Current Employment Issues

Schulte Roth&Zabel

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PRIVATE INVESTMENT FUNDS SEMINAR

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Partner
New York Office
+1 212.756.2050
mark.brossman@srz.com

Practices

Employment & Employee Benefits

Education

Insurance

Nonprofit

Mark E. Brossman

Mark is co-head of the Employment & Employee Benefits Group. His areas of concentration include ERISA, employment discrimination, labor relations and related litigation. Mark is a frequent public speaker and author. He has served as an instructor at Columbia University Teacher's College and as a lecturer in the Cornell University ILR School's Labor Relations Studies Program.

Mark is listed in *The Best Lawyers in America* and *New York Super Lawyers* and was recognized by both *Human Resource Executive* and *Lawdragon* as one of the 100 most powerful employment attorneys in America. Mark received the Cornell University School of Industrial and Labor Relations' prestigious Judge William B. Groat Alumni Award, the Emerald Isle Immigration Center's Robert Briscoe Award, membership in the Academy of Employee Benefit Authors, and the Lawyers Alliance for New York's Cornerstone Award (for outstanding pro bono service to New York nonprofit organizations), in addition to being the first recipient of LANY's Pro Bono Leadership Award. He also is active in several not-for-profit organizations and serves on the Board of Directors of New York University School of Law's Center for Labor & Employment Law, the Advisory Council of Cornell University ILR School, the Board of Trustees of Bard College, the Advisory Board of The Scheinman Institute of Conflict Resolution at Cornell University and is a trustee emeritus of the Montefiore Health System Inc. Mark earned his B.S. in Industrial and Labor Relations from Cornell University and his J.D. and LL.M in Labor Law from New York University School of Law.

Special Counsel
New York Office
+1 212.756.2506
max.garfield@srz.com

Practices

Employment & Employee Benefits

Education

Max Garfield

Max focuses his practice on representing employers in all areas of employment law. He litigates disputes involving employment agreements, restrictive covenants, employment discrimination and harassment, contract claims, common law tort claims, executive compensation and ERISA claims in federal and state court, in arbitrations and before administrative agencies. Max also advises employers on day-to-day employment issues including hiring and terminating employees, drafts and advises on separation and other employment-related agreements, and conducts and leads trainings and investigations for clients. He also represents clients in connection with government investigations.

Max has been listed in *New York Super Lawyers* as a "Rising Star" for employment litigation: defense. He is also a member of Bloomberg Law's Labor & Employment Technology and Innovation Board. He received his J.D. from Columbia Law School and his A.B., *magna cum laude*, from Brown University.

Partner
New York Office
+1 212.756.2075
omoz.osayimwese@srz.com

Practices

Investment Management

Private Equity

Hedge Funds

Omoz Osayimwese

Omoz focuses his practice on the representation of sponsors and investors in the formation and structuring of private equity funds, hedge funds and hybrid funds. He also advises investment managers on strategic transactions involving alternative asset management businesses. Omoz has extensive experience representing sponsors and investors on funds employing credit, distressed investment, buyout, real estate, special opportunities, structured products, activist, multi-strategy and quantitative strategies. Omoz has advised clients on spin-out transactions, acquisitions of minority stakes in hedge fund and private equity firms, joint ventures between investment management firms and strategic transactions involving a change of management of private investment funds. He also represents hedge fund managers and investors in the negotiation of seed-capital transactions, and advises sponsors of private equity firms and hedge fund firms in the structuring of complex carry-sharing arrangements among principals and employees. Omoz's recent representations include institutional sponsors and boutique firms in the formation of private equity funds, hedge funds and hybrid funds; lead investors on their investments in private equity funds; hedge fund managers and investors in seed-capital arrangements; investment managers in joint venture arrangements; and investment managers and investors in the formation of special purpose acquisition and co-investment vehicles.

Omoz is listed in *The Legal 500 US* and he regularly speaks to investment managers about current developments relating to private investment funds. He spoke on "Permanent Capital Investment Vehicles" at SRZ's 27th Annual Private Investment Funds Seminar and discussed "Liquidity and Winding Up Issues" at SRZ's 6th Annual Private Equity Fund Conference. Omoz contributed to the *Fund Formation and Incentives Report* (Private Equity International in association with SRZ) and authored the article "Investor Remedies: The Importance of Key-Person Provisions," published in *Law360*. Omoz was also featured in the article "Ringing the Changes," published in leading private equity magazine *Private Funds Management*. Omoz received his J.D. from University of Michigan Law School and his B.A., with highest honors, from Michigan State University.

