

Legal News for Your Business

FROM CHARLOTTE, NORTH CAROLINA'S

Litigation, Employment, Healthcare & Tax Law

PREMIER BOUTIQUE LAW FIRM  GARDNER | SKELTON

GENERAL BUSINESS ALERT

Biden's executive order on non-compete clauses: What you need to know

President Biden **recently released** an executive order directing the Federal Trade Commission (the "FTC") to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

What does the executive order on non-competes say?

The executive order is not a mandate. However, it encourages the FTC to ban what it calls the "unfair" use of non-competes and other restrictive covenants. The order is frustratingly vague on details. Most notably, it does not specify what constitutes an "unfair" practice. (It does not say, for example, whether all non-competes should be banned or whether there should only be restrictions with respect to workers in certain wage or job categories.)

Non-compete agreements are typically regulated by states and not the federal government. In 2016, the Obama Administration issued **a call-to-action** to state governments, encouraging reforms to reduce their prevalence. While some states responded by passing new legislation, only three states—California, North Dakota, and Oklahoma—have banned non-competition agreements outright.

Much remains unknown about how the FTC will proceed, and whether any regulations will survive legal challenges. In the meantime, companies can prepare themselves by looking at their non-compete policies and considering alternative options for protecting client relationships and confidential information.

*If you have questions about any of your restrictive covenants, contact **Jared Gardner**, **Nicole Gardner**, or **Tyler Peacock** today.*

GENERAL BUSINESS ALERT

What are some hidden effects of COVID-19 on state and local taxes?

Unlike the federal government, state and local governments generally must balance their

operating budgets each year. COVID-19 continues to strain subnational revenue, and businesses are experiencing financial and compliance changes. Here are a few lesser-known impacts to businesses due to the pandemic.

Remote workers - COVID-19 caused a huge transition into remote work, the remnants of which will remain in some form long after the health crisis has ended. So what happens when somebody in one state works from home for a company located in another state? Does the state where the worker resides get to collect tax revenue from the employer? Will the employer have to withhold payroll taxes for the employee based in a different state? While states often treat the presence of employees as a definitive factor, the answer can vary state by state and may depend on additional considerations in light of COVID-19.

Sales and Use tax - E-commerce has reached new heights during the pandemic, and states are scrambling to collect revenue wherever they can by requiring online sellers located out of state to collect and pay sales tax. While the *South Dakota v. Wayfair* decision opened that door, will other factors (such as remote employees) extend a state's reach?

Property tax - Real estate values have certainly fluctuated because of the pandemic, and how real and business personal property taxes are calculated (will they be determined by pre, mid, or post-pandemic valuations?) varies from state to state. Employers are likely seeing their local governments change rates, valuation methods, and methods of collection (increased audits) as they look for more tax revenue to cover budget shortfalls.

Unclaimed property compliance - Because of the pandemic, some companies might not have the capacity to meet their state's unclaimed property requirements, opening them up to expensive penalties. Companies should take care to remain in compliance to avoid an even bigger financial headache.

*If you have questions about your company's state and local tax obligations, contact **Fred Parker** today.*

GENERAL BUSINESS ALERT

\$125 million awarded in EEOC disability discrimination case

A federal jury in Wisconsin recently awarded more than \$125 million in punitive damages to a former Walmart employee with Down syndrome. In its case against the retail giant, the U.S. Equal Employment Opportunity Commission (EEOC) alleged Walmart failed to accommodate the employee's request to return to her original work schedule after changes caused her disability-related difficulty.

Failure to Accommodate

Marlo Spaeth worked as a Walmart sales associate for more than 15 years. Throughout her tenure, she received pay raises and positive performance reviews. In 2014, Walmart

made storewide schedule changes, including Spaeth's. As an individual with Down syndrome, Spaeth thrives on routine. When Spaeth asked Walmart to return to her old schedule, the retailer refused. Shortly after, Walmart terminated Spaeth for absenteeism and later refused to rehire her. The EEOC alleged that Walmart violated the Americans with Disabilities Act (ADA) for failure to provide Spaeth a reasonable accommodation, and firing, and later refusing to rehire, her on account of her disability.

Reasonable Accommodation & the Interactive Process

The ADA requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. Generally, an employer's duty to engage in the interactive process is triggered whenever it learns that an employee needs an accommodation. Courts give employees wide latitude in how they make this known. The employee is not required to provide the request in writing, identify a specific accommodation, or use specific terms such as "disability," "ADA," or "reasonable accommodation." In the interactive process (a discussion about an applicant's or employee's disability) the employer should gather information about the nature of the disability and the limitations that may affect the employee's ability to perform the essential job duties.

Although the jury award will be reduced (compensatory and punitive damages under the ADA are capped at \$300,000 for employers with more than 500 employees), the verdict in *EEOC v. Walmart Stores East LP* is a reminder for employers that the ADA requires that they make exceptions to policies if the exception is necessary to reasonably accommodate a person with a disability.

*If you need assistance with your EEO policies and procedures or would like to schedule manager training, contact **Nicole Gardner** today.*



Nicole Gardner

(704) 335-0350 phone
(704) 390-7007 direct
nicole@gardnerskelton.com



Jared Gardner

(704) 335-0350 phone
(704) 390-7019 direct
jared@gardnerskelton.com



Fred Parker

(704) 335-0350 phone
(704) 390-7020 direct
fred@gardnerskelton.com



Tyler Peacock

(704) 335-0350 phone
(704) 390-7045 direct
tyler@gardnerskelton.com



GARDNER|SKELTON

CHARLOTTE, NORTH CAROLINA'S
PREMIERE BOUTIQUE LAW FIRM FOR
EMPLOYMENT • HEALTHCARE
TAX • BUSINESS LITIGATION