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Recent Developments in Employment Law

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August 12, 2023

Overview

Today's Roadmap

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2. The FTC's Proposed Non-Compete Rule
3. The NLRB and Employer Policies
4. The NLRB and Severance Agreements
5. Whistleblower Protections
6. The Virginia "Speak Out Act"
7. Rolling Back COVID-19 Vaccine Requirements
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Disclaimer: This presentation is offered for discussion purposes only and shall not constitute legal advice.

Virginia COVID Era Legislation

Virginia COVID Era Legislation

- As the pandemic raged, much of the world shut down
- But the General Assembly got to work passing some of the most significant employment legislation in Virginia history
- This section highlights some of that legislation

The Virginia Human Rights Act

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Expanded Private Right of Action for State Discrimination Claims

- Prior to 2020, only small employers could be liable for state law employment discrimination claims—available claims were very narrow
- Now almost all Virginia employers are covered
- State law protects characteristics not covered by federal law
  - Traits historically associated with race such as hair texture/type
  - Sexual orientation
  - Gender identity
- Allows aggrieved employees can take advantage of favorable state court procedures

The Virginia Human Rights Act

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Pregnancy Accommodation (No Longer A Disability Accommodation)

- Employers with five or more employees for a 20-week period in the current or preceding year must provide reasonable accommodations for pregnancy, childbirth or related medical conditions, including lactation, unless the accommodation would impose an undue hardship.

- Employers also may not, in response to a request for a reasonable accommodation for pregnancy:
  - take adverse actions against an employee;
  - deny employment or promotions; or
  - require an employee to take leave if another reasonable accommodation can be provided.

The Virginia Whistleblower Law

- In 2020, Virginia employees were granted powerful protections against retaliation for engaging in certain protected "whistleblowing" activities

- Protected activity <u>(very broad):</u>
  - Making a good faith report of a violation of law to a supervisor, governmental body or law enforcement,
  - Is requested by the government/law enforcement to participate in an investigation, hearing or inquiry,
  - Refuses to engage in a criminal act that would subject the employee to criminal liability,
  - Refuses an order to perform an act that violates law/regulation and the employee communicates that refusal, or
  - Provides information or testifies before a governmental body or law enforcement regarding violations of law or regulation by employer.
    Va. Code § 40.1-27.3

The Virginia Whistleblower Law

- Law is fairly new, so there are few reported cases interpreting it but it is regularly being asserted in new lawsuits.

- Example cases:
  - Bartender claimed she was fired for refusing to violate the law by serving an intoxicated person an alcoholic drink. *Foster v. Fraternal Order of Eagles*, 108 Va. Cir. 409 (Rockingham Cir. Ct. 2021)
  - City employee claimed she was fired for making legally mandated reports of child abuse. *Alexander v. City of Chesapeake*, 108 Va. Cir. 161 (Chesapeake Co. Cir. Ct. 2021)

The Virginia Whistleblower Law

Physicians already have state law protections in the context of reporting concerns about patient safety:

- ***No employer shall take retaliatory action against an employee who in good faith makes a report of patient safety data to a patient safety organization.*** *Va. Code § 8.01-581.17.H.*

"Patient safety organization" means any organization, group, or other entity that collects and analyzes patient safety data for the purpose of improving patient safety and health care outcomes and that is independent and not under the control of the entity that reports patient safety data.

The FTC's Proposed Non-Compete Rule

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The FTC's Proposed Non-Compete Rule

