCONSIN EMPLOYERS?

On Friday, July 9, 2021, President Biden signed an Executive Order that, among other things, instructed the Federal Trade Commission ("FTC") to ban or limit non-compete agreements and other clauses or agreements that "unfairly limit worker mobility." This is not a federal ban on non-compete agreements and does not change any current law. It is important to note, however, that the FTC and the U.S. Department of Justice Antitrust Division, through civil and criminal enforcement actions, have already been looking at no-poach agreements between employers and other competitive restrictions through the lens of antitrust and consumer protection laws and have begun to indict those employers who have entered into anti-competitive agreements that adversely affect America's labor market. To comply with President Biden's Executive Order, the FTC will likely go through a notice and comment period and eventually issue regulations governing the enforceability of restrictive covenants. Although a full federal ban on restrictive covenants is unlikely and any FTC rule would be subject to legal challenges, there may be limitations for certain workers (e.g., those in lower wage positions) or those in certain industries (e.g., retail, hospitality). Therefore, employers will need to stay informed on the progress of these regulations.

This is also a good reminder for Wisconsin employers to review their employee restrictive covenants, including non-disclosure, non-solicitation, and non-compete agreements. Regardless of any potential updates to federal law, Wisconsin has its own state statute regulating restrictive covenants – Wis. Stat. § 103.465. Wisconsin's statute imposes certain requirements for a restrictive covenant to be valid, including reasonable time and geographic limitations. Given the new focus on non-competes by the federal government, it is worthwhile for employers to have their restrictive covenants reviewed to evaluate enforceability and ensure that they're being appropriately used to protect those legitimate business interests recognized by law. As always, O'Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding restrictive covenants and related issues.

EMPLOYMENT LAWSCENE ALERT: SUPREME

COURT DECIDES CLASS-ACTION WAIVERS ARE ENFORCEABLE FOR EMPLOYEES

For the last several years, employers have been operating under a cloud of confusion regarding whether provisions in employment agreements that require employees to engage in individual arbitration proceedings, as opposed to class proceedings, are enforceable. Finally, the Supreme Court, in a 5-4 decision, has given us an answer, and the answer is yes, such provisions are enforceable!

In 2012, the National Labor Relations Board (NLRB) took the stance that class waivers violated workers' rights to engage in concerted activity under Section 7 of the National Labor Relations Act (NLRA). Although the Fifth Circuit rejected that stance in *D.R. Horton and Murphy Oil* and held that such provisions were valid and enforceable, the NLRB continued to litigate the issue, claiming that such provisions were not legal. In the intervening years, the Second and Eighth Circuits have agreed with the Fifth Circuit, while the Sixth, Seventh, and Ninth Circuits have agreed with the NLRB.

On Monday, in *Epic Systems Corp. v. Lewis*, the Supreme Court finally settled the dispute. In examining the issue, the Court considered two issues: (1) whether the "savings clause" of the Federal Arbitration Act (FAA) required enforcement of the arbitration agreements as written if the agreement violated another federal law, and (2) whether the arbitration agreements that waived collective rights violated the NLRA.

In looking at the first issue, the majority found that the FAA required courts to enforce arbitration agreements and, therefore, favored arbitration agreements. Although it acknowledged the general FAA "savings clause," such clause only applies when certain *contract* defenses apply. In examining the case at hand, the majority found that no such contract defenses were applicable and that it could not override the established policy of enforcing arbitration agreements.

The Court also considered whether the NLRA's protection of employees' collective rights displaced the FAA's favored enforcement of arbitration agreement. The majority held that, although the NLRA guarantees employees the right to *bargain* collectively, it neither guarantees the right to *collective action* nor manifests intent to displace the FAA. Because the NLRA was enacted after the FAA, if Congress had intended the NLRA to override the FAA's protections for arbitration agreements, such intent would have needed to be clear. Because it was not clear, the Court found that there was no such intent and that the NLRA's protection of collective rights could not override the FAA's policy of enforcing arbitration agreements as written.

Based on the Supreme Court's ruling in *Epic*, employers are now free to include arbitration

agreements that include a waiver of class and collective actions in their employment contracts. Although Congress could amend the law to clearly state that the NLRA, or some other federal law, does not allow for waiver of class or collective actions by employees, such legislative action is unlikely at this point in time. Employers may find arbitration agreements useful as arbitration may be less expensive, faster, and more flexible than traditional litigation.