Partner
New York Office
+1 212.756.2515
holly.weiss@srz.com

Practices

Employment & Employee Benefits

Cybersecurity

Regulatory & Compliance

Holly H. Weiss

Holly focuses her practice on the representation of employers in all aspects of employment law and employee relations. She also serves as co-head of the Cybersecurity Group. Holly litigates disputes involving restrictive covenants, ERISA claims, executive compensation, employment agreements, statutory employment discrimination claims, and common law tort and contract claims in federal and state courts, before administrative and government agencies and in arbitral forums. She advises employers on employment law compliance, best practices, human resources matters, hiring and termination, and litigation avoidance; drafts and negotiates employment agreements, separation agreements, data security and privacy policies and other employment-related agreements; and provides training and conducts investigations. Holly has extensive experience in designing anti-sexual harassment training programs, policies and procedures and considerable expertise about employer obligations and best practices with respect to sexual harassment and discrimination in the workplace.

Holly is listed in *The Best Lawyers in America* and *New York Super Lawyers*. A recognized thought leader, Holly has authored or co-authored numerous articles of interest to employers. Recently, she co-authored the articles "How Employers Are Responding to New York's New Anti-Sexual Harassment Laws" and "Overcoming the Presumption that Courts Must Decide Class Arbitrability," both published in the *New York Law Journal*. A much sought-after speaker, she recently discussed "Conducting the Internal Investigation — Considerations, Processes and Procedures & Privilege Issues and Ethical Traps in Conducting the Investigation" at PLI Internal Investigations 2018 and spoke at NYU's 21st Annual Employment Law Workshop for Federal Judges. Holly earned a J.D. from the University of Virginia School of Law and a B.A. from Emory University.

Current Employment Issues

I. Overview of Litigation and Other Trends in Employment Law

A. Litigation Trends

1. U.S. Equal Employment Opportunity Commission ("EEOC")

(a) Suits Filed

(i) In 2017, the EEOC filed 201 enforcement suits, the most since 2011 and almost double the amount filed in 2016. In contrast, the number of individual charges filed with the EEOC decreased from 91,503 in 2016 to 84,254 in 2017. The number of individual charges filed in 2017 was the lowest since 2007.

(ii) Based on preliminary data, the EEOC filed 50 percent more suits challenging sexual harassment in 2018 than it did in 2017. Furthermore, the number of charges filed with the EEOC alleging sexual harassment increased by more than 12 percent between 2017 and 2018.

(iii) In 2017, the EEOC recovered $47.5 million for victims of sexual harassment through litigation and administrative enforcement. That number increased to approximately $70 million in 2018.

(b) Recent Regulations

(i) The EEOC recently issued regulations relating to disability discrimination. The regulations clarify federal agencies' affirmative action obligations for individuals with disabilities and provide guidance to employers that use incentives to encourage employees to participate in wellness programs that ask for disability-related information or involve medical examinations.

(ii) The EEOC also recently issued a regulation that addresses the extent to which an employer may incentivize an employee's spouse to provide information relating to the spouse's manifestation of diseases during a health risk assessment in connection with wellness programs. The regulation clarifies that the employer may provide limited inducements so long as the confidentiality requirements of the Genetic Information Nondiscrimination Act are observed.

(c) Political Trends

(i) EEOC Appointments

(1) The issue of EEOC appointments has been the center of recent controversy. President Trump nominated three people to become EEOC commissioners and one person to serve as the EEOC general counsel. Traditionally, the Senate confirms EEOC commissioners as a block. However, Senator Mike Lee of Utah has put a hold on the nominations, which has prevented the Senate from moving forward with the nominees.

(2) Senator Lee's objection to proceeding with the nominees relates to Chai Feldblum, who is one of President Trump's nominees and has served as a commissioner since President Obama nominated her in 2010. Senator Lee opposes Feldblum because of her views on marriage and LGBTQ rights. Feldblum helped draft and propose the Employment Non-

Discrimination Act, which has not been passed but would provide federal protections against sexual orientation and gender identity discrimination.

(3) Feldblum's current term expires on Dec. 31, 2018. After Feldblum's term expires, the EEOC will lack a quorum until the Senate confirms at least one commissioner. In December 2018, Daniel Gade, one of President Trump's commissioner nominees, withdrew from consideration because of the "toxic political climate." President Trump originally nominated Gade in August 2017.

(ii) EEOC/DOJ Split over Title VII of the Civil Rights Act

(1) Under the Obama Administration, the Department of Justice and the EEOC interpreted Title VII as prohibitive of discrimination on the basis of sexual orientation and gender identity. The Trump Department of Justice, however, has reversed course. In October 2017, the DOJ told agency heads and U.S. Attorneys that "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity per se, including transgender status." The DOJ also withdrew a 2014 memorandum that reflected the Obama DOJ's approach.

(2) Despite the DOJ's change in course, the EEOC continues to interpret Title VII as it did under the Obama Administration and continues to bring discrimination cases based on sexual orientation and gender identity. Because of the delay in EEOC appointments, the EEOC is currently run by a Democratic majority, which explains why the EEOC's approach to Title VII differs from that of the Trump DOJ.