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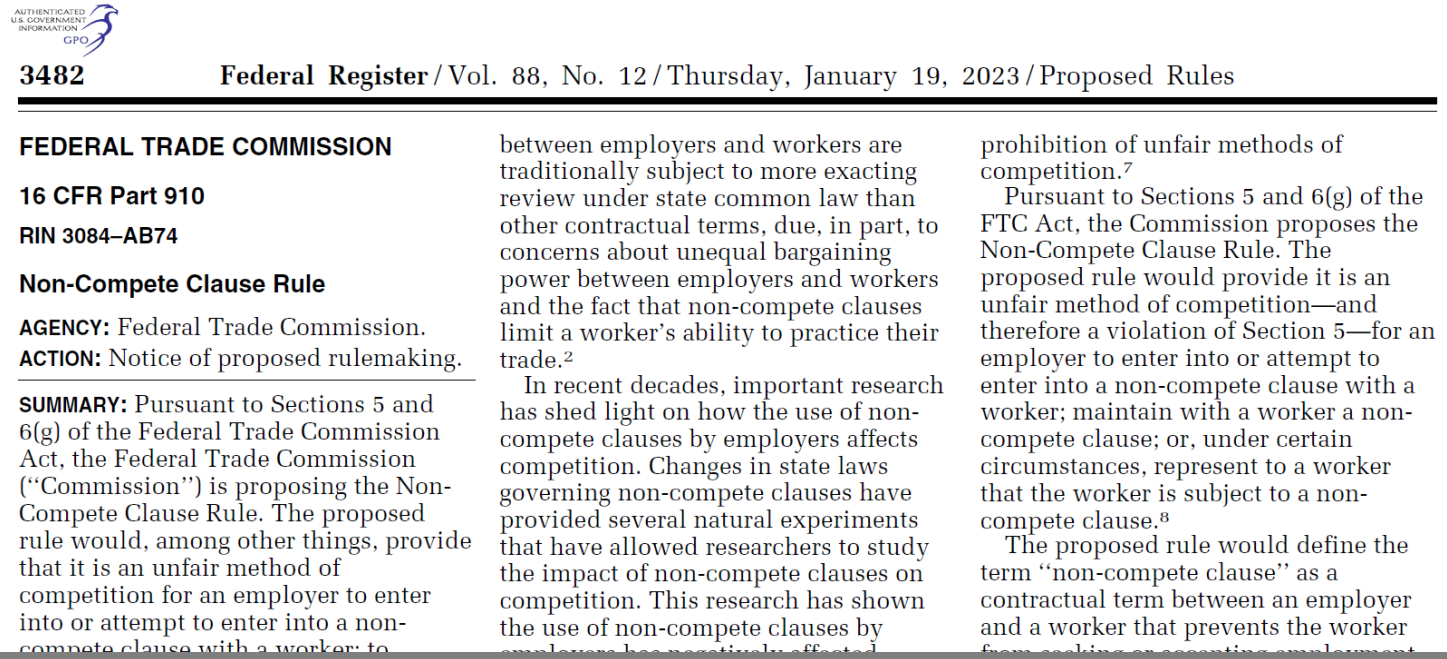
- In 2020, Virginia prohibited non-competes for "low-wage" workers. Va Code § 40.1-28.7:8
  - Low-wage currently = < $1,343/week ($69,836/year)

- In January 2023, the Federal Trade Commission (FTC) took initial steps to restrict non-competes nationwide



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3482 **Federal Register** / Vol. 88, No. 12 / Thursday, January 19, 2023 / Proposed Rules

FEDERAL TRADE COMMISSION

16 CFR Part 910

RIN 3084–AB74

Non-Compete Clause Rule

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: Pursuant to Sections 5 and 6(g) of the Federal Trade Commission Act, the Federal Trade Commission ("Commission") is proposing the Non-Compete Clause Rule. The proposed rule would, among other things, provide that it is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; to

between employers and workers are traditionally subject to more exacting review under state common law than other contractual terms, due, in part, to concerns about unequal bargaining power between employers and workers and the fact that non-compete clauses limit a worker's ability to practice their trade.[2]

In recent decades, important research has shed light on how the use of non-compete clauses by employers affects competition. Changes in state laws governing non-compete clauses have provided several natural experiments that have allowed researchers to study the impact of non-compete clauses on competition. This research has shown the use of non-compete clauses by employers has negatively affected

prohibition of unfair methods of competition.[7]

Pursuant to Sections 5 and 6(g) of the FTC Act, the Commission proposes the Non-Compete Clause Rule. The proposed rule would provide it is an unfair method of competition—and therefore a violation of Section 5—for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or, under certain circumstances, represent to a worker that the worker is subject to a non-compete clause.[8]

The proposed rule would define the term "non-compete clause" as a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment

The FTC's Proposed Non-Compete Rule

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Features of the Proposed Rule:

- Will ban *all* non-compete clauses
- Applies to employees, independent contractors, interns, volunteers, etc.
- Ban extends to "de facto" non-compete clauses that have the effect of keeping workers from working or operating a business after their employment ends (i.e., repayment agreements for training, broad NDAs, some non-solicitation clauses)
- Requires rescinding non-compete provisions already in effect

The FTC's Proposed Non-Compete Rule

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Limitations of the Proposed Rule:

- Likely will not apply to many 501(c)(3) tax exempt organizations
    - Some questions remain whether any such organizations engaging in an unrelated trade or business could fall under the proposed rule

- Narrow exception for sales of businesses--non-competes acceptable for individuals selling a business or substantially all of a business' assets

The FTC's Proposed Non-Compete Rule

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Looking Ahead:

- The FTC's proposed rule is not final
  - Nearly 27,000 comments were submitted by stakeholders
- Because of the overwhelming response, no final version of the rule is expected until Spring of 2024
  - Final rule will likely include substantial changes and clarifications
- We also anticipate opponents will challenge any final rule in court leading to additional delays

The FTC's Proposed Non-Compete Rule

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Takeaways:

- Impossible to know what the final rule will look like (if one is even put into place)

- Even if this rule ultimately never goes into effect, it is clear that lawmakers and regulators are interested in addressing non-competes—future efforts at limiting the provisions are likely:
  - ➢ Practices should begin thinking through strategies to protect themselves if non-competes are no longer a viable option:
    - ❑ Additional protections on confidential/sensitive data
    - ❑ Compensation structures that reward continued service

The NLRB and Employer Policies

The NLRB and Employer Policies

- Most employers, including healthcare employers, are covered by the National Labor Relations Act (NLRA)
  - It applies to all private employers except those who employ only agricultural workers or who are subject to the Railway Labor Act
  - Even small practices or those with a non-unionized workforce are covered

- The NLRA is enforced by the National Labor Relations Board (NLRB)

The NLRB and Employer Policies

Section 7 of the NLRA

- Employees shall have the right to self-organization, to form, join, or assist labor organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…" (29 USC § 157).

What it means

- The NLRA gives employees the right to act jointly to try to improve their pay and working conditions, regardless of whether or not they are in a union.

The NLRB and Employer Policies

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Section 8 of the NLRA

- "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]."

What it means

- If an employee is engaged in "protected concerted activity," an employer violates the NLRA if:
  - The employer knows of the concerted nature of the activity; and,
  - An adverse employment action (i.e., discipline or firing) taken by the employer is motivated by the employee's protected activity.

The NLRB and Employer Policies

- Interpretations of employee rights and employer obligations under the NLRB have varied widely in recent years
- It is the most political agency that regulates employment issues
- During the Trump Administration, the NLRB tended to take a more “hands off” approach
- The Biden Administration has steered toward heavier enforcement
- One recent area of focus by the NLRB is whether an employee’s insubordinate/abusive/offensive conduct could constitute activities protected by Section 7

The NLRB and Employer Policies

- Earlier this month, the NLRB issues a decision (Stericycle) that set a new standard for evaluating whether an employer policy violates the NLRA because it could impair Section 7 rights

- The NLRB adopted a balancing test for assessing the lawfulness of policies that are not intentionally worded to interfere with workers' rights
    - Only a rule that has a tendency to chill employees from exercising their rights is presumptively unlawful. An employer can rebut this presumption by showing the rule advances legitimate business interests and a more tailored rule is not possible.

- Review your handbooks and don't be surprised if you hear from employees or the NLRB about work rules

The NLRB and Employer Policies

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Possible Policies that Could be Implicated

