The headlines are rampant: “Federal Trade Commission Bans Noncompetes”. But don’t tear up those agreements just yet. Staying informed about the terms of the FTC ban and also when – and whether – they are enforceable will be critical for employers seeking to protect their intellectual property and customer relationships and for employees seeking the benefit of increased mobility.

Background. On April 23, 2024, the FTC commissioners voted along party lines (3 Democrats-2 Republicans) to adopt a Final Rule prohibiting noncompetes throughout the United States (the “Rule”). The FTC’s action – which would be the first such federal ban – is the culmination of a process that began in January 2023 when the FTC first announced its proposed rule on this subject. Importantly, none of the Rule’s requirements become effective until 120 days from its publication in the Federal Register, which should take approximately two weeks, i.e., in or about September 2024. In the meantime, the U.S. Chamber of Commerce and others have already filed lawsuits in federal courts challenging the FTC’s authority to adopt and enforce the Rule. There is also a fair chance that a court will preclude the FTC from enforcing the Rule pending a resolution of these legal challenges. Accordingly, while it is vital for employers and employees to stay informed about further developments, the first important take away is that, for now, whichever laws governed the enforceability of noncompetition agreements before the FTC adopted the Rule remain in effect, as do the existing agreements themselves and the ability to enter into them.

Terms and Scope of the Ban. If the Rule does go into effect, it will drastically change the legal landscape that currently exists for noncompetes and contractual provisions that have the same “functional effect” as noncompetes. This landscape currently consists of a patchwork of statutory and judicially-created rules that often vary from one state to the next. A number of states (such as California) already ban or severely curtail noncompete agreements; others (such as New York) determine the enforceability of noncompetes on a case-by-case basis, which involves a fact-intensive inquiry under what is often referred to as a “rule of reason.”

Regardless of any state law, the FTC’s Rule provides that an employer unlawfully engages in an unfair method of competition under the FTC Act if it: (i) enters or attempts to enter into a non-compete clause; (ii) enforces or attempts to enforce a non-compete clause; or (iii) represents that an employee is subject to a non-compete clause. The Rule defines noncompetes as a “term or condition of employment that prohibits a worker from (i) seeking or accepting work in the United States . . . where such work would begin after the conclusion of the employment . . .; (ii) operating a business in the United States after the conclusion of employment . . . .” The Rule goes further, however, by also including agreements that “function” to prevent a worker from doing either of these things. The Rule also contains specific requirements for employers to “clearly and conspicuously” notify their employees that their pre-existing noncompetes are no longer enforceable.

Exemptions. Subject to noncompetes with "senior executives" that pre-existed the Rule's enactment, as discussed below, the only exemptions to the ban are for (i) non-compete clauses that are entered into by a person pursuant to a bona fide sale of a business entity, of the person's ownership interest in a business entity, or all or substantially all of a business entity's operating assets, (ii) causes of action concerning noncompetes that accrued before the effective date, and (iii) enforcement or attempts to enforce a non-compete clause – or to make representations about same – where a person has a good-faith basis for believing that the Rule does not apply.

Retroactive Application. The Rule will apply retroactively, with a narrow exception for "senior executives" who entered into a noncompete before the Rule's effective date. To qualify as a "senior executive," the individual must earn more than $151,164 annually and be in a "policy-making position". On a go-forward basis, however, "senior executives" are not exempt from the Rule's prohibitions.

Open Questions and Administrative Burdens. While it remains uncertain whether the Rule will ever go into effect, one thing is certain if it actually does: the Rule begs many questions that will lead to additional litigation concerning non-compete clauses, such as (i) whether someone qualifies as a "senior executive", (ii) whether provisions such as forfeiture-for-competition clauses, training repayment agreements, no-hire agreements, and certain severance arrangements in which the worker is paid only if they refrain from competing are "functionally equivalent" to a banned non-compete clause, and (iii) whether an NDA or client non-solicitation agreement is appropriately tailored in such a way as to escape the Rule's reach. Employers will also need, among other things, to put systems in place to identify any pre-existing non-competes and provide the requisite notice to those who are subject to them as well as ensure that such clauses are removed from employment agreements, equity award agreements, and similar documents that they provide to their workforce in the future.

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Beginning in 2024, the Corporate Transparency Act (CTA) requires many U.S. and foreign LLCs, corporations, and other entities created or registered in any State of the U.S. to file a beneficial ownership information (BOI) report with the Financial Crimes Enforcement Network (FinCEN) – unless such entity qualifies for an exemption. Although the CTA has 23 exemptions, they generally apply to companies already filing reports with the federal government that name beneficial owners, such as publicly traded companies and other entities registered with the Securities and Exchange Commission, or companies in heavily regulated industries such as financial institutions, public utilities, public accounting firms, and insurance companies. A “large operating company” exemption, however, applies to privately held companies that are not necessarily already reporting beneficial ownership information or in a regulated industry. The large operating company exemption is discussed at the end of this Alert.