(iii) Recent Circuit Court Precedents Regarding Title VII

(1) The Seventh Circuit recently overruled its own precedent and held that Title VII recognizes sexual orientation as a form of sex discrimination. *See Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017). The case involved an openly gay adjunct professor who, after her employer rejected her applications for full-time positions and declined to renew her contract, alleged sexual orientation discrimination. The Seventh Circuit held that the question was whether the employer disadvantaged the professor because she was a woman. Had the professor been a man married to or living with a woman, would the employer have treated her differently? With this as the central question in the case, the Seventh Circuit held that the professor had made out a prima facie claim of sex discrimination under Title VII.

(2) The Second Circuit also recently overruled its own precedent to hold that Title VII's prohibition on sex discrimination includes sexual orientation discrimination. *See Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018). The Second Circuit relied on similar reasoning to that of the Seventh Circuit in *Hively*.

(3) The Sixth Circuit recently held that Title VII's sex discrimination provision included transgender discrimination. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018). The case involved a transitioning employee at a funeral home who was fired after telling her employer about her transition. The EEOC brought the case and the Sixth Circuit held that transgender discrimination fell under Title VII's sex discrimination provision, in part, because discrimination based on a change in sex inherently involves discrimination based on sex.

2. Trends in Discrimination Case Jury Awards

    (a) Between 2011 and 2017, the mean value of jury awards in discrimination cases increased, but the median value remained relatively constant (dropping slightly between 2016 and 2017).

        (i) The mean value in 2016 was $424,273 and the median was $165,677. In 2017, the mean value was $692,648 and the median was $157,202.

        (ii) The increase in mean value, but relatively constant median value, can be explained by a small number of more recent cases with large awards.

            (1) For example, the total range of awards for discrimination cases in 2015 was between $1 and $7,137,391. In 2016, the range was between $1 and $2,946,563. In 2017, the total range of awards was between $1 and $15,544,413.

            (2) Between 2011 and 2017, disability discrimination and sex discrimination cases have seen the most high-value jury awards. For disability discrimination cases, 4 percent of awards were equal to or in excess of $2,000,000 and the highest jury award was $7,137,391. For sex discrimination cases, 2 percent of awards equaled or exceeded $2,000,000, and the highest jury was $15,544,413. One percent or fewer of other discrimination cases resulted in awards that equaled or exceeded $2,000,000, and the highest jury award was $3,800,000.

    (b) The takeaway is that jury awards have remained relatively stable. There has, however, been an uptick in large awards in a small number of recent cases, primarily those involving sex or disability discrimination.

B. Litigation Strategy Trends

1. As a result of many recent high-profile sexual harassment cases and the #MeToo movement, the plaintiff-side playbook has shifted from threats about money to threats of public exposure. Plaintiff's lawyers are more willing to file complaints in court, even when enforceable arbitration agreements exist.

2. Anecdotally, the public exposure threat has resulted in more employers settling cases prefiling for larger amounts. Employer insurers have been pushing back on funding large settlements, arguing that coverage extends only to risk of monetary loss – not reputational harm.

3. The parties often agree to utilize alternative dispute resolution procedures (e.g., mediation, arbitration, etc.).

C. Employment Contract Trends

1. Many of the high-profile #MeToo cases have involved the employer terminating the accused employee and paying significant severance.

2. Employers are increasingly including sexual misconduct/harassment as part of the definition of "cause" in employment contracts.

D. Legislative Trends Regarding Hiring Processes

1. Credit Checks

(a) Over the past eight to 10 years, various states and jurisdictions have begun to ban, or limit, the ways in which employers can access or consider credit history of job applicants. To date, California, Colorado, Connecticut, Delaware, Hawaii, Maryland, Nevada, Oregon, Vermont, Washington and Washington, DC have passed laws limiting an employer's use of credit information. In addition, Chicago, Philadelphia and New York City have passed their own laws addressing credit information in employment.

(b) New York City's law, the Stop Credit Discrimination in Employment Act, amended the New York City Human Rights Law to prohibit employers from requesting or using consumer credit reports, with some narrow exceptions. For example, employers can still use credit information when hiring a chief financial officer or if the candidate will have regular access to trade secrets, as defined in the statute.

2. Salary Inquiries

(a) To date, 11 states have banned employers from inquiring into compensation history when considering job candidates. Several localities have done the same.

(b) In January 2017, New York State banned compensation inquiries by state employers. New Jersey has a similar ban, which was passed in February 2018.

(c) New York City instituted a compensation history inquiry ban in October 2017 that applies to all employers in New York City. New York City employers may verify and rely on compensation history only if it is provided voluntarily and without prompting. Albany County followed in December 2017 with a similar ban of its own, as did Westchester County in July 2018.