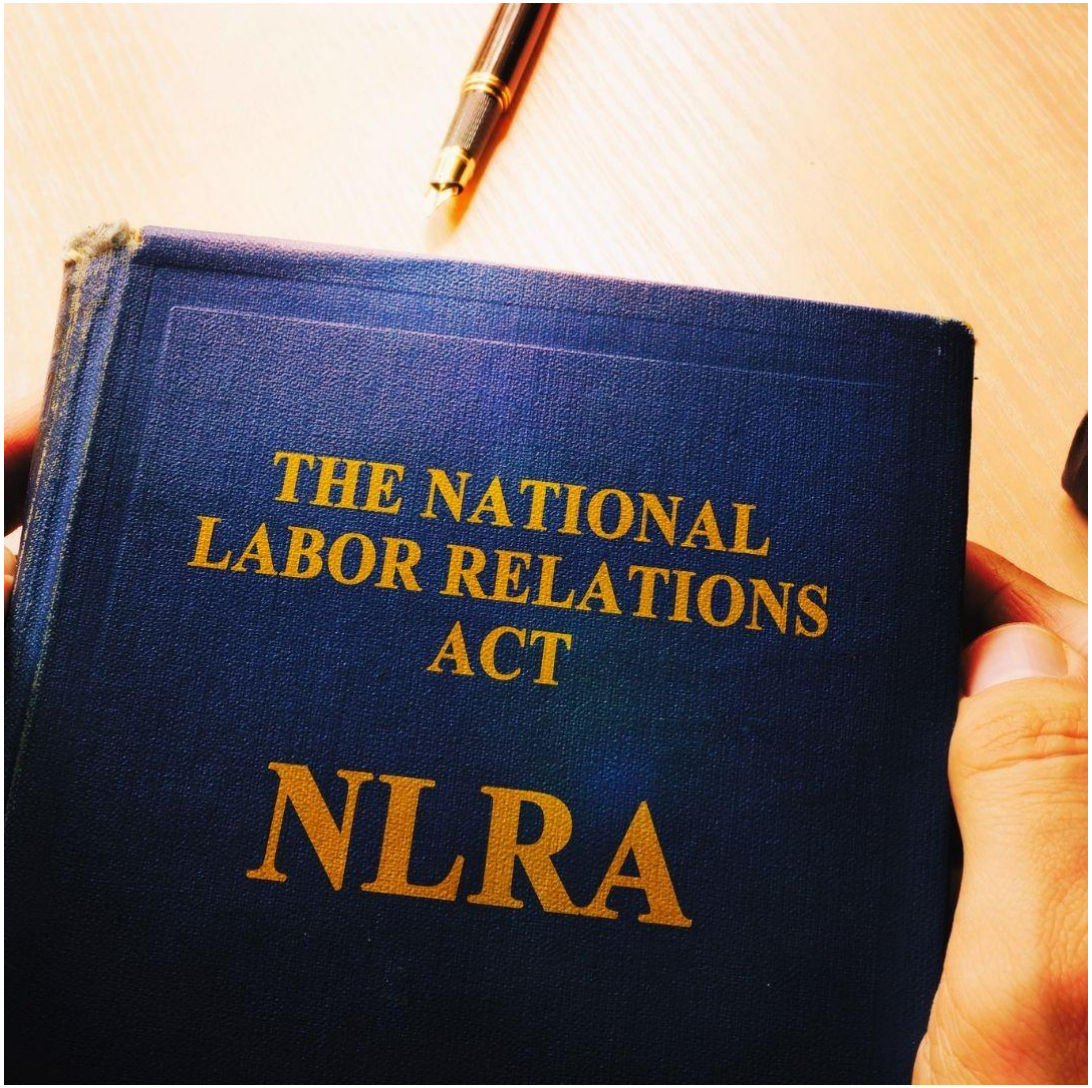
- Never adopt policy preventing employees from discussing wages
- Other policies creating potential liability include restricting disclosure of confidential information, use of employer technology and tools, social media and related activity, media and third-party engagement, solicitation and distribution rules, photography/recording policies, anti-harassment policies, employee disciplinary rules, appearance/dress code policies, open door/internal complaint policies

The NLRB and Employee Conduct

Takeaways:

- Review your handbook and policies with counsel to mitigate risk of NLRA liability
- Be on the lookout for further rulings and guidance from the NLRB that could clarify this most recent decision

The NLRB and Severance Agreements



The NLRB and Severance Agreements

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The *McLaren Macomb* Decision

- In February of 2023, the NLRB issued a decision prohibiting severance agreements that bar departing employees (1) from making disparaging statements about the employer, or (2) from disclosing the terms of the agreement. This called into question common severance terms.

