NY Attorney General Sends a Message: Re-Think Non-Compete Agreements

Barbara E. Hoey

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New York employers be warned – your non-compete agreements may be under attack.

The office of the New York Attorney General (AG), Eric Schneiderman, has recently reached settlements with two different companies that require each one to suspend their practice of requiring incoming employees to sign non-compete agreements. The settlements clearly send a signal that the New York AG is critical of employers who require low-level employees to sign non-competes as a condition of employment. These agreements were never favored by New York courts, and this may be the time to re-think the broad use of such contracts.

Settlement with News Website *Law360*

The first settlement in June 2016 involved the legal news website *Law360*, which entered into a settlement agreement with the AG's office, agreeing that it would suspend its long time practice of requiring most of its incoming reporters to sign one-year non-competes as a condition of employment. According to the press release, *Law360*, like many companies, had required virtually all employees to sign a non-compete agreement – as part of the hiring process – prohibiting them from working for a competitor for one year after leaving the company. The New York AG clearly did not like this practice. The AG stated that this requirement was imposed on even entry-level reporters, just coming out of school and with little or no experience, and was "non-negotiable and non-waivable".

Law360 agreed that, going forward, it would only require more senior level executives to sign such agreements. The AG trumpeted the agreement as a victory, issuing a press release stating, "**Unless an individual has highly unique skills or access to trade secrets, non-compete clauses have no place in a worker's employment contract.**" *Law360* was also required to tell existing employees that the agreements which they had signed were no longer enforceable. In that same press release, the AG encouraged employees who "believe they are subject to an unlawful non-

compete agreement" to contact the AG's office.

Settlement with Sandwich Chain Jimmy John's

The press release may have worked! Earlier this month, the AG announced that, after an 18-month investigation, the sandwich chain Jimmy John's Gourmet Sandwiches entered into a settlement, agreeing that it would tell all of its franchise outlets that the New York AG had concluded that **its non-compete agreements are unlawful** and **should be voided.** Like *Law360*, the AG stated that Jimmy John's had been requiring most entry-level employees to sign non-competes. Jimmy John's must also stop including these sample non-compete agreements in hiring packets it sends to its franchisees.

The AG again was open in his criticism of non-compete agreements, stating in a press release, "non-compete agreements for low-wage workers are unconscionable," and, "New York law does not permit the use of non-compete agreements, except in very limited circumstances."

The AG further noted that, "non-compete agreements cause various harms to 'worker welfare, job mobility, business dynamics, and economic growth more generally.'"

The AG's proactive approach to eliminate what he views as unenforceable and "unconscionable" non-compete agreements signals a new tactic. New York has not yet become California, which generally does not allow non-competes, but it is certainly trending in that direction. Courts in New York already disfavor non-compete agreements, and will enforce them only when they are reasonable and necessary to protect the employer's "legitimate business interests" (e.g. protecting trade secrets or confidential information, the goodwill of a client or customer, or preventing competition from an employee with unique or extraordinary skills or services). Even if the court ultimately finds that an agreement is unenforceable, it can "blue pencil" the scope of the agreement – striking out the portions that it considers overbroad and enforcing the remainder of the agreement to the extent possible.

The AG appears to have taken an even broader view – that non-compete agreements for "rank-and-file" employees *are never appropriate*. There appears to be a political momentum disfavoring non-compete agreements, as the AG's approach is in line with a May 2016 White House report that came out strongly against non-compete agreements, claiming that they negatively affect the labor market in the United States.

What Should You Do?

The take-away here is that if your company requires that all (or a large number of) employees sign non-compete agreements, you should re-examine this process. For one, a non-compete signed by a "low-level" employee may not be enforceable anyway. Second, you do not want to wind up to be the next subject of an AG investigation.

The better practice is to focus your non-competes on those employees who you really need to restrict. Make an individualized determination of whether a particular employee or position should be subject to a non-compete agreement. Ask:

- Will they be given trade secrets or access to highly confidential information?
- Do they have highly specialized skills?
- How high are they within the company?

- Will you be willing to pay their salary while they are under the non-compete?

Also, make sure the agreements are reasonable in time and geographic scope. This can help ensure that your non-compete agreements will actually hold up in court (should it come to that), and avoid unwanted attention from the AG’s office.