(d) Effective Jan. 1, 2019, Connecticut prohibits employers from asking about an applicant's previous pay, unless the applicant volunteers the information.

(e) Michigan and Wisconsin are the only states that have taken the opposite approach – they prohibit salary inquiry bans.

3. Criminal Background Checks

(a) More than 30 states have passed laws that prohibit employers from asking job applicants about criminal history. "Ban-the-box" laws, as they are called, apply to public employers in some states and to all employers in other states. "Ban-the-box" has been gaining momentum in recent years as more states and localities ban job application questions that ask about criminal history.

(b) In 2015, New York City amended its Human Rights Law with the Fair Chance Act. The Fair Chance Act prohibits criminal history questions on job applications or in job interviews. It also prohibits criminal record checks before an employee receives a conditional job offer. Employers may still run a criminal history check after extending a conditional job offer. If the employer rescinds a job offer as a result of information learned about criminal history, the employer must produce a written report detailing "job relatedness" and provide the report to the applicant.

(c) More recently, the New York City Commission on Human Rights issued rules interpreting the Fair Chance Act. The Commission created a category of per se violations, which include references to criminal convictions or background checks in job postings; seeking information about arrests that did not result in a criminal conviction; and failing to comply with the law's procedural requirements for giving notice when an employer withdraws a conditional offer of employment because of information in an applicant's background report. The Commission's rules also clarified the

procedure for withdrawing an offer of employment and addressed other related topics, such as search terms that employers cannot use with an applicant's name prior to extending a condition offer (e.g., "jail," "mugshot" and "warrant").

II. Market Practices Relating to Restrictive Covenants

A. Non-Competition Provisions

1. Non-Competes in New York

(a) New York courts will generally enforce a non-compete to the extent necessary to prevent a former employee from engaging in unfair competition by disclosing or using trade secrets or confidential information, or if the employee's services are unique or extraordinary. See *Reed, Roberts Assoc., Inc. v. Strauman*, 40 NY.2d 303 (N.Y. 1976); *Ivy Mar Co. v. C.R. Seasons Ltd.*, 907 F. Supp. 547 (E.D.N.Y 1995). When drafting a non-compete, employers need to identify one of these protectable interests and tie the covenant's restrictions to the interest.

(i) The scope of what constitutes a protectable interest is broad.

(1) Trade secrets can constitute a protectable interest. A New York court will look at several factors to determine whether a trade secret is protectable: (a) the extent to which employees who do not have a need to know the information have knowledge of the information; (b) the measures the employer takes to safeguard the information; (c) the value of the information to the employer and its competitors; (d) the amount of money or effort that the employer spent to develop the information and (e) the ease or difficulty with which the information could be acquired or duplicated by others. *See Ivy Mar Co*, 907 F. Supp. 547.

(2) Trade secrets can include client or customer relationships. *See Solomon Agency Corp. v. Choi*, 2016 WL 3257006 (E.D.N.Y. May 16, 2016). Furthermore, a New York court found that client goodwill is a protectable interest even when there was no current relationship between the employer and client. *See Globaldata Mgmt. Corp. v. Pfizer Inc.*, 814 N.Y.S.2d 561 (N.Y. Sup. Ct. 2005).

(3) Courts will also uphold non-competes against an employee whose services are unique or extraordinary. However, this protectable interest is not as common as the trade secret protectable interest.

(ii) Because of the burden a non-compete imposes on a former employee's ability to make a living, New York courts will only enforce a non-compete that is reasonable. A non-compete is reasonable only if it (1) is no greater than is required to protect a legitimate interest of the employer, (2) does not impose undue hardship on the former employee and (3) does not conflict with public policy. *See BDO Seidman v. Hirshberg*, 93 N.Y.2d 382 (N.Y. 1999).

(iii) Employers should tailor non-competes as closely as possible to the company's protectable interests and avoid extending non-competes to restrict interests that are not protectable. The more tailored the covenant is, the more likely a court will uphold it.

(1) Traditionally, geographic scope played more of a role in a court's evaluation of a non-compete's reasonableness. It used to be that courts would give greater weight to non-competes that were limited in geography because the non-compete was better tailored to the employer's interest.

(2) In many industries, including the financial services industry, the importance of geographic scope has waned in recent years. Former employees have the ability to conduct their business anywhere in the world and still threaten a former employer's protectable interests.

(b) Courts sitting in equity can broadly consider all relevant factors, including whether either party has unclean hands, such as if either party has engaged in bad acts or self-help. One example could include an employee's misuse or improper possession of employer confidential information or property.

(c) Employment can constitute consideration for non-compete agreements at the outset of employment. Continued employment can also be consideration if termination was the alternative or the employee continued to work for the employer for a "substantial time" after signing the non-compete. *See Zellner v. Stephen D. Conrad, M.D., P.C.*, 183 A.D.2d 250 (N.Y.S. App. Div. 1992).

