Important Federal Employment Law Developments

We would like to bring to your attention two recently enacted statutes and one pending proposal regarding non-competition agreements which President Biden highlighted in the State of the Union Address this week. These recent developments in federal law will impact employers in Massachusetts and around the country.

1. The Speak Out Act Prohibits Pre-Dispute Non-Disclosure and Non-Disparagement Clauses for Sexual Misconduct

On December 7, 2022, President Biden signed the Speak Out Act (the "Act"), restricting the use of non-disclosure and non-disparagement provisions relating to sexual harassment and assault claims. This action follows the recent legislative ban on forced arbitration of similar claims and #MeToo efforts to combat sexual misconduct in the workplace. The Act affects any employer with employment agreements or policies imposing a prohibition on speaking about sexual misconduct allegations.

Notably, the Act only bars those clauses entered into "before a dispute arises" and does not nullify those included in post-dispute settlement or separation agreements. Therefore, employers can likely continue to require standard confidentiality agreements that prevent one or all parties from revealing information about the claim or settlement. While the term "dispute" is not explicitly defined in the Act, its legislative intent suggests that a dispute has arisen once a complaint of sexual harassment or assault is made. The Act specifically excludes employer protection of trade secrets or proprietary information through non-disclosure or non-disparagement agreements.

The Act also permits states to create their own versions of the Act that are "at least as protective," and provides that existing state laws that are broader than the Act remain enforceable. Several states, including New York, Vermont, and Maryland, have already enacted laws granting employees more expansive protections in their ability to speak openly about sexual harassment and assault claims. For example, a 2019 amendment to the New York Obligations Law prohibits nondisclosure provisions in any settlement agreement resolving a discrimination dispute without the victim's consent.

While the Act covers agreements signed before December 7, 2022, it only applies to claims filed on or after that date. Nonetheless, employers will need to alter company policies, employee handbooks, and any standard contracts to remove or modify the newly prohibited provisions to the extent that they apply to claims of sexual harassment or assault.

<u>Considerations for Employers</u>:

- Examine current policies, procedures, and practices designed to prevent workplace sexual misconduct and implement additional measures as needed.

- Carefully review any non-disclosure and non-disparagement clauses related to sexual harassment and assault in any employment, arbitration, and confidentiality agreements, and revise them to ensure compliance with the Act.

- Ensure that non-disclosure and non-disparagement agreements covering trade secrets or confidential information are crafted so as to fall outside of the Act's purview.

2. The Respect for Marriage Act Grants Federal Protection for Same-Sex and Interracial Couples

On December 13, 2022, President Biden signed the Respect for Marriage Act (the "RFMA"). This legislation codifies the landmark *Obergefell v. Hodges* decision by the Supreme Court, and guarantees the federal rights, benefits, and obligations of marriage to couples regardless of sex, race, ethnicity, or national origin. The RFMA also repeals the Defense of Marriage Act, which defined a spouse as being only a person of the opposite sex and prohibited federal recognition of same-sex marriages.

The RFMA does not guarantee the right to marry nor does it require states to grant marriage licenses which are contrary to that state's law; however, it does require all states to fully recognize marriages legally formed in other states, and assures federal recognition of these marriages. The legislation protects religious liberties, stating that churches and religious institutions are not "required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage."

Implications for Employers

While the RFMA does not confer additional rights to employees beyond what is already available under current Supreme Court precedent, it ensures that same-sex and interracial couples will receive the same marital rights and privileges in the employment context, such as favorable tax treatment for employer-provided spousal health coverage and spousal rights under HIPAA. While the RFMA may have limited effect on Massachusetts employers in light of the Commonwealth's strong commitment to marriage equality, it should prompt employers (particularly those with out-of-state employees) to review their benefits plans and their diversity, equity, and inclusion policies to ensure that they align with the provisions of the RFMA.

Employers should:

- Review employee benefit offerings and policies to ensure that all married couples are provided equal treatment and access to benefits.

- Review EEO training for coverage of all protected categories, including sexual orientation.

- Provide training to employees, particularly those involved in hiring, promotion, discipline, and discharge, to ensure that they are aware of all protected categories that cannot form the basis of any employment decisions.

3. Proposed Regulation by Federal Trade Commission To Ban Non-Competition Agreements

On January 5, 2023, the Federal Trade Commission ("FTC") announced a proposed regulation that would bar employers from entering into non-competition agreements with their employees as well as require employers to rescind existing non-competition agreements. The FTC defines non-competition clauses as any "contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer." This action follows President Biden's July 2021 Executive Order directing the FTC to limit non-competition agreements and "other clauses or agreements that may unfairly limit worker mobility."

Other types of employment restrictions could be subject to the rule if they are so broad in scope that they function as non-competition agreements, such as non-disclosure or non-solicitation agreements that effectively preclude workers from employment in the same field. The proposed rule would apply broadly to independent contractors, consultants, and any individual who works for an employer, paid or unpaid. It includes one narrow exception in connection with the sale of a business which permits non-competition agreements with respect to individuals owning more than 25% of a business entity.

The proposed regulation is open for public comment until March 10, 2023. Any employers with concerns or questions about the proposed regulation should consider submitting comments to the FTC before this period ends, after which date the regulation will be finalized. It will then become effective 180 days after the final version is published.

Takeaways for Employers:

If the proposed regulation takes effect, the following will occur:

- Employers will be prohibited from including in agreements with employees a non-competition clause that prevents the employee from seeking or accepting employment or operating a business after the conclusion of their employment with the employer. The rule will override the Massachusetts Noncompetition Agreement Act (M.G.L. c. 149, § 24L), adopted in 2018, which allows non-competition agreements subject to specific limitations. See previous client alert here https://kb-law.com/articles/documents/alert-2018-08-21-Governor-Baker-Signs-Act-Limiting-Employers-Ability-To-Require-Noncompetition-Agreements.pdf

- Employers will need to rescind all existing non-competition clauses prior to the effective date of the regulation and within 45 days thereafter provide all current and former employees with individual notice that they are no longer subject to these clauses.

- Employers will need to review and tailor all restrictive covenants in employment-related agreements to avoid classification as de facto non-competition clauses.

For additional information or if you have questions regarding any of these federal developments, please contact any of the following employment attorneys at K&B:

Jill Brenner Meixel at jmeixel@kb-law.com
Brian Richichi at brichichi@kb-law.com
Bettina Toner at btoner@kb-law.com
Allison Lennon at alennon@kb-law.com
Paul Holtzman at pvh@kb-law.com