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Trade Secret Protection through Non-Compete Agreements: Heading into 2021

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By now, President-Elect Biden's aversion to employee non-compete agreements is well-known. So too is the notable bipartisan interest within Congress to scale back the enforceability of such agreements nationwide. While, at present, the fate of non-compete agreements in the months and years ahead is unclear at best, it appears more likely than not that well-drafted non-compete agreements tailored to the protection of trade secrets will remain enforceable and, therefore, among the several tools that are available to companies, and that companies should utilize, to protect their trade secrets.

Among other requirements, a valid and enforceable non-compete agreement must serve a legitimate business purpose. Historically, courts have found such a purpose in non-compete agreements aimed at the protection of trade secrets. And notwithstanding his mostly negative outlook on non-competes, President-Elect Biden likewise appears to acknowledge their value and legitimate utility in protecting trade secrets. As noted, moreover, although certain politicians on both sides of the aisle would appear to favor legislation aimed at enhancing workforce mobility by, among other things, tightening the requirements for an enforceable non-compete agreement, it is unlikely that Congress will pass legislation anytime soon to invalidate non-competes that are well-tailored to trade secret protection.

Nevertheless, the impending change to the Biden administration and the related prognostications of new non-compete legislation (and/or regulations) should serve as an important reminder of the increasing scrutiny that non-compete agreements continue to draw from not only our politicians but also our courts across the country. In light of that scrutiny, and its likely intensification in the coming years, now may be a good time to review your non-compete agreements to make sure (i)

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that they are properly drawn to protect what you want them to protect, whether it be your trade secrets or any of your other legitimate business interests, such as customer relationships, (2) that they are not overbroad in terms of their duration, restricted lines of business, or geographical reach, and therefore unenforceable as a matter of law, and (3) that you are best positioned to seek to enforce them in court, should litigation become necessary. Any one of our team members would be happy to assist you in that regard.

Best wishes for a happy, healthy 2021.

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