Impact on Small Businesses

With certain exceptions, the BOI reporting rule applies to small businesses that employ 20 or fewer persons in the U.S. or reported gross receipts and sales of $5 million or less on the previous year’s federal income tax filings. Starting on January 1, 2024, reporting companies created or registered to do business in the U.S. before January 1, 2024, must file their initial BOI reports by January 1, 2025. Reporting companies created or registered on or after January 1, 2024, will have 30 days after receiving notice of their company’s creation or registration to file their initial BOI reports. FinCEN’s electronic filing system is currently under development and will not be available until January 1, 2024.

Information to Be Reported

A. Information about the Company

- Full legal name, including any trade name or “doing business as” (DBA) name
- Complete current U.S. address
- State, Tribal, or foreign jurisdiction of formation or registration; and
- IRS Taxpayer Identification Number (TIN) (including an Employer Identification Number (EIN))

B. Information about each Beneficial Owner and the individual(s) filing and directing or controlling the filing of the formation or registration document (“Company Applicant”)

The individual’s full legal name, date of birth, complete current address (in the case of a Company Applicant, a business address may be used; in all other cases a residential address must be used), and a unique identifying number from an acceptable identification document, as well as copies of such documents. In lieu of acceptable identification documentation, an individual or company who is required to provide information to a reporting company may provide a unique identifier assigned by FinCEN.

Who is a Beneficial Owner?

A beneficial owner is an individual who, directly or indirectly, either (1) exercises substantial control over the reporting company, or (2) owns or controls at least 25 percent of its ownership interests. An individual exercises "substantial control" if they satisfy any of the following factors:

- they serve as a senior officer of the company
- they have authority over the senior officers or majority of the board of a company
- they have substantial influence over the company's important decisions, or
- they have any other type of substantial control over the company.

Individuals indirectly related to the company will also be considered beneficial owners if they satisfy any of the requirements for substantial control. Specifically, individuals may indirectly exercise substantial control over a reporting company by controlling one or more intermediary entities that in turn exercise substantial control over the reporting entity.

The Large Operating Company Exemption

As noted above, there is an exemption from the reporting rules for "large operating companies". For an entity to be a large operating company, it must meet each of the following three criteria:

1. Number of employees. The entity must have at least 20 full time employees in the United States. Consolidated employee headcounts across affiliated entities are not permitted.

2. Presence within the United States. The entity must regularly conduct its business at a physical location in the United States that it owns or leases and that is physically distinct from the place of business of any other unaffiliated entity.

3. Gross receipts or sales. The entity must have filed a Federal income tax or information return in the United States for the previous year demonstrating more than $5 million in gross receipts or sales. This excludes gross receipts or sales from sources outside the United States. (For an entity that is part of an affiliated group of corporations that file a consolidated federal income return, the applicable amount is the amount reported on the consolidated return for the group.)

There is also an exemption for subsidiaries of certain exempt entities, including subsidiaries of large operating companies. A subsidiary would qualify for this exemption if its ownership interests are controlled or wholly owned, directly or indirectly, by a large operating company.

Penalties

The willful failure to report complete or updated beneficial ownership information to FinCEN, or the willful provision of or attempt to provide false or fraudulent beneficial ownership information, may result in a civil penalty of up to $500 for each day that the violation continues and/or criminal penalties, including imprisonment, for up to two years and/or a fine of up to $10,000. Senior officers of an entity that fails to file a required BOI report may be held accountable for that failure.

We will continue to monitor developments regarding the CTA.

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The Securities and Exchange Commission adopted new rules and amendments to the Advisers Act of 1940 on August 23, 2023, aimed at tightening the regulation of private fund advisers, especially at private equity and hedge funds, and updating an existing rule that applies to all investment advisers.

The new rules are a significant expansion of the SEC’s regulation of private fund advisers. It is anticipated that the rules will change how private fund advisers and investors in private funds— institutional investors, pension plans, and high-net-worth individuals— will structure their relationships. The Rules will create substantive compliance and reporting requirements that are more detailed and potentially more burdensome than what is currently required from registered advisers to funds that are subject to registration under the Investment Company Act of 1940 and certain other private fund advisors.

Generally, the focus of the new rules is to require funds to disclose more information about their fees and certain expenses, as well as require quarterly financial disclosures and annual financial statement audits for each fund they advise to be distributed to investors. The purpose of the audits is to provide a check on the advisor’s valuation of

private fund assets and protect private fund investors against the misappropriation of fund assets.