(d) If an employee challenges a non-compete, the employer needs to be ready to explain the trade secret or confidential information at issue and describe the adverse impact that disclosure of that information would have on the employer's business. Mere generalized knowledge of information is not enough to support the need for a non-compete. The employer needs to show specifically how the employee's knowledge of the trade secret could harm the company, and the scope and time of the non-compete needs to be connected to the potential harm as well. *See Int'l Bus. Mach. Corp. v. Visentin*, 2011 WL 672025 (S.D.N.Y. Feb. 16, 2011).

(e) New York courts have been inconsistent on whether a non-compete is enforceable when the employer terminates without cause. In 1979, the New York Court of Appeals refused to enforce a forfeiture for competition clause because the employee had been terminated without cause. *Post v. Merrill Lynch, Pierce, Fenner & Smith*, 48 N.Y.2d 84 (N.Y. 1979). Since *Post*, New York courts have been hesitant to enforce restrictive covenants when the employer fired the employee without cause. *See Buchanan Capital Mkts., LLC v. DeLucca*, 144 A.D.3d 508 (N.Y. App. Div. 2016) (citing Post). However, in 2012, the Second Circuit noted that Post only applied to forfeiture for competition clauses and not to other restrictive covenants. *See Hyde v. KLS Prof'l Advisors Grp., LLC*, 500 F. App'x 24 (2d Cir. 2012). The Fourth Department has held similarly. *See Brown & Brown, Inc. v. Johnson*, 25 N.Y.3d 360 (N.Y. 2015).

(f) In general, New York courts will recognize the right of contracting parties to select which states' laws will apply to their contract and, therefore, their non-compete. However, New York courts will only do so if a "substantial relationship" exists between the controversy and the state whose laws the parties want applied. *See* Restatement (Second) of Conflicts of Law § 187.

(i) The types of substantial contacts that a court will look for are generally the:

(1) Place of contracting;

(2) Negotiation and performance of the contract;

(3) Domicile of the parties; and

(4) Location of the subject matter of the contract. *See* Restatement (Second) of Conflicts of Law § 188(2).

(ii) Even if a substantial relationship exists between the controversy and the state in the parties' choice of law provision, a New York court will not apply the choice of law provision if the law

of the chosen state would undermine a fundamental public policy of another state that has a materially greater interest in the controversy. *See* Restatement (Second) of Conflicts of Law § 187. For example, in *Brown & Brown, Inc. v. Johnson*, the New York Court of Appeals held that a Florida choice of law provision in a non-compete was unenforceable. 25 N.Y.3d 360 (N.Y. 2015). The court applied New York law instead. Florida law prohibits courts from considering the burden that a non-compete would have on an employee while New York law requires such consideration. The court therefore held that applying Florida law would offend fundamental public policies of New York.

(g) Employers should undertake appropriate due diligence with respect to prospective hires to determine what, if any, restrictive covenants a prospective hire is bound by.

2. Recent Developments in Other States' Non-Compete Laws

(a) Massachusetts

(i) In August 2018, Massachusetts enacted a law that regulates, and limits, non-compete agreements. The new law applies to any agreement entered into on, or after, Oct. 1, 2018. Previously, Massachusetts common law provided that non-competes could be no broader than necessary to protect a legitimate business interest and that non-competes must be reasonable in duration, scope and geography. The new law codified this principle. *See* Mass. Gen. Laws ch.149, § 24L (2018).

(ii) Under the new law, non-competes cannot exceed 12 months, except in certain limited circumstances such as when the employee breaches a fiduciary duty to the employer or takes the employer's property. The new law also established that a geographic scope limited to the area in which the employee provided services or had an influence is presumptively reasonable. Furthermore, if the scope of prohibited activities under the non-compete is limited to the specific types of services that the employee provided to the employer during the last two years of employment, then the scope is presumptively reasonable.

(iii) Employers cannot enforce a non-compete against any employee who is non-exempt under federal overtime law, employees who were terminated without cause or laid off, student interns and employees aged 18 or younger.

(iv) Non-competes must be supported by adequate consideration, which the parties must specify in the agreement. If an employer and employee enter into a non-compete during employment (rather than at the beginning of employment), then the consideration must be more than continued employment, such as "garden leave." Garden leave refers to the practice of continuing pay after termination. Under the new law, any garden leave provision must provide for prorated payments during the restricted period of at least 50 percent of the employee's highest annualized base salary for the two years prior to termination.

(v) The new law has a mandatory governing law and forum selection provision. Non-competes must apply Massachusetts law if the employee has been a resident of, or employed in, Massachusetts for at least 30 days before the termination of employment. Governing law provisions to the contrary are unenforceable under the new law. Employers must also bring any enforcement action of a non-compete in the county where the employee lives. Alternatively, if both parties agree, the employer can bring the action in Suffolk County. This prevents a Massachusetts employer from attempting to circumvent the new restrictions by contracting to have another state's laws apply.

