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New York and Illinois AGs crack down on use of non-competes in settlement with WeWork and release guidance on use of non-competes

By Matthew T. McLaughlin and Lisa C. Sullivan

The perceived overuse of noncompete agreements continues to concern state attorneys general, as exemplified by new guidance released yesterday by both the New York State Attorney General and Illinois Attorney General in connection with a coordinated settlement with WeWork Companies, Inc. Under the announced settlement, WeWork's nearly entire workforce nationwide will either be released completely from their noncompete restrictions or subject to far less onerous ones.

The WeWork settlement follows similar AG investigations and settlements with other companies as well as recent legislation enacted in Massachusetts[1] that limits the use of noncompete agreements.

The AGs have signaled that their investigations of companies with overly broad noncompete agreements will continue. Employers based in New York or Illinois, or that have employees in either state, should review not only the terms of their existing noncompete agreements but also the categories of employees who are subject to such agreements in order to minimize the risk of a similar investigation.

The settlement with WeWork

WeWork provides shared workspaces and services to customers throughout the United States and globally. The New York Attorney General Barbara Underwood and the Illinois Attorney General Lisa Madigan launched separate investigations into WeWork's noncompete practices. In both New York and Illinois, as in most states, noncompete agreements may only be used to protect legitimate business interests of the employer—such as its trade secrets, confidential information or goodwill—and the restrictions may be no greater than necessary to protect such interests. However, the investigations found that WeWork used noncompete agreements that prohibited all of its employees from working for competitors regardless of any particular employee's job duties or knowledge of confidential information.

[1] See our prior alert, "Non-competition reform in Massachusetts," available here.

As part of the coordinated resolution of the investigation, WeWork has agreed to release approximately 1,400 of its nearly 3,300 employees nationwide from their noncompete agreements entirely. These released employees include executive assistants, mail associates, cleaners and baristas. In addition, the company agreed to enter into much less restrictive noncompete agreements with nearly 1,800 other employees—including architects, senior software engineers and interior designers. The agreed changes include reducing the noncompete period from one year to six months, a far smaller geographic restriction of a fifteen-mile radius of WeWork locations engaged in the business line in which the employee worked and narrowing the scope of prohibited competition to the specific type of work the employee performed. The company will also be required to submit regular reports to the AG regarding certain future changes to its noncompete agreements.

New York's guidance

The New York Attorney General also released guidance to employees on noncompete agreements in the form of "Frequently Asked Questions." The New York guidance advises employees that noncompete terms can be "easily overlook[ed]," resulting in employees "unintentionally sign[ing] unenforceable non-competes." It urges employees who believe that an employer requires an unenforceable non-compete to contact the AG's office—at a unique email address (noncompete@ag.ny.gov). In many respects, the New York guidance is similar to the FAQ guidance released by the Illinois Attorney General. While nothing in the guidance signals any sea change in noncompete law, it does confirm that perceived overuse of noncompete agreements is increasingly a high priority for many state enforcers.

Impact on employers

The settlement with WeWork follows similar investigations and settlements over the past two years that limit companies' uses of noncompete agreements. As this latest example demonstrates, however, many employers still have either a "one-size-fits-all" approach for their entire workforce or overly broad restrictions that will unlikely survive court scrutiny and may invite a government investigation.

Employers should analyze their existing noncompete agreements and make any necessary revisions both to the scope of the restrictions as well as to the categories of employees that are subject to the restrictions so that the company's legitimate business interests can be protected without running afoul of the law or inviting an investigation. Experienced counsel, who are part of Nixon Peabody's Trade Secrets and Restrictive Covenants team, are available to assist you in this analysis and to draft the provisions needed to comply with the applicable law.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Matthew T. McLaughlin, 617-345-6154, **mmclaughlin@nixonpeabody.com**
- Lisa C. Sullivan, 312-977-4465, **lcsullivan@nixonpeabody.com**
- David S. Rosenthal, 617-345-6183, **drosenthal@nixonpeabody.com**