SEC registered private fund advisors will be required to: (1) prepare and distribute quarterly statements disclosing information on fund performance, fees and expenses, as well as certain compensation or other amounts paid to the adviser; (2) obtain an annual audit by an independent public accountant for each private fund they manage; and (3) distribute to investors a fairness opinion or a valuation opinion in connection with adviser-led secondary transactions and disclose certain material relationships between the adviser and the opinion provider. A change from the original proposal, registered and unregistered advisers will not be absolutely prohibited from charging various fees and expenses in various enumerated circumstances. Registered and unregistered advisers are, however, prohibited from engaging in certain types of preferential treatment of investors that have a material negative effect on other investors unless certain exceptions are met.

The SEC did not adopt the proposed prohibition on the adviser seeking reimbursement, indemnification, exculpation or limitation of liability for the adviser's breach of fiduciary duty, willful malfeasance, bad faith, negligence, or recklessness in providing services to a private fund. Also, the SEC did not adopt the proposed prohibition on charging fees for unperformed services, under the premise that such a practice is already inconsistent with an adviser's fiduciary duty.

Generally compliance with these rules will begin 18 months after publication in the Federal Register, except for the amendments to the Advisers Act which have to be complied within 60 days after publication in the Federal Register.

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The firm's litigation group represents clients in all aspects of litigation in state and federal courts. Corporate clients include middle-market private corporations, public companies, private equity firms, venture capital firms, individual investors, and entrepreneurs on a global scale.

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Summary

It is not unusual for a lender's form of credit agreement for middle-market secured leveraged loan facilities with banks and other institutional lenders to contain common flaws that may result in technical covenant defaults being unexpectedly triggered. This can occur when a borrower takes an action which, although expressly permitted under a carveout for a particular negative covenant (or an action that is not otherwise expressly restricted by the credit agreement which is contemplated to be taken by the parties), can nevertheless cause a technical default because the carveouts to other negative covenants covering the action do not expressly permit such action (or such action is not otherwise excluded from the application of a particular covenant). As discussed further below, such conflicts often exist between the "Asset Sales" covenant and other negative covenants, and borrowers and their counsel should be aware of these potential conflicts and how to avoid such technical defaults.

Restrictive or Negative Covenants

Credit Agreements for middle-market secured leveraged loan facilities typically include (in addition to other customary provisions) representations and warranties, affirmative covenants (which require the borrower and/or its subsidiaries to take certain actions, such as to deliver financial statements), financial covenants (which generally includes certain financial tests), and "restrictive" or "negative" covenants which prohibit the borrower and its subsidiaries (and other members of the "restricted group", which generally includes a parent guarantor of the borrower and its subsidiaries) from taking certain actions (subject to certain specified exclusions and carveouts), including, among other things:

(i) an "Asset Sales" covenant, which typically restricts the sale, lease, assignment, conveyance, transfer or other disposition of, or grant of an exclusive license on, the assets of the borrower and its subsidiaries (and the other members of the restricted group);
(ii) a "Debt" covenant, which typically restricts the incurrence of debt, and other items defined to be included as indebtedness for purposes of such covenant (such as capital leases and guarantees of indebtedness of others);
(iii) a "Liens" covenant, which typically restricts the incurrence of liens on the assets of the borrower and its subsidiaries (and the other members of the restricted group) and the granting of other security interests;
(iv) a "Restricted Payments" covenant, which typically restricts the payment or making of dividends or other distributions on account of the equity of, or the purchase or other acquisition for value of the equity of, or the prepayment of subordinated debt of, in each case, directly or indirectly, or the borrower and its subsidiaries (and the other members of the restricted group); and
(v) an "Investments" covenant, which typically restricts the making of investments, including guarantees of indebtedness of, and the making of loans and advances to, other persons.

Each of the restrictive or negative covenants acts independently of each other but, in many standard lender "forms", compliance with one covenant may in fact violate another covenant if there is not an exclusion or carveout to such other covenant that permits the specified action taken in compliance with the covenant in the first instance. Alternatively, such exclusion or carveout to permit the action may be found in the defined terms used in such covenant rather than having such exclusions or carveouts expressly set forth in such covenant.

Asset Sales Covenant

One of the most common issues found in "form" credit agreements is the failure to include "customary" carveouts to the "Asset Sales" covenant that are designed to avoid a default resulting from taking actions expressly permitted under other negative covenants that the parties have agreed to permit, or actions that the parties understand will be taken by the borrower, its subsidiaries or the other members of the restricted group in connection with the conduct of their business. For example, the form "Asset Sales" covenant frequently prohibits the disposition of any and all assets but fails to permit the use of cash and cash equivalents not otherwise restricted under the credit

agreement. In such an instance, the use of cash to make payroll, pay interest or principal on the loans that are made pursuant to the applicable credit agreement, and other cash payments that are otherwise contemplated to be made from time to time even if not in the ordinary course of business (such as making permitted capital expenditures or paying legal expenses in connection with lawsuits that may be brought from time to time), would not be permitted by the Asset Sales covenant. If such issues are present, absent modification of the credit agreement, a borrower will unwittingly default from the normal and expected operations of its business. Although a lender may not seek to enforce such default, particularly if the loan is otherwise performing, there is no benefit to providing a lender with the opportunity to call a default merely from the business being run as intended or contemplated. Moreover, the technical default likely hinders an officer of the borrower from delivering a clean covenant compliance certificate (which certificate is required quarterly in nearly all credit agreements) that certifies as to the absence of any defaults or events of default, which could result in other negative consequences under the credit agreement.