(vi) There are several exceptions to the new law's restrictions. A few of them are forfeiture agreements, non-disclosure agreements, non-solicit agreements and non-competes in connection with an employee's cessation or separation of employment. However, this last exception only applies if the employee is given seven business days to rescind acceptance after originally agreeing to the non-compete.

(b) California

(i) California has long restricted the use of non-competes. Except for a few narrow exceptions, such as in the context of the sale of a business, California prohibits enforcement of non-compete provisions for public policy reasons. *See* Cal. Bus. & Prof. Code § 16600.

(ii) A California Court of Appeals recently invalidated a non-solicit citing to the same statute that bars non-competes. The case involved nurse recruiters who had signed an agreement at the start of their employment. The non-solicit purported to bar the nurse recruiters from soliciting employees of the former employer for a period of one year. The court held that the provision was too burdensome and contrary to California's public policy that disfavors restrictive covenants. *See Amn Healthcare, Inc. v. Aya Healthcare Servs., Inc.*, 28 Cal. App. 5th 923 (Cal. Ct. App. 2018).

(iii) Some employers have attempted to minimize the impact of California's broad ban on non-competes by using choice of law provisions to select a more favorable jurisdiction. However, these other jurisdictions sometimes find that California's fundamental public policy of prohibiting non-competes overrides the contract's choice of law provision. Under California law, employers cannot require that an employee who primarily resides and works in California agree to a foreign venue or choice of law provision as a condition of employment. The exception is when the employee is represented by legal counsel. *See* Cal. Lab. Code § 925.

(1) Nonetheless, a Delaware court recently found that California's public policy was not so fundamental as to override the parties' choice of law provision because the employee was represented by counsel and knowingly bargained away protections. The case involved a Delaware corporation doing business in California, NuVasive, and an employee who was a California resident. The employee resigned from his post and began working for a competitor. NuVasive sought to enforce a non-compete agreement, which included a Delaware choice of law provision. *See NuVasive, Inc. v. Miles*, No. CV 2017-0720-SG, 2018 WL 4677607 (Del. Ch. Sept. 28, 2018).

(2) *NuVasive* marks a potential change in how courts will view choice of law provisions in the context of non-competes with California residents. To maximize the chances of repeating the outcome of NuVasive, employers should make sure that any California employee is represented by counsel when the parties negotiate the non-compete.

B. Non-Solicitation Provisions

1. Non-solicits can operate in two ways. First, a non-solicit provision can prevent a former employee from recruiting and hiring from the employer's ranks. Second, employers can use non-solicits to prevent a former employee from soliciting customers, investors or clients. In both cases, employers can extend the non-solicit to current and former employees, customers, investors and clients.

(a) For former employees, customers, investors and clients, the employer typically crafts the non-solicit so that it applies to anyone who was an employee, customers, investor or client within several months of the employee's termination.

(b) Covering former employees protects against employees quitting in anticipation of being rehired by the departing employee.

2. There is typically less litigation over non-solicits as compared to non-competes.

(a) Solicitation can be difficult to prove in terms of who initiated the communication.

(b) When litigating a non-solicit, the employer will need to prove damages unless the employer is seeking an injunction. Employers should also tailor non-solicits so that they are as narrow as possible in scope and time to adequately protect the employer's interest. Non-solicits may extend for a longer period of time than a non-compete.

C. Forfeiture-for-Competition

1. Forfeiture-for-competition provisions present employees with a choice: compete and forfeit a prospective benefit or refrain from competing and retain the benefit.

2. In contrast to their close scrutiny of non-competes, New York courts are more inclined to uphold forfeiture-for-competition provisions because forfeiture-for-competition provisions do not interfere with an employee's ability to make a living in the same way as non-competes.

3. New York courts will not uphold a forfeiture for competition clause against an employee who was involuntarily terminated without cause. *Post v. Merrill Lynch, Pierce, Fenner & Smith*, 48 N.Y.2d 84 (N.Y. 1979); *see also Lucente v. IBM*, 310 F.3d 243 (2d Cir. 2002). The courts have held that in such circumstances there is no choice because the employee would be forced to search for another job and therefore forfeit their benefits. In such a case, the court will analyze the provision as a regular non-compete and will only enforce the provision if it is reasonable in scope and duration.

D. Clawbacks

1. Clawbacks allow an employer to reclaim compensation already paid to an employee if the employee violates a restrictive covenant. In New York, employers cannot claw back wages. Any compensation that an employer paid to its employee for services rendered is insulated from clawback provisions. *See* New York Labor Law
§ 195-4.5(e)-(g).