EMPLOYMENT LAWSCENE ALERT: EMPLOYERS SHOULD REVIEW THEIR EMPLOYEE NON-SOLICITATION AGREEMENTS

On January 19, 2018, the Wisconsin Supreme Court issued a decision in *The Manitowoc Company, Inc. v. Lanning* affirming a 2016 Wisconsin Court of Appeals ruling that expanded the scope of Wis. Stat. § 103.465, which governs the enforceability of restrictive covenants, to include employee non-solicitation, or anti-raiding, provisions. We previously posted a blog about the Court of Appeals decision here.

John Lanning, a long-term employee of the Manitowoc Company, signed an agreement whereby he agreed, for a period of two years after the termination of his employment, not to solicit, induce, or encourage any employee of the Manitowoc Company to terminate his or her employment with the company or to accept employment with a competitor, supplier, or customer of the company. After he terminated his employment, he encouraged multiple employees of the Manitowoc Company to terminate their employment and join him at his new employer, which was a competitor of the Manitowoc Company.

The Wisconsin Supreme Court addressed two questions: 1) Whether employee non-solicitation agreements are "covenants not to compete" governed by Wis. Stat. § 103.465; and 2) if they are, was the provision contained in Lanning's agreement enforceable.

In answering whether non-solicitation agreements are covenants not to compete, the Court acknowledged that the statute has been applied to agreements viewed as restraints on trade, which may take many forms, and opined that the focus of the inquiry about whether a provision is a covenant not to compete should focus on the effect of the restraint, rather than its label. Therefore, the Court found that, because the non-solicitation provision restricted Lanning's ability to compete fully with the Manitowoc Company by prohibiting him from soliciting employees and competing in the labor market, it was a restriction on his ability to engage in ordinary competition and was governed by the statute.

The Court stated that the purpose of Wis. Stat. § 103.465 is to invalidate covenants that impose unreasonable restraints on employees. The Court found the employee non-solicitation unenforceable under Wis. Stat. § 103.465 because the non-solicitation provision was unnecessarily broad because it restricted Lanning's ability to compete fully in the marketplace with the Manitowoc Company by prohibiting him from soliciting all employees wherever they might work in the world. Such a restriction does not allow for the ordinary sort of competition attendant in the free market and, as a result, was an unlawful restraint of trade.

In order to be enforceable under the statute, a covenant not to compete must 1) be necessary for the protection of the employer, 2) provide a reasonable time limit; 3) provide a reasonable territorial limit; 4) not be harsh or oppressive to the employee; and 5) not be contradictory to public policy. Because the Court found that the employee non-solicitation provision that Lanning had signed was not necessary for the protection of the employer, they only addressed that portion of the test. Because words are interpreted to have their plain meaning, the Court found that the words "any employee" contained in Lanning's agreement prohibited him from soliciting every one of the Manitowoc Company's 13,000 world-wide employees with no limits as to the nature of the employee's position, Lanning's personal familiarity with or influence over the particular employee, or the geographical location in which the employee worked. The company's contention that it had a protectable interest in maintaining its entire workforce was rejected by the Court, which said that, ordinarily, the protectable interest would be limited to top-level employees, employees with special skills or knowledge important to the employer's business, or employees with a set of skills that are difficult to replace. Because the employee non-solicitation provision was not limited in any way, the Court found that it was overbroad on its face and unenforceable.

Based on this decision, employers must carefully review their restrictive covenants, particularly employee non-solicitation provisions, to ensure that they are carefully drafted to be necessary to protect their interests and no broader than needed. The focus must be on protectable, identifiable interest of the company. An experienced management-side employment attorney can assist employers with drafting such provisions in order to meet the enforceability standards required by the Wisconsin restrictive covenant statute.

EMPLOYMENT LAWSCENE ALERT: DEFEND TRADE SECRETS ACT OF 2016: EMPLOYERS

MUST INCLUDE NEW WHISTLEBLOWER IMMUNITY NOTICE IN CONFIDENTIALITY OR NON-DISCLOSURE AGREEMENTS

On May 11, 2016, President Obama signed into law the Defend Trade Secrets Act of 2016 ("DTSA") which amends the Economic Espionage Act (18 U.S.C. § 1831, *et seq.*).

The DTSA creates a private cause of action for trade secret misappropriation under federal law and opens a direct avenue for trade secret cases to proceed in federal court. While making it easier for employers to bring suits for trade secret misappropriation in federal court, the DTSA does not replace or preempt state trade secrets laws such as the Wisconsin Uniform Trade Secrets Act ("WUTSA") (Wis. Stat. § 134.90 *et seq.*). This means that an employer who believes that one of its trade secrets may have been misappropriated may proceed under either the DTSA or the WUTSA, or both, to enjoin the misappropriation of a trade secret and remedy the harm.

