BUSINESS IN 2024

WEEKLY WEBINAR SERIES

BOND SCHOENECK & KING ATTORNEYS

Your Host

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TODAY'S AGENDA

Gabe Oberfield – (12:00PM-12:05PM)

- Opening Remarks

Mark Beloborodov – (12:05PM-12:15PM)

- Attention on IP in View of the FTC Ban on Non-Compete Agreements

John Harras – (12:15PM-12:25PM)

- Are You a Fiduciary? The New Definition of an ERISA Fiduciary

David Burgio – (12:25PM-12:35PM)

- Updates on Credit Card Surcharges in New York State

Liz Heifetz – (12:35PM-12:45PM)

- Updates to the Form 9089 Application for Permanent Employment Certification

G. Oberfield – (12:45PM)

- Wrap Up

Attention on IP in View of FTC Ban on Non-Compete Agreements?

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FTC's Final Rule Banning Non-Compete Agreements

- FTC voted on April 23, 2024 to approve the final rule, declaring the vast majority of non-compete agreements an unfair method of competition.
- The final rule also prohibits the use of de facto non-competes.
  - Broad non-disclosure provisions;
  - Financial penalty provisions; and
  - Broad non-solicitation/non-interference provisions.
- Effective date **September 4, 2024**

Exceptions: (a) during employment, (b) with "Senior Executives" now in effect, and (c) ancillary to sale of a business

Employer's Obligations under Rule

- Employers must notify all existing and past "workers" subject to the rule, by September 4, 2024, that the non-compete will not be enforced against them
  - "worker" defined broadly to include employees, independent contractors, interns, volunteers, apprentices, etc.
- There is model language in the rule that satisfies requirement.

What Employers Should Be Doing Now

- Begin identifying workers (existing and past) subject to non-competes ban so that you can comply with the notice requirement.
- Review agreements for “de facto” non-competes to make sure non-disclosures and non-solicits are no broader than necessary

What Else?

- Review and update their trade secrets policies
- Consider patent protection for more inventions vs. keeping them as trade secrets

Trade Secrets

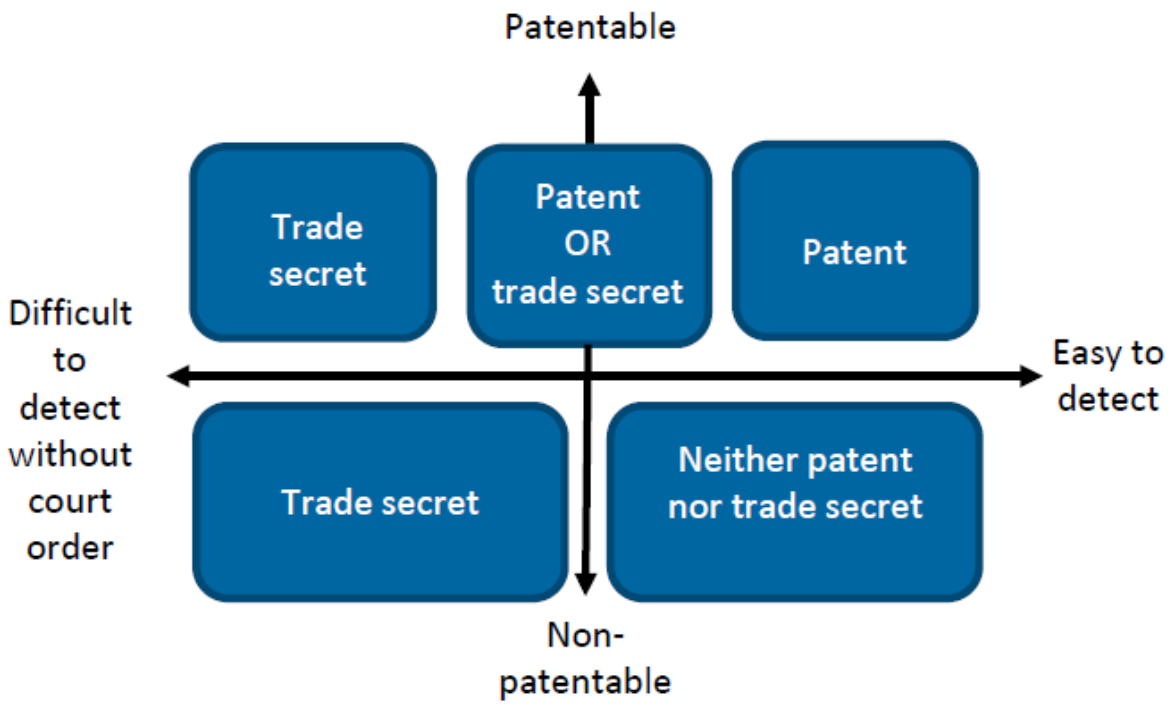
Any proprietary information that provides a competitive advantage in the marketplace, such as formulas and recipes, manufacturing processes, best practices, and other “know how”

