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INSIGHT: Trade Secrets 2019 Legislative, Executive Roundup and 2020 Trends

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Gibson Dunn & Crutcher LLP attorneys, in Part 2 of a two-part series, highlight 2019 developments in trade secret legislation, executive orders, and notable prosecutions, and predict states will continue to focus on noncompete agreements in 2020. They say plaintiffs may have a useful tool in civil cases if courts endorse the government's position that it need not identify trade secrets at issue in conspiracy and attempt cases.

2019 was eventful for legislation and enforcement related to trade secrets. Seven states restricted noncompete agreements—an important tool in protecting an employer's trade secrets—and California federal courts restricted nonsolicitation agreements.

The Trump administration heightened efforts to combat intellectual property theft and espionage from China. And, the Department of Justice argued that indictments for conspiracy or attempt to steal trade secrets need not identify those secrets.

Looking Ahead

In 2020, legislative and agency focus on limiting noncompete—and potentially nonsolicit—agreements is likely to continue.

The U.S. Federal Trade Commission, for example, is currently considering whether and how to enact a rule restricting their use. Several FTC commissioners have expressed concern that noncompetes reduce labor mobility and depress wages. And on Jan. 9, 2020, the FTC held a workshop to discuss a rule that would either ban or restrict the use of noncompetes. We will continue to watch to see whether Congress, the FTC, or other states adopt further restrictions on noncompetes.

We also may see increased claims for other forms of relief, like trade secret misappropriation, from plaintiff-employers as a result of continuing restrictions on noncompetes.

And as the Trump administration continues its zealous enforcement of federal intellectual property laws, we will be looking to see whether the court in *United States v. Xu* agrees with the government that it need not identify the trade secrets at issue in conspiracy and attempt cases.

State Legislative Developments—Noncompete Agreements

Reflecting a growing legislative focus on noncompete agreements, seven states—Maine, Maryland, New Hampshire, Oregon, Rhode Island, Utah, and Washington—enacted or amended statutes limiting their use and enforcement in 2019. This follows trends in civil antitrust litigation against noncompete and nonsolicit agreements, and guidance for human resources professions from the Department of Justice on criminal enforcement.

Overall, these new laws prohibit employers from enforcing noncompete agreements

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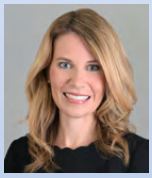

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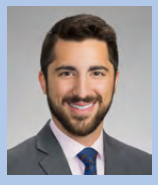

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against lower-wage employees. Washington is the most restrictive, prohibiting noncompetes for employees earning less than $100,000. Wash. Rev. Code § 49.62.020(1)(b) (effective Jan. 1, 2020). Maine subjects employers to a $5,000 civil penalty for requiring a noncompete from employees making less than $49,960. Me. Stat. tit. 26, § 599-A(6) (effective Sept. 19, 2019).

The statutes also impose enhanced notice and consideration requirements for noncompetes.

Oregon's recently amended law, for example, requires the most immediate action for potential plaintiffs seeking to enforce a noncompete—employers must now provide a signed, written copy of the terms of a noncompete within 30 days of an employee's termination. *See* Or. Rev. Stat. § 653.295(1)(e) (effective Jan. 1, 2020).

In Washington, a new noncompete from an existing employee is unenforceable unless the employer provides "independent consideration," like a raise or promotion. Wash. Rev. Code § 49.62.020(1)(a)(ii).

And in Oregon, a noncompete for an existing employee remains voidable unless it is in exchange for a "bona fide advancement," or genuine promotion. Or. Rev. Stat. Ann. § 653.295(1)(a)(B).

Some statutes also limit the duration of noncompetes. In Washington, for example, there is a presumption that any provision over 18 months is unenforceable.

California has long proscribed noncompetes except in limited circumstances. *See* Cal. Bus. & Prof. Code § 16600. However, in 2019, at least two federal courts followed a 2018 California appellate court decision to extend Section 16600 to employee nonsolicitation agreements. In *Barker v. Insight Global LLC*, for example, a court found that "California law is properly interpreted...to invalidate employee nonsolicitation provisions." *See* also *WeRide Corp. v. Huang*.

Intellectual Property Theft and Espionage

As predicted, the Trump administration continued to take a hard line with China to deter intellectual property theft and espionage last year.

On May 15, 2019, President Trump issued an executive order declaring a national emergency against the threat of foreign adversaries "increasingly creating and exploiting vulnerabilities in information and communications technologies and services...to commit malicious cyber-enabled actions, including economic and industrial espionage against the United States and its people."

The order authorized the Secretary of Commerce to block transactions involving information or communications technology posing an "unacceptable risk to the national security of the United States," as determined by the secretary. It was widely viewed as responsive to a perceived threat from China.

The week after the order was issued, for example, the secretary barred U.S. companies from selling technology to China-based Huawei Technologies Co. and nearly 70 of its affiliates without government approval.

And in November, the Department of Commerce noticed proposed rules with procedures the secretary would use to identify, assess, and address transactions posing an "undue risk" to information and communications technology in the U.S.

Notable Prosecutions

Building on its efforts in 2018, the DOJ also increased enforcement of intellectual property laws against individuals with ties to China last year. According to DOJ press releases, nine such indictments were issued or unsealed, prompting some backlash.

For example, two Huawei companies moved to dismiss an indictment for conspiracy to steal trade secrets and attempted theft, claiming that they were indicted solely as a "target of the politically motivated decision...to pursue the selective prosecution of Chinese companies and nationals for alleged misappropriation of intellectual property." The court has not yet ruled on Huawei's motion.

In response to a motion to dismiss from alleged Chinese Ministry of State Security operative Yanjun Xu—who was indicted in 2018 for conspiring to commit economic espionage and attempting to steal trade secrets from U.S.

aviation and aerospace companies—the DOJ took the position in December that it need not even *identify* the trade secrets at issue in conspiracy and attempt cases. ("[T]he law does not require the government prove, much less identify, specific trade secrets....").

If the court endorses the DOJ's position, it might also be useful to plaintiffs in civil trade secrets cases when faced with a demand to identify the trade secrets at issue with particularity.

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