Accordingly, where these issues are present, a borrower should request that either the “Asset Sales” covenant itself, or the defined terms used in the “Asset Sales” covenant, expressly exclude the following items: (1) liens or other security interests permitted by the “Liens” covenant, (2) “Restricted Payments” permitted by the “Restricted Payments” covenant, (3) “Investments” permitted by the “Investments” covenants, and (4) any disposition of cash or cash equivalents.

Also, where a credit agreement includes an “Asset Sale Sweep” (i.e., a mandatory prepayment from the net cash proceeds from “Asset Sales”), care must be taken to ensure that the actions excluded from the application of the “Asset Sales” covenant are likewise excluded from the “Asset Sales Sweep”.

The carveouts described above to avoid technical defaults between covenants should be in addition to the customary covenant exclusions necessary to avoid a default from the normal operations of a business, such as (i) dispositions of inventory sold in the ordinary course of business, (ii) dispositions of obsolete or worn out property or property in the ordinary course of business, (iii) dispositions of accounts receivable resulting from the compromise or settlement thereof in the ordinary course of business, (iv) the theft, loss, destruction, condemnation or taking for public use of assets, and (v) licenses, sublicenses, leases or subleases granted in the ordinary course of business that do not materially interfere with the business of the borrower, its subsidiaries or the other members of the restricted group. Because many loan covenants overlap, these customary exclusions may need to apply to more than one covenant to avoid unexpected defaults.

Lender’s Counsel’s Responses

While the suggestions made herein are the most straightforward way to address potential technical defaults, some lenders and their counsel push back on or otherwise try to limit the aforementioned carveouts. Indeed, it is not unusual for a lender’s counsel to respond that their form of credit agreement has been used extensively and no one has previously made such comments. Nevertheless, in our experience, lender’s counsel has typically been amenable to making appropriate changes, whether the carveouts suggested herein or narrower, more specific carveouts that avoid a technical default, so long as specific examples are provided of how such technical defaults could occur.

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Summary of the Proposed Bill

On June 20, 2023, the New York Assembly passed the proposed New York State LLC Transparency Act (the "LLC Transparency Act"). The primary purpose of the LLC Transparency Act is to mandate public disclosure of beneficial owners of limited liability companies ("LLCs") formed in New York as well as out-of-state LLCs qualified to do business in New York State ("Non-NY LLCs"). *See LLC Transparency Act, A. 3484, 2023 N.Y. Assemb., Reg. Sess. (N.Y. 2023), and LLC Transparency Act, S.B. 995, 2023 N.Y. Sess. (N.Y. 2023)*. The bill now awaits delivery to Governor Hochul's office for her signature or veto. If signed within 30 days after the bill is presented to Governor Hochul, the LLC Transparency Act will take effect one year thereafter.

Background

The LLC Transparency Act was proposed in response to perceived issues arising from the current anonymity of LLC owners. The Act's supposed purpose is to address illegal activities conducted through anonymous corporate ownership, including tax evasion, money laundering, and violations of real property codes, carried out by beneficial owners anonymously hiding behind limited liability companies. The LLC Transparency Act echoes the efforts of the federal Corporate Transparency Act ("CTA") to create a registry of beneficial owners of corporate entities. However, unlike disclosures required under the CTA, ownership information disclosed under the LLC Transparency Act will be

available to the general public through the New York Department of State's website.

Impact on LLC Owners

If the New York State LLC Transparency Act is signed, New York LLCs and Non-New York LLCs would be required to publicly disclose the names and addresses of beneficial owners through the New York Department of State's database. The LLC Transparency Act's definition of "beneficial owner" includes any individual who, directly or indirectly, (i) exercises substantial control over the entity; or (ii) owns or controls not less than 25% of the ownership interests of the entity. Failure to comply may result in monetary penalties.

Once the law takes effect, the New York Department of State shall establish and maintain a publicly accessible database on its website, through which the general public can access ownership information for any registered LLC.

The LLC Transparency Act provides that the Department of State may issue a disclosure waiver for beneficial owners demonstrating a significant privacy interest. However, it is expected that individuals seeking a waiver would need to make a strong showing justifying confidentiality. Some of the circumstances upon which the Department of State may grant a waiver include whether an individual is participating in a confidential program or is a member of a LLC, acting as a whistleblower using the LLC to commence an action under the False Claims Act.

What does this mean?

