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City Bar Recommends New York Adopt Statutory Guidelines Governing the Use of Noncompete Agreements for Lower-Salary Employees

New York, February 22, 2021 – The New York City Bar Association has issued a report advocating "enactment of a statute to regulate the use of noncompete agreements as applied to lower-salary employees in order to ensure equity and fairness in employment markets while preserving New York's traditional role as the nation's commercial leader."

"New York now stands alone as an outlier in trade secrets law," the report states. "Federal law under the Defend Trade Secrets Act ("DTSA") and the laws of 49 states under their versions of the Uniform Trade Secrets Act ("UTSA") impose statutory requirements and restrictions on trade secrets issues – except in New York, the lone remaining common law jurisdiction in the country." Nine states have enacted statutes banning low-wage noncompetes in the four years since adoption of the DTSA.

Specifically, the report recommends adoption of a New York State statute that is a hybrid of the statutes recently adopted in other states and New York's pre-existing common law, "imposing a presumptive prohibition on noncompete agreements for employees whose salaries fall below a statutorily-defined limit as lower-salary employees. Under the proposed statutory regime, the presumption of illegality would be rebuttable only on condition that (1) the employer agrees to pay the affected worker's full pro-rated compensation for the entire duration of any noncompetition period; (2) the agreement is found to be enforceable under any of the existing New York common law bases for enforcing a noncompete agreement, e.g., trade secrets protections, protectable customer relationships, or employees possessing unique skills or expertise; and (3) the employee was provided with notice of any noncompete agreement and the employer's intention to enforce the noncompete with respect to the particular position prior to the employee's agreement to enter into the employment relationship."

According to the report, New York's common-law regime "can result in unfair and inequitable enforcement against employees whose earnings simply do not support a period of non-employment mandated by a noncompete and affords too much leverage to employers… against employees who simply are not in a position to absorb the economic cost of litigating for their employment futures," the report states.

The report includes an extensive review of the national legal and economic context in which the issue of noncompetes for lower-salary employees arises. It surveys the statutory responses enacted in other states, and analyzes the statutory approach available to New York.

The report characterizes its recommendation as providing "the needed balance between permitting the continued use of noncompetes for statutorily-protected lower-salary employees, *but only* under specified circumstances."

The report can be read here: http://bit.ly/3kdke83

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world. www.nycbar.org.