2. An exception is when the employee violated a duty of loyalty. Under New York law, if an employee was disloyal, the employer can recover any compensation that was paid during the period of disloyalty. *See Phansalkar v. Anderson Weinroth & Co.*, 344 F.3d 184 (2d Cir. 2003).

3. Incentive compensation is not considered wages. *See Truelove v. Northeast Capital & Advisory, Inc.*, 95 N.Y.2d 220 (N.Y. 2000). Therefore, an employer can require forfeiture of previously awarded but unvested compensation, provided that it was discretionary when awarded.

E. Confidentiality Provisions

1. Employers use confidentiality provisions to protect the company's trade secrets and proprietary and confidential information. New York courts will generally enforce a confidentiality provision for as long as the information that is subject to the provision remains valuable and secret.

2. There are a few limitations to confidentiality provisions.

   (a) Both the National Labor Relations Act and New York's labor law prohibit employers from barring employee discussions of wages and other compensation among co-workers. Employers can, however, impose reasonable time, place and manner restrictions on such discussions.

   (b) Confidentiality agreements should not restrict use and disclosure of information that becomes public through means other than a breach of the provision.

   (c) Confidentiality provisions should include carve-outs for information that an employee must disclose by law and for whistleblowing, as required under the federal Defend Trade Secrets Act (DTSA).

F. Protections Under Federal and State Trade Secret Laws

1. The federal Lanham Act includes protections for false or misleading advertisements under section 1125 of the statute. An example of when an employer might turn to section 1125 is when a former employee represents the employer's track record as his or her own in promotional materials. To prove the violation under section 1125, the employer must show that the information in the promotional materials is (a) a false and misleading statement of fact, (b) likely to confuse and/or deceive potential investors, (c) material in its effect on investing decisions, (d) connected with interstate commerce and (e) damaging or likely to damage the employer.

2. The DTSA provides employers with a cause of action for when an employee misappropriates trade secrets. Under the DTSA, employers can bring suit against former employees who steal trade secrets or disclose them in violation of their duties to their employer. In some cases, employers can even bring suit against third parties who use the trade secrets.

3. New York law also provides a cause of action for misappropriation of trade secrets. To bring suit, an employer must prove two elements: (a) that the information at issue is, in fact, a trade secret and (b) that the defendants used the trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means. *See E.J. Brooks Co. v. Cambridge Sec. Seal*, 31 N.Y.3d 441 (N.Y. 2018) (citing *Integrated Cash Management Services, Inc. v. Digital Transactions, Inc.*, 920 F. 2d 171 (2d Cir. 1990).

G. Non-Disparagement Clauses

1. Non-disparagement clauses prevent employees and/or employers from making disparaging comments to third parties. Non-disparagement provisions should include carve-outs to avoid conflicts with whistleblower protection laws and to avoid preventing the employee from cooperating with government investigations.

2. One issue that may arise with non-disparagement provisions is with enforcement.

(a) An employer will likely have difficulty proving and calculating damages. In addition, since damages will likely relate to the employer's damaged reputation, the employer might have to involve its clients or investors, or prospects, to show how the employee's remarks damaged the employer.

(b) The purpose of subjecting an employee to a non-disparagement provision is to preserve the reputation of the employer. Unless the parties have agreed to confidential arbitration, the employer will need to file a lawsuit in order to enforce the provision. Suing the employee would require including the employee's disparaging remarks in a public filing, which may undermine the original purpose of the provision.

III. Compliance with New Legislation Aimed at Preventing Sexual Harassment

A. New York State and New York City Requirements for Sexual Harassment Prevention Policies

1. New York State and New York City recently enacted laws requiring employers to have sexual harassment prevention policies that meet minimum standards set forth in the statutes.

(a) New York State

(i) Effective Oct. 9, 2018, policies must explain what sexual harassment is and provide examples; include a standard complaint form; include information about state and federal sexual harassment laws and remedies; include information about employee rights; include a clear statement that sexual harassment is considered a form of employee misconduct; and prohibit retaliation.

(ii) Policies must also include a complaint form and inform all employees of their rights of redress and all available forums.

(iii) The New York State Department of Labor, in consultation with the New York State Division of Human Rights, developed a model sexual harassment prevention guidance document and a model sexual harassment prevention policy.

(1) Employers can adopt the model policy or create their own that meets or exceeds the minimum requirements.

(2) Most employers have not adopted the model policy. The model policy only covers sexual harassment. Many employers' discrimination policies are broader and cover other types of discrimination in addition to sexual harassment, so many employers have revised their existing policies to ensure compliance with the new sexual harassment prevention requirements. In that regard, the model policy serves a compliance tool that employers use when updating their own policies.

(b) New York City

(i) The Stop Sexual Harassment in NYC Act amended the New York City Human Rights Law to provide expanded protections. The law goes into effect in April 2019.