The DTSA has a similar definition of "trade secrets" that is found in the WUTSA. Like the WUTSA, the DTSA defines the term "trade secret" to include all forms and types of financial, business, scientific, technical, economic, or engineering information where reasonable measures are taken to keep such information secret and the information derives independent economic value, actual or potential, from not being generally known to the public. The DTSA also defines the term "misappropriation" relative to the theft of a trade secret identically to the way it is defined by the WUTSA.

While appearing similar, the DTSA, however, differs significantly from the WUTSA on two fronts. First, the DTSA, unlike the WUTSA, permits an owner of a trade secret to obtain an *ex parte* seizure order providing for the seizure of property necessary to prevent the further dissemination or use of a misappropriated trade secret. Similar seizure remedies are found in the Copyright Act and the Lanham Act. Such an order could include, for example, an order seizing an employee's computers or smartphone or even an order seizing an employee's new employer's computers if evidence exists that the misappropriated trade secret was transferred and disseminated by a former employee to his/her new employer. This *ex parte* seizure remedy is only available under extraordinary circumstances. Realizing that such a powerful remedy could be subject to abuse, Congress included a provision within the DTSA that permits a person who is subject to a wrongful or excessive seizure to recover civil damages.

Second, the DTSA has a whistleblower protection provision that is not found in the various Uniform Trade Secrets Acts enacted by various states, like in Wisconsin under the WUTSA. Specifically, the DTSA amends 18 U.S.C. § 1833(b) to provide criminal and civil immunity

under any federal or state trade secret law for the disclosure of a trade secret that either is made: (i) in confidence to a federal, state, or local government official or to an attorney solely for the purpose of reporting or investigating a suspected violation of law; or (ii) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

Overlaying this immunity protection under the DTSA is also a notice requirement. Specifically, starting May 12, 2016 employers must give employees, contractors, and consultants notice of this potential immunity in any contract or agreement that governs or protects the use of a trade secret or other confidential information entered into or amended after this date. The DSTA requires that this whistleblower immunity notice be expressly provided in a contract protecting trade secrets or should at least contain a notice provision that cross-references a policy that contains the employer's whistleblower reporting policy for a suspected violation of law. Failure to provide this notice, however, does not invalidate the enforceability of the agreement or preclude an employer from bringing a claim under the DTSA. Rather, failure to provide the required whistleblower immunity notice simply precludes an employer from recovering exemplary damages or attorneys' fees under the DTSA.

To comply with the new whistleblower immunity notice requirement under the DTSA, all employers must include this notice in any contract protecting the use of trade secrets or confidential information entered into or modified on or after the effective date of the DTSA (May 12, 2016) involving any employee or any non-employee individual performing work as a contractor or consultant for the employer. Employers are not required to amend existing contracts. Employers should take immediate action to incorporate the DTSA's new required whistleblower immunity notice in all new or modified confidentiality or non-disclosure agreements entered into on or after May 12, 2016.

EMPLOYMENT LAWSCENE ALERT: CONTINUED EMPLOYMENT IS RULED VALID CONSIDERATION FOR NON-COMPETES IN WISCONSIN

On April 30, 2015, the Supreme Court of Wisconsin issued its long-awaited decision in *Runzheimer International Ltd. v. Friedlen*, in which it came to the conclusion that the promise of continued at-will employment is valid consideration for a restrictive covenant.

In *Runzheimer*, the employee had worked for his employer for fifteen years when the employer required all employees to sign restrictive covenants or be terminated. The

employee signed the restrictive covenant, but after he was terminated more than two years later, he went to work for a competitor in breach of that agreement, and the employer sued. The employee then claimed that the agreement was invalid because it lacked consideration.

In Wisconsin, forbearance in exercising a legal right is valid consideration. The Court reasoned that, because Wisconsin is an employment at-will state, companies have a legal right to terminate employees at any time for a good reason, a bad reason, or no reason at all, as long as it does not violate existing law or public policy. Therefore, giving up the legal right to terminate an employee at that moment in exchange for the employee signing a covenant not to compete is valid consideration.

The court emphasized that its holding in *Runzheimer* is consistent with its 1994 holding in *NBZ, Inc. v. Pilarski* where the Wisconsin Supreme Court held that the promise of continued employment did not provide sufficient consideration to support a restrictive covenant entered into by an existing employee. The Wisconsin Supreme Court distinguished its holding in *NBZ* by finding that, in that case, the employee's employment had not been conditioned upon her signature and the employer did not promise to do anything else in exchange. Without these elements, there can be no consideration to support enforcement of the agreement under Wisconsin law.