If enacted, the LLC Transparency Act, will require that the names and business addresses of beneficial owners of New York LLCs and Non-New York be publicly available, and parties will have to weigh the benefits of the LLC structure against any possible negative consequences of such public disclosures.

We will continue to monitor any developments.

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continents, and helps member firms partner with others in countries around the globe.

A historic change in New York competition law is potentially on the horizon: entering into non-compete agreements may become unlawful. These agreements, which typically prohibit sellers of a business or former employees from competing against the buyer or former employer for a limited period of time within a certain geographic area, have long been enforceable provided that the specific terms satisfy a reasonableness inquiry that courts conduct based on the facts and circumstances of each case. However, on June 20, 2023, the New York State legislature passed Bill S03100A, which, if signed by the Governor, would make non-compete agreements unlawful if they are signed or modified after the bill's effective date. But the scope of the bill is unclear, and if enacted in its current form, it is likely to lead to substantial litigation over its contours.

The bill would add new Section 191-d, titled "Non-compete agreements," to the Labor Law. In addition to certain definitions in Section 1, the bill contains two prohibitions, and also creates a private right of action that covered individuals may pursue through litigation if they assert that the law has been violated.

Ban On Non-Compete Agreements

First, Section 2 of the bill would prohibit employers, as well as other entities who engage workers, from requesting or entering into new non-compete agreements:

> No employer or its agent, or the officer or agent of any corporation, partnership, limited liability company, or other entity, shall seek, require, demand or accept a non-compete agreement from any covered individual.

This prohibition is not limited to a traditional employer/employee relationship. Rather, a "covered individual" is

defined as “any other person who, *whether or not employed under a contract of employment*, performs work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person.”

“Non-compete agreements” that would be prohibited by this section encompass any agreement: “between an employer and a covered individual that *prohibits or restricts such covered individual from obtaining employment, after the conclusion of employment with the employer*.”

Second, Section 3 of the bill would render certain non-compete agreements in any context unenforceable:

Every contract by which *anyone* is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void. For all covered individuals, no employer or its agent, or the officer or agent of any corporation, partnership, limited liability company, or other entity shall seek, require, demand or accept a non-compete agreement from any covered individual.

The first sentence in Section 3 is not limited to covered individuals, and therefore would appear to apply even outside the context of someone who performs work or services.

No Effect On Existing Non-Compete Agreements Or Certain Other Restrictive Covenants

The bill, if enacted, should not have any effect on existing non-compete agreements. It states that it would take effect 30 days after it is signed into law, and that it “shall be applicable to contracts entered into or modified on or after such effective date.” As such, the enforceability of existing non-compete agreements should continue to be governed by New York case law on this subject.

The bill would also carve out certain other types of restrictive covenants, provided that they do "not otherwise restrict competition" in violation of the proposed law. These carve-outs are:
• Agreements fixing a term of service;
• Agreements prohibiting disclosure of "trade secrets" or "confidential and proprietary client information"; or
• Agreements prohibiting "solicitation of clients of the employer that the covered individual learned about during employment."

Private Right Of Action

Section 4 of the bill would allow a covered individual to bring a lawsuit against "any employer or persons alleged to have violated" the bill's prohibitions. The remedies provided for under the bill include voiding the non-compete agreement and "all other appropriate relief," which may include: injunctive relief; liquidated damages up to $10,000; awarding lost compensation and/or other damages; and awarding reasonable attorneys' fees and costs.

The bill would impose a two-year statute of limitations for such a claim, but the trigger for the statute of limitations ranges from *the later of* when the non-compete was signed to when any steps were taken to enforce it.

Takeaways And Open Issues

If you are an employer that routinely uses non-compete agreements, if this bill is enacted, you will need to re-evaluate your practices going forward. You may need to consider what less-restrictive post-employment restrictive covenants may be appropriate for your business in lieu of a broad non-compete, such as appropriately-tailored confidentiality and non-solicitation restrictions.

Additionally, you should take stock of what non-compete agreements you already have in place. While the bill, by its terms, should not apply to non-compete agreements existing prior to its effectiveness, there is an important caveat: the bill states that it would apply to contracts "modified" after the effective date. Therefore, if the bill becomes law and an employer has a pre-existing non-compete agreement with an employee, the employer would

need to be careful about any subsequent modification or amendment of the contract containing that non-compete provision. If there is any subsequent modification or amendment of the contract, even if entirely unrelated to the non-compete clause, the employee may argue that the contract would become subject to the new law, rendering the non-compete unenforceable (and subjecting the employer to a potential claim for damages by the employee). If you have valuable employees who are not currently subject to a non-compete, you may want to consider getting a non-compete agreement in place before the bill is potentially enacted and becomes effective.