(1) The statute of limitations for filing a gender-based harassment claim with the New York City Commission on Human Rights increases from one year to three years.

(2) The new law also extended protections to all employees no matter the size of the employer. This includes interns and independent contractors.

(ii) Effective Sept. 6, 2019, New York City employers need to post a notice in the workplace. The notice needs to be posted in English and Spanish. It describes the New York City Commission on Human Rights complaint process, gives examples of discrimination, encourages witnesses of harassment to file a report and explains that retaliation in response to reporting sexual harassment is prohibited.

(iii) New York City employers also need to distribute a fact sheet that covers similar material to the posting. Employers can either distribute the fact sheet to all employees and any new employees upon hiring, or employers can integrate the information into their employee handbooks (or free-standing harassment prevention policies) instead.

B. New York State and New York City Requirements for Sexual Harassment Training

1. New York State and New York City have enacted laws requiring employers to provide annual training to prevent sexual harassment in the workplace. While not all of the new provisions have gone into effect yet, there is no reason why employers should wait to update their trainings.

(a) New York State

(i) Effective Jan. 1, 2019, trainings must be interactive; explain what sexual harassment is and include examples; include a standard complaint form; include information about state and federal sexual harassment laws and remedies; include information about employee rights; include a clear statement that sexual harassment is considered a form of employee misconduct; and prohibit retaliation.

(ii) The New York State Department of Labor, in consultation with the New York State Division of Human Rights, developed a model sexual harassment prevention training program in addition to the model guidance document and model policy mentioned above.

(1) The model training program includes a script, PowerPoint and videos that are available on YouTube.

(2) Employers must either adopt the training program or develop their own training program that meets or exceeds the state's minimum standards.

a. Some issues with the model training program are that the model only covers sexual harassment and the examples are not tailored to the financial services industry.

b. The ideal training program is live and interactive and covers all forms of discrimination, not just sexual harassment. Also, for employers in financial services, the sexual harassment training should address situations and examples that are relevant to the industry.

(iii) Employers must train all employees on sexual harassment.

(1) This includes exempt, non-exempt, seasonal, part-time and temporary workers.

(2) Even though contractors are now protected under the new law, employers do not need to train them; however, training contractors on sexual harassment is encouraged.

(b) New York City

(i) Effective April 1, 2019, trainings must be interactive; occur at least annually (and, for new employees, within 90 days of employment); explain that sexual harassment is a form of discrimination; describe and provide examples of sexual harassment; address the internal complaint process available to employees; explain that retaliation against complaints is prohibited; provide examples of retaliation; provide information about bystander intervention; and address the specific responsibilities of supervisors and managers in preventing sexual harassment and retaliation.

(ii) Employers must keep a record of each training conducted for at least three years. The records must include signed employee acknowledgements, which can be electronic.

2. These new requirements under state and city law are the minimum. Employers can adapt or create their own trainings so long as the trainings meet or exceed the minimum requirements. EEOC has stated that one size does not fit all when it comes to trainings: "Training is most effective when tailored to the specific workforce and workplace, and to different cohorts of employees," such as departments and offices.

3. The best line of defense against behaviors that lead to sexual harassment claims is a commitment across all levels of the organization, starting at the top, to prevent harassment and develop an inclusive workplace.

C. Changes in New York State Law Regarding Non-Disclosure Agreements

1. New York State now prohibits employers from requiring an employee/complainant to sign a nondisclosure agreement as part of a settlement agreement involving a sexual harassment claim, unless confidentiality is the "complainant's preference." If the complainant prefers confidentiality, then there are some procedural requirements that the employer must follow:

(a) The employer must give the complainant 21 days to consider the confidentiality condition. This timeframe cannot be waived.

(b) If after 21 days the complainant agrees to confidentiality, then the parties should memorialize the complainant's preference for confidentiality in writing.

(c) After the complainant agrees to and signs the confidentiality condition, the complainant has seven days to revoke the agreement.

2. If an employer is settling a claim that does not involve sexual harassment, the employer should include a representation to that effect in the agreement.

D. Changes in New York State Law Regarding Arbitration

1. New York State recently passed a law that prohibits "any clause or provision . . . [requiring] that the parties submit to mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment." The law purports to nullify any mandatory arbitration clause covering sexual harassment claims except "where inconsistent with federal law."

2. It is unlikely that New York's ban on mandatory arbitration clauses for sexual harassment claims will be upheld by the courts, absent a change in federal law governing arbitration.

(i) The Supreme Court has repeatedly held that the Federal Arbitration Act (FAA) expresses a "liberal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

(ii) The Court has held that whenever state law prohibits arbitration of a particular type of claim, then the state law is displaced by the FAA. *See Concepcion*, 563 U.S. at 341.

3. The FAA will likely be held to preempt New York's new law. Employers should keep this in mind when considering whether to continue using arbitration provisions.

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