Therefore, under the Wisconsin Supreme Court's holding in *Runzheimer*, in order for continued at-will employment to be valid consideration for a restrictive covenant agreement, employers must condition the employee's continued employment upon the employee actually signing the agreement. In order to maintain that position in any action that might challenge the issue of consideration, an employer must actually terminate any employee who refuses to sign the restrictive covenant for it to validly assert that continued employment was conditioned upon the employee's signature to the agreement.

Wisconsin has now joined the majority of jurisdictions, which hold that a promise to continue an at-will employee's employment is lawful consideration for a restrictive covenant. The *Runzheimer* decision now permits Wisconsin employers to require their existing employees to sign new or modified restrictive covenant agreements without promising employees anything more than continued at-will employment.

RECORD RETENTION POLICY: A START TO BEING LITIGATION-READY

Almost 99% of today's information created by businesses is generated and stored

electronically. The ability to easily and conveniently store large amounts of data has created a hidden liability that did not exist in the age of when companies maintained its information primarily in paper format. The effect of this hidden liability is twofold. First, companies create more information then they know what to do with. Second, companies sometimes delete or destroy data and information that they actually do need.

For the unwary, these hidden liabilities may become exposed when your company is faced with a lawsuit. In today's litigation, the age of electronic data has generated a paradigm shift away from traditional paper documents to digital information. This shift has changed the discovery process in litigation by changing what attorneys are looking for; how they are looking; and where they are looking for relevant information. Companies can expect in today's litigation that the way it stores and preserves electronic information will be a central topic during the discovery process that will involve not only your record custodians, but also your information technology department. How well a company manages and preserves its electronic information may be an outcome determinative factor for it in litigation.

Today, companies that find themselves involved in a lawsuit oftentimes are faced with attacks through the discovery process as to how they typically store and delete electronic information. The purpose of this inquiry is to set the expectation as to what electronic information, such as e-mails, the company should or should not reasonably have at its disposal for discovery purposes. Companies that do not have a well-drafted record retention plan that addresses electronic information and which incorporates a comprehensive litigation hold policy may find themselves at a significant disadvantage in trying to defend what might otherwise be a winning case. That is why it is more important than ever for all companies, both large and small, to effectively manage their electronic information. This means that **companies must be litigation-ready** by taking affirmative actions that allow the company to effectively manage and retain electronic information. It is simply too late to start thinking about the manner and method of retention and destruction of electronic data after you have been served with a lawsuit.

The best tools to avoid these hidden liabilities is a **record retention policy** that addresses electronic information as well as a **litigation hold policy** that is designed to preserve electronic data once litigation is reasonably anticipated. A record retention policy should be designed so that your company does not destroy information that it is obligated to maintain and at the same time the policy should be designed to destroy or delete information that the company no longer needs and/or is no longer mandated to maintain. Most companies have some sort of document retention policy. These retention policies were originally implemented to manage the volume and space occupied by paper documents. Companies have been less diligent, however, in applying their retention policies to the electronic information that they store on their servers and individual computer hard drives. This lack of diligence in managing electronic data has created a treasure trove for plaintiffs' lawyers looking for the proverbial "smoking gun," such as that e-mail that explains exactly what

motivated the company's decision to terminate that troublesome employee.

A litigation hold policy has long been an important concept in litigation. In simple terms, it means that once you are sued, you have to stop destroying documents. It is an easy concept to understand when applied to paper documents, but it becomes a much more complicated task when dealing with electronic information. Electronic evidence can easily disappear, be altered or destroyed if not properly preserved. For example, some companies' computer systems provide for automatic deletion of e-mails and documents, so stopping that process takes an affirmative effort on behalf of management. When implementing a legal hold, a company needs to approach the hold requirement with a coordinated team effort. Business units, IT, records management and custodial personnel, and either in-house or outside counsel need to be involved and work together in the process of implementing the hold.

The failure to have a properly drafted record retention policy as well as a litigation hold policy may result in serious and adverse consequences for your company and may compromise your company's ability to defend itself in a lawsuit. For example, failure to have these policies in place can result in court-imposed sanctions, adverse jury instructions and significant monetary awards.

For example, a federal district court in Illinois recently agreed to permit the jury to be instructed that it can assume computer data destroyed by an employer would be unfavorable to its defense in an employee's lawsuit under the Americans with Disabilities Act when the employer permitted a software program to automatically overwrite computer data relevant to the claims in the case. It made no difference that the employer did not act intentionally in deleting the information, rather, the district court found that the employer's failure to prevent the automatic deletion made it "at fault" relative to its duty to preserve evidence that was discoverable pursuant to the Federal Rules of Civil Procedure. Consequently, thinking ahead and addressing the hidden liabilities created by your electronic information can save your company time and money, and, more importantly, potentially prevent your company from having to incur an unfavorable judgment as the result of electronic information being inadvertently deleted.