Note also that it appears that the bill would not prohibit the use of non-compete agreements for the duration of employment (as opposed to post-employment), although this is not entirely clear. The definition of "non-compete agreement" as used in Section 2 is expressly limited to restrictions "after the conclusion of employment with the employer." Section 3, on the other hand, does not contain this limitation. Arguably, however, as long as the worker is employed, he or she is not "restrained from engaging in a lawful profession, trade, or business," and therefore the non-compete may be enforceable during the term of employment. This provision will likely become the subject of judicial construction.

Significantly, the bill does not contain any express carve-outs for commercial transactions or agreements involving sophisticated parties and/or parties represented by counsel, where non-competes are often heavily negotiated and where concerns about unequal bargaining power may not be relevant.

For example, the bill does not have any express exclusion for highly-compensated executives. Moreover, non-compete agreements are often entered into outside the employment context, such as when businesses are formed (e.g., in an operating agreement among members of a limited liability company) or when businesses are sold (e.g., to restrict the seller from competing with the buyer). Arguably, these commercial agreements would not be covered by Section 2, since they would not be agreements between an "employer and a covered individual." However, these agreements would potentially fall within Section 3, and therefore care would need to be taken that the agreement does not restrict the individual from "engaging in a lawful profession, trade, or business." Non-compete agreements are also often included in settlement agreements in connection with the termination of employment or resolution of claims between an employer and employee. These settlement agreements, too, would need to be analyzed for whether they fall within the scope of the law, if enacted, depending on the facts and circumstances.

Other language in the bill also raises questions that, if the bill is enacted, will likely lead to litigation and will require clarification from the courts. For example, Section 2 applies to workers who are "in a position of economic

dependence on, and under an obligation to perform duties for" an entity. Query whether, for example, a consultant or other independent contractor is "in a position of economic dependence on" the entity that engaged him or her. Even the carve-outs in the bill would create questions about interpretation. For example, the carve-out for confidentiality agreements is limited to "trade secrets" or "confidential and proprietary client information." Clearly, there are many other types of confidential business information (e.g., pricing information) that an employer would not want a former employee to be able to disclose or use in subsequent employment. Similarly, the carve-out relating to non-solicitation applies to "clients" that the former employee "learned about during employment," but what about solicitation of employees, prospective clients, or vendors? If a restrictive covenant goes beyond the categories of information specifically mentioned in these carve-outs, employees may try to argue that they are therefore unenforceable. The issue may then become whether the agreement "restricts [the individual] from obtaining employment" (Section 2) or "restrain[s] [the individual] from engaging in a lawful profession, trade, or business of any kind" (Section 3).

We will continue to monitor developments regarding this bill.

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On April 28, 2023, the U.S. Court of Appeals for the Fifth Circuit reversed a decision by the Western District of Texas that had originally denied the Restaurant Law Center's and the Texas Restaurant Association's preliminary injunction request, which sought to enjoin the U.S. Department of Labor's ("DOL") so called "80/20/30 Rule," which took effect December 28, 2021. This administrative rule tightened the requirements for when employers can apply a tip credit against the Fair Labor Standards Act ("FLSA") minimum wage.

As a brief background, the FLSA allows employers to satisfy the federal minimum wage for tipped employees by paying a reduced hourly wage and making up the difference through a tip credit, up to $5.12 per hour, if tips actually received are sufficient to fulfill the difference between the tipped wage and the minimum wage, and

provided the employer meets certain additional requirements.

Under prior DOL guidance, an employer was able to take the tip credit for an employee's tip-producing work, as well as for other work that supports tip-producing work in keeping with a category scheme issued by the DOL during the Trump administration. The DOL's new guidance (under the Biden administration), reverted to the "80/20 Rule" (in effect prior to the Trump administration's change), which required a tipped employee's "supporting", *i.e.,* non tip-producing work may not exceed 20% of the employee's workweek if the employer wished to benefit from the tip credit.

The new rule went a step further and added an additional limitation that a tipped employee's directly supporting work may not exceed 30 consecutive minutes *or* cumulatively more than 20% of the tipped employee's workweek. The new 30-minute requirement presented significant challenges for employers whose tipped employees perform preparatory and concluding work incidental to their tipped duties. The DOL indeed expressly acknowledges that "some employers may incur ongoing management costs . . . to ensure that tipped employees are not spending more than 20 percent of their time on directly supporting work per workweek, or more than 30 minutes continuously performing such duties."

The Restaurant Law Center and the Texas Restaurant Association challenged the 80/20/30 Rule starting in December 2021, alleging that it violates the FLSA, exceeds the DOL's rulemaking authority, and creates significant, irreparable compliance burdens, among other challenges. The district court denied the preliminary injunction but the Fifth Circuit Court of Appeals disagreed, finding that the lower court ignored cost estimates advanced by the restaurant groups and disregarded circuit precedent that nonrecoverable compliance costs usually constitute irreparable harm. Of particular note, the Fifth Circuit found that the addition of the 30 continuous minute limitation creates significant recordkeeping obligations and costs for employers that did not exist before. The court explained, "[t]hose omissions are striking, given that plaintiffs assert that their members will incur exactly the kinds of continuing compliance costs predicted by the department itself."