- Excerpts of now unlawful language:
  - **Confidentiality.** *Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person…or unless legally compelled to do so...*
  - **Non-Disclosure.** *Employee promises and agrees…not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer…*

The NLRB and Severance Agreements

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The *McLaren Macomb* Decision and its Aftermath

NLRB: "…we conclude that the nondisparagement and confidentiality provisions interfere with, restrain, or coerce employees' exercise of Section 7 rights."

Note: Supervisors do not have Section 7 rights, so they aren't covered.

General Counsel of the NLRB issued a memorandum to provide additional guidance

The NLRB and Severance Agreements

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The General Counsel Memorandum:

- Ruling is not limited to severance agreements
- Confidentiality provisions restricting only dissemination of proprietary information/trade secrets likely permissible
    - Possible that requiring financial terms of settlement confidentiality *may* be acceptable
- Non-disparagement provisions barring defamatory statements about employer likely permissible
- Limitations on confidentiality and non-disparagement provisions are retroactive
    - GC: inform employees already bound by unlawful provisions that those provisions will not be enforced
- An entire severance agreement is not voided because it has unlawful confidentiality or non-disparagement provisions

The NLRB and Severance Agreements

Takeaways:

- Work with counsel to develop updated templates for severance agreements and other confidentiality and employment agreements
    - Confidentiality and non-disparagement language must be narrowly tailored for employees that are not supervisors

- Review signed agreements with counsel to determine if it is necessary to inform former employees they are not bound by confidentiality and non-disparagement language in previously executed severance agreements.

The Virginia “Speak Out Act”

The Virginia "Speak Out Act"

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Precursors to the New Virginia Law

- In 2019, Virginia made unenforceable any NDAs/confidentiality agreements that had the purpose or effect of concealing a sexual assault as a condition of employment (Va. Code § 40.1-28.01)

- A federal law went into effect in December of 2022 that voids any non-disclosure or non-disparagement clause relating to sexual assault/harassment that is entered into **before the dispute arises** (136 Stat. 2290)
    - Under the federal law, parties may agree to confidentiality/non-disparagement only *after* an allegation of sexual assault or harassment is made
    - Aimed at blanket NDAs entered into before any misconduct occurs

The Virginia "Speak Out Act"

The Virginia "Speak Out Act"

- Effective July, 2023
- Any NDA or confidentiality agreement (including a non-disparagement provision) that has the purpose or effect concealing details of a sexual assault *or sexual harassment* as a condition of employment is void and unenforceable
- Perhaps broader than the federal law as it may apply to severance agreements and definition of sexual harassment broader = "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when such conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment." (No severe/pervasive requirement).

The Virginia “Speak Out Act”

Takeaway:

- Review any current or future employment or severance agreements with employees. Will need to ensure agreements do not have the effect of concealing details about sexual assault or sexual harassment claims. Confidentiality and non-disparagement will be difficult to obtain.

Rolling Back COVID-19 Vaccine Requirements

Rolling Back COVID-19 Vaccine Requirements

- In November of 2021, the Centers for Medicare and Medicaid Services (“CMS”) promulgated a rule requiring CMS-certified suppliers/providers to ensure staff were fully vaccinated
  - The mandate included employees and staff providing services in hospitals
- This was led to numerous legal challenges
  - Unlike other mandates, the CMS requirement was upheld

Rolling Back COVID-19 Vaccine Requirements

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- In anticipation of the end of the COVID-19 public health emergency, CMS announced in May that it would roll back the mandate
- On June 5, CMS formalized the end of the mandate
- The mandate officially ended on August 4
- Vaccination rates will still be included in determining quality measures—which could affect reimbursement
- But many entities are eliminating the requirement

Rolling Back COVID-19 Vaccine Requirements

Takeaways:

- COVID-19 vaccine mandates are no longer required by CMS—Practices have flexibility to update HR policies related to vaccination and other requirements accordingly

2023 Grab Bag

Additional notable updates from the General Assembly include:

- Expanded the scope of protections against threats to health care providers beyond the hospital to any facility rendering health care. (H 1835)

- Required DHP to amend licensure applications to remove questions regarding mental health conditions and impairment (H 1573)

- Defeat of legislation that would have removed the five-year supervised training requirement before NPs may engage in autonomous practice

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