



Winds of Change: the NLRB Challenges Confidentiality Agreements and The Obama Administration's "Call to Action" to Prohibit Non-Compete Agreements

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This year, the federal government is challenging contractual provisions that regularly appear in private employment agreements. Both the National Labor Relations Board ("NLRB") and the Obama administration have challenged the legal sufficiency of certain restrictive covenants.

For example, on June 30, 2016, the NLRB filed a Complaint and Notice of Hearing against Bridgewater Associates LP ("Bridgewater"), one of the world's largest hedge fund firms, for allegedly violating the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("the Act") by including certain confidentiality provisions in its employment contracts.

The NLRB's complaint specifically alleges that the confidentiality provisions violate section (8)(a)(1) of the Act because they interfere with, restrain, or coerce employees in the exercise of their rights to self-organization, collective bargaining, and other concerted activities guaranteed to them under Section 7 of the Act. The Complaint also challenges Bridgewater's use of class action waivers. The confidentiality provisions at issue are the following:

- "You agree that the terms of your employment with Bridgewater are confidential."
- "Confidential information" means any non-public information relating to the business or affairs of Bridgewater or its affiliates, or any existing or former officer, director, employee, or shareholder of Bridgewater.
- Provisions prohibiting distribution of "employee lists and employees' compensation and management's compensation," which includes "Bridgewater's organizational structure (including the allocation of responsibilities and general construction of Bridgewater's departments, businesses, subsidiaries, and the employees assigned to them)"
- "For the avoidance of doubt, your obligation not to disclose or use Bridgewater's Confidential Information without prior authorization applies in all contexts, industries, and businesses. This includes, but is not limited to any media business, outlets, or other endeavors that publish, broadcast,

distribute, or otherwise disseminate information in any format, including but not limited to books, newspapers, magazines, journals, websites, blogs, social media, outlets, television and radio stations, and streaming media outlets."

- "You also may not disparage Bridgewater and/or its present or former affiliates, directors, officers, shareholders, employees or clients, whether directly or indirectly, in any manner whatsoever (whether related to the business of Bridgewater or otherwise) except as required by law."

With a decision on the NLRB's Bridgewater complaint pending, companies are now being prompted to re-examine their employment contracts and company policies. A hearing is scheduled for December of this year on this matter, although many are saying that it is likely that this case will settle. We will continue to observe this dispute, and expect that the NLRB may conclude that confidentiality terms which interfere with an employee's ability to join or form a union will likely be invalidated.

Additionally, the Obama administration recently issued a "Call to Action" to reduce the use of non-compete clauses in employment agreements, stating "[m]ost workers should not be covered by a non-compete agreement," "non-compete agreements should be the exception rather than the rule," and "there is gross overuse of non-compete clauses today."

While the White House did acknowledge that "the primary rationale of non-competes is to prevent workers from transferring trade secrets to rival companies," it ultimately concluded that non-competes were being enforced at the expense of employees. Accordingly, the White House is now calling on state policymakers to adopt legislation that does one or more of the following:

- Banning non-compete clauses for categories of workers, such as workers under a certain wage threshold; workers in certain occupations that promote public health and safety; workers who are unlikely to possess trade secrets; or those who may suffer undue adverse impacts from non-competes, such as workers laid off or terminated without cause.



- Improving transparency and fairness of non-compete agreements, by, for example, disallowing non-competes unless they are proposed before a job offer or significant job promotion has been accepted (because an applicant who has accepted an offer and declined other positions may have less bargaining power); providing consideration over and above continued employment for workers who sign non-compete agreements; or encouraging employers to better inform workers about the law in their state and the existence of non-competes in contracts and how they work.
- Incentivize employers to write enforceable contracts, and encourage the elimination of unenforceable provisions by, for example, promoting the use of the “red pencil doctrine,” which renders contracts with unenforceable provisions void in their entirety.

The Obama administration also asked policymakers to assign appropriate remedies or penalties for employers that do not comply with state non-compete statutes. In the employment context, California has prohibited covenants not to compete since the Gold Rush era.

In light of these recent actions taken by the NLRB and the Obama administration, it is especially important for employers to stay alert to the legal landscape in this area and to regularly review their agreements and policies for compliance with applicable law.



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