The Fifth Circuit remanded the case to the lower court for it to address other key preliminary injunction issues, *i.e.,* whether the restaurant groups can succeed on the merits, whether the balance of equities tips in their favor and whether the injunction is in the public interest. While this appeal was pending, both parties filed motions for summary judgment on the merits.

Although further litigation of the 80/20/30 Rule is inevitable, hospitality employers are (for now) relieved of the 30 continuous-minute constraint under the FLSA. Please note that *the former FLSA 80/20 Rule remains in full effect*. Moreover, certain state laws, including New York's, also impose robust tipped work and tip credit regulations that in some respects go well beyond the FLSA's restrictions. As a result, employers are required to continue complying with these overlapping rules.

This Client Alert was written by attorneys Alexander Leonard and Gina Nicotera. Golenbock Eiseman Assor Bell & Peskoe LLP uses Client Alerts to inform clients and other interested parties of noteworthy issues, decisions and legislation that may affect them or their businesses. A Client Alert should not be construed or relied upon as legal advice. This Client Alert may be considered advertising under applicable state laws.

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Transitional Return-to-Work programs have been a part of the employment-law lexicon for decades. Traditionally, these programs have arisen in the context of post-disability reentry. This would be the so called “light duty” assignment. The idea is to better enable a valuable employee to come back to the workplace sooner than they otherwise could have without the program. This is normally accomplished by accommodating an altered work arrangement inside the organization. Work-from-home arrangements are a common permutation. These programs also have side benefits, such as promoting company-employee connection and reducing turnover. Of course, employees tend to like the flexibility as well. As a result, these programs are not rare creatures.

It is only natural to apply such a well-worn concept to a hot topic like parental leave. Whether or not, “parental reentry benefits” becomes the next flavor-of-the-month (in the employee benefits realm) remains to be seen. However, it can be argued that Transitional Return to Work is already a *de facto* perk in many professional services settings. It is much more common these days for professionals to ask for such transition periods when returning from parental leave than it used to be, such as asking for three remote (or partial) days at the start of their return.

Employers who want to promote a positive work environment tend to provide some form of this flexibility. One could easily argue that it is better for employers to simply get ahead of the curve and expressly advertise such “parental reentry benefit” offerings, leveraging any resulting goodwill, and also put some guardrails around it to avoid misuse. Many employers will allow at least some form of soft reentry to the workplace anyway. A “parental reentry benefit” can also complement other targeted leave offerings that are often meant to improve recruitment efforts, such as leave benefits for in vitro fertilization procedures, upon miscarriage, and/or traditional paid parental leave itself.

The “parental reentry benefit” may be the next big thing in employee retention.

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This article was written by Alexander Leonard, Partner and Chair of the Labor & Employment group, Golenbock Eiseman Assor Bell & Peskoe LLP.

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Generally buried at the end of various types of real estate agreements (leases, purchase and sales agreements for real estate, construction contracts, loan agreements, etc.) is the "miscellaneous" section that covers and addresses so-called "boilerplate" provisions – such as venue for contractual disputes, representation as to authority to sign documents, jury trial waiver language, etc. Since these are generally considered "standard" provisions, it may be tempting to focus less intently on these provisions when negotiating these documents. However, overlooking or downplaying the potential impact of these provisions may have a significant adverse effect.

One of these provisions is the "force majeure" clause. This clause generally serves to excuse a party from performing under an agreement if an event occurs that is beyond the reasonable control of such party and such event delays or prevents performance, such as severe weather conditions, storms, hurricanes, fire, explosions, earthquakes, strikes, war and terrorism. However, it is important to note, that generally, unless specifically stated otherwise, only non-monetary obligations are excused due to a force majeure event. As a consequence, for example, a borrower under a loan will still have to make loan payments in a timely fashion even if his or her business was impacted by a storm.

As it is the case with other legal clauses, the expression "the devil is in the details" rightfully applies when negotiating force majeure provisions. Some items to consider, and possible consequences if omitted, are as follow:

1. Make Application Mutual – The benefit of excusing performance due to force majeure should apply to both parties. Sometimes an agreement may only have the clause run in favor and to the benefit of the drafter of the agreement. To quote another proverb – "what is good for the goose is good for the gander" – should apply in the force majeure context. Why should only the landlord, but not the tenant, be excused from undertaking repairs when there is a shortage of building materials? The tenant should not be at risk to defaulting under its lease because it could not timely complete repairs due to no fault of its own.