1. Information not generally known outside the company;
2. Information is valuable to the company (or likely would be valuable to competitors); an
3. Measures have been taken to guard the secrecy of the information

For as long as secrecy of such information is maintained, it is protected against improper appropriation, i.e. potentially indefinitely

- no protection if the information is developed independently or inadvertently disclosed

Trade Secrets vs. Patents



- For on and same invention, filing a patent application forfeits any trade secret protection, BUT
  - trade secrets could be complementary to patents in protecting certain aspects of the overall product
- When both options are available, a decision to seek patent protection vs keeping invention secret depends on which IP right is more valuable
  - whether an invention could practically be kept secret is an important factor to consider

Steps to Take in No-Non-Compete Environment

The challenge is that protecting and enforcing trade secret rights is appreciably more burdensome than relying on non-compete agreements alone. Trade secret protection and enforcement requires careful attention to information control, workforce access and training, and vigilant and timely review of data upon employee departures.

- Take inventory of your valuable trade secrets and restrict access to them, both physically and technologically
  - Maintain a list of company's trade secrets and keep track of necessary information to increase the chances of successful enforcement
  - Establish "need to know" basis for accessing trade secrets by employees and contractors
  - Restrict physical access to secure areas
  - Implement tighter information security measures with your IT team

- Update and increase reliance on NDAs
  - Make sure the scope is not overly broad
  - Specifically address trade secrets

Steps to Take in No-Non-Compete Environment

The challenge is that protecting and enforcing trade secret rights is appreciably more burdensome than relying on non-compete agreements alone. Trade secret protection and enforcement requires careful attention to information control, workforce access and training, and vigilant and timely review of data upon employee departures.

- Update employee handbooks & HR policies and conduct training
  - Educate employees and manage expectations on how they should handle trade secrets
  - Remind departing employees of their obligations regarding trade secrets during exit interviews, and make sure no unauthorized copies or transmissions of protected information have been made prior to departure

- Consider seeking more patent protection
  - add lack of non-compete protection to your list of factors when deciding between patent filing vs keeping invention a secret

Are You a Fiduciary? The New Definition of an ERISA Fiduciary

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Overview

- **Objectives**
  - Advise plan sponsors and investment advisors
  - Inform investors of rights
- **Background**
  - Regulatory Environment
  - Investment Environment
- **The Retirement Security Rule**
  - New Definition of Fiduciary
- **Impact of the New Rule**
  - Who effected? How to deal?
- **Chance of Survival**
  - Legal challenges

Background

- **1970s – Regulatory Environment**
  - Employee Retirement Income Security Act of 1974 (“ERISA”)
    - Established fiduciary duty with respect to management of ERISA plans.
      - Duty of loyalty and prudence.
      - Operate plan in best interest of participants.
      - Must avoid conflicts of interests, such as prohibited financial incentives.
    - An ERISA “fiduciary” is a person that either:
      - exercises discretionary authority or control over the assets or administration of a retirement/welfare plan; or
      - renders investment advice for a fee (direct or indirect) with respect to plan assets (“Investment Advice Fiduciaries”).

Background

