Four More Years? Examining the Push for Extended Non-Competes in Florida

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Following lobbying efforts by the now Miami-based hedge fund Citadel, Florida governor Ron DeSantis is poised to sign into law a new bill allowing non-compete clauses to extend up to four years for certain employees. Anyone who follows noncompete law knows that, absent this legislative blessing, it's almost impossible to otherwise imagine an enforceable four-year post-employment noncompete. (Enforcement of noncompetes associated with the sale of equity and goodwill in a business are a different story and are frequently that long or longer.)

The new legislation will apply to workers earning at least double the average local wage—in urban areas, typically more than $140,000. In addition, the bill seeks to accelerate court orders blocking covered employees from performing similar work elsewhere or barring competing businesses from hiring them. Importantly, these provisions are not limited to finance, and will impact a slew of professionals across a broad range of industries.

This development occurs in the wake of the Federal Trade Commission's efforts to bar many non-compete agreements last year. The FTC's effort was blocked in court, and an appeal is pending, but no observer believes that the regulatory push will be resurrected in the foreseeable future, particularly by the Trump administration. Hedge funds—like other professional organizations—are confronted with high turnover rates as competitors are quick to lure talent away with upfront bonuses, buyouts, and other compensation. Florida employers argue that deferred compensation and garden leave—wherein an employer continues to pay salaries and benefits to a departing worker, essentially sidelining them from the industry for a period of time without needing to pay lucrative bonuses—are insufficient protections.

Beginning this year, Citadel itself began extending non-compete clauses for some managers up to 21 months. In 2020, the average duration for a non-compete was one year. A four-year upper limit is undoubtedly a move that heavily favors employers, though it remains incumbent on these employers to enforce the agreements and pursue former employees through litigation. This option is not always attractive, as it can run the risk of exposing sensitive company information about their operations to the public.

If passed into law—which appears to be about to happen—legislation intended to favor employers in the battle for highly-compensated, specialized talent may suffer from the law of unintended consequences (translation: this may backfire). Some hedge funds may try to bring an increasing number of non-compete agreements under the ambit of Florida law through contractual choice-of-law and forum-selection provisions. This can be an uncertain exercise as would-be competitors challenge the enforceability of those provisions. And even if enforcement sticks, detractors note that

employees may be unwilling to join companies that take advantage of the full four-year period. Finally, even if individual non-competes get past the enforceability hurdle *and* someone is actually willing to sign a very long non-compete, very highly paid finance professionals will expect to be compensated for exceedingly long sit-outs, which (even for a hedge fund) may be prohibitively expensive.

We will keep an eye on these legislative developments and their impacts. In the meantime, watch for updates on our Labor Days blog or contact a partner in our employment law group if you have any questions.