2. Enumerate Specific Force Majeure Events that Are of Concern – In addition to listing the standard type of events that are subject to a force majeure clause (such as a storm or acts of terrorism), it will be important to include specific events, in light of a party's line of business, which, if affected or impacted, may cause a delay in performance. For example, if a contractor constructing a building faces a risk that it cannot obtain a specific construction material, then it should seek to include "shortages of such material" as a force majeure trigger. However, from the owner's perspective, especially in a construction contract setting, the owner may not want to agree to such an inclusion since the contractor, not the owner, should assume the risk of not obtaining sufficient materials in a timely fashion. To mitigate the risk of omitting the enumeration of a specific force majeure event, it would be advisable to attempt to describe the qualifying events under the proviso of "including, but limited to," in the contract (e.g., the events that qualify as a force majeure event include, but are not limited to, storms, hurricanes, etc.). This will allow, or at least give the party seeking to invoke force majeure, a stronger position that the event in question that resulted in the delay in fact qualified as a force majeure event.

3. How long is the Performance Excused? – The force majeure provision should specifically state that performance is excused, at a minimum, for the same period of time that the force majeure event lasts and continues to delay performance. Some force majeure provisions do not address the length of excused performance – instead they only state that performance is excused – so it is important to have that clear in the agreement to avoid any ambiguity or argument in that respect (although disagreements may still arise as to when the force majeure event effectively ceased and performance was again viable). Further, some contracts – especially in relationships where one party may have less leverage than the other party (usually in a borrower / lender relationship) – may attempt to limit the period that non-performance is excused due to force majeure (e.g., a period not to exceed 90 or 180 days). This represents a potential concern in a context where the force majeure event continues beyond that time limitation and the resulting continued non-performance may trigger a default under the respective contract. Accordingly, if possible, it would be advisable to not acquiesce to such a cap or, at least, negotiate a sufficiently lengthy cap period.

4. Notice of Force Majeure – A contract may require that the party claiming force majeure give notice to the other party of the event it claims qualifies as a force majeure event and that such notice be given within a certain period of time (usually 5-10 days after the force majeure event / knowledge of the event). Further,

the notice may need to be accompanied by sufficient evidence that, in fact, a force majeure event has occurred. This presents several potential issues. First, it is extremely important to give such notice timely so as not to lose the right to excuse non-performance and risk a potential breach or default under the contract due to such non-performance. Second, the timeframe to give notice should commence once the party knows (or should know) of the force majeure event, not necessarily when the force majeure event actually occurred, as there may be a gap or delay between those two occurrences. For example, if there is a strike that results in material shortage, the contractor may not be aware of such impact until a certain time period following the strike. As above, the importance is that the party seeking to invoke force majeure not lose such right and risk a potential breach of the contract. Finally, one may want to delineate what evidence needs to be provided to claim force majeure. When an impactful storm occurs, providing the evidence may be easy. But what about the strike and resulting material shortage – what does the affected party have to show to qualify such an event?

Although a party will hopefully never need to invoke the rights under a force majeure clause, this provision serves – in accordance with the phrase, "plan for the worst, hope for the best", – as a crucial form of protection if an event occurs outside the control of a party which impacts performance under the contract. Therefore, it is crucial to not overlook this clause, as well as other "standard" boilerplate provisions in real estate agreements.

For example, recently an event occurred which required a Golenbock client, a real estate developer, to claim the force majeure to protect its interests. The developer had taken a complex construction loan for a luxury residential condominium project in Florida. As it is customary for these types of projects and loans, the lender conditioned continued construction funding on the borrower meeting and satisfying certain construction deadlines – not only that current deadlines are met, but also that future deadlines (including the final completion date) are anticipated to be met – in light of the current state and progress of construction.

Shortly after the closing of the loan, however, Hurricane Ian devastated southwest Florida. This natural disaster not only damaged the project built to date, but also impacted future construction and would result in the construction deadlines being missed and could have triggered a default under the loan had not the developer been protected by a mutual force majeure clause in the loan agreement. The initial draft of the loan agreement contained a force majeure clause which only excused performance by the lender, but not the borrower for force majeure events. However, the final, negotiated version made the force majeure clause mutual and therefore the developer was also protected. By negotiating what many think of as the boiler plate part of the loan agreement, we were able to shield our client from a possible loan default and entitled the client to receive extensions of time due to the delays caused by Hurricane Ian.

This article was written by Florian Ellison, Partner, Golenbock Eiseman Assor Bell & Peskoe LLP.

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In January 2022, New York City enacted legislation requiring all covered employers advertising jobs in (or that could be performed in, even remotely) New York City to include a "good faith" salary range for every job, promotion and transfer opportunity advertised, internally or externally. That law was set to go into effect on May 15, 2022. However, the City Council recently and significantly amended the law, which was signed by Mayor Eric Adams on May 12, 2022. Most notably, the amendment pushes back the effective date of the new law several months to November 1, 2022. Further details on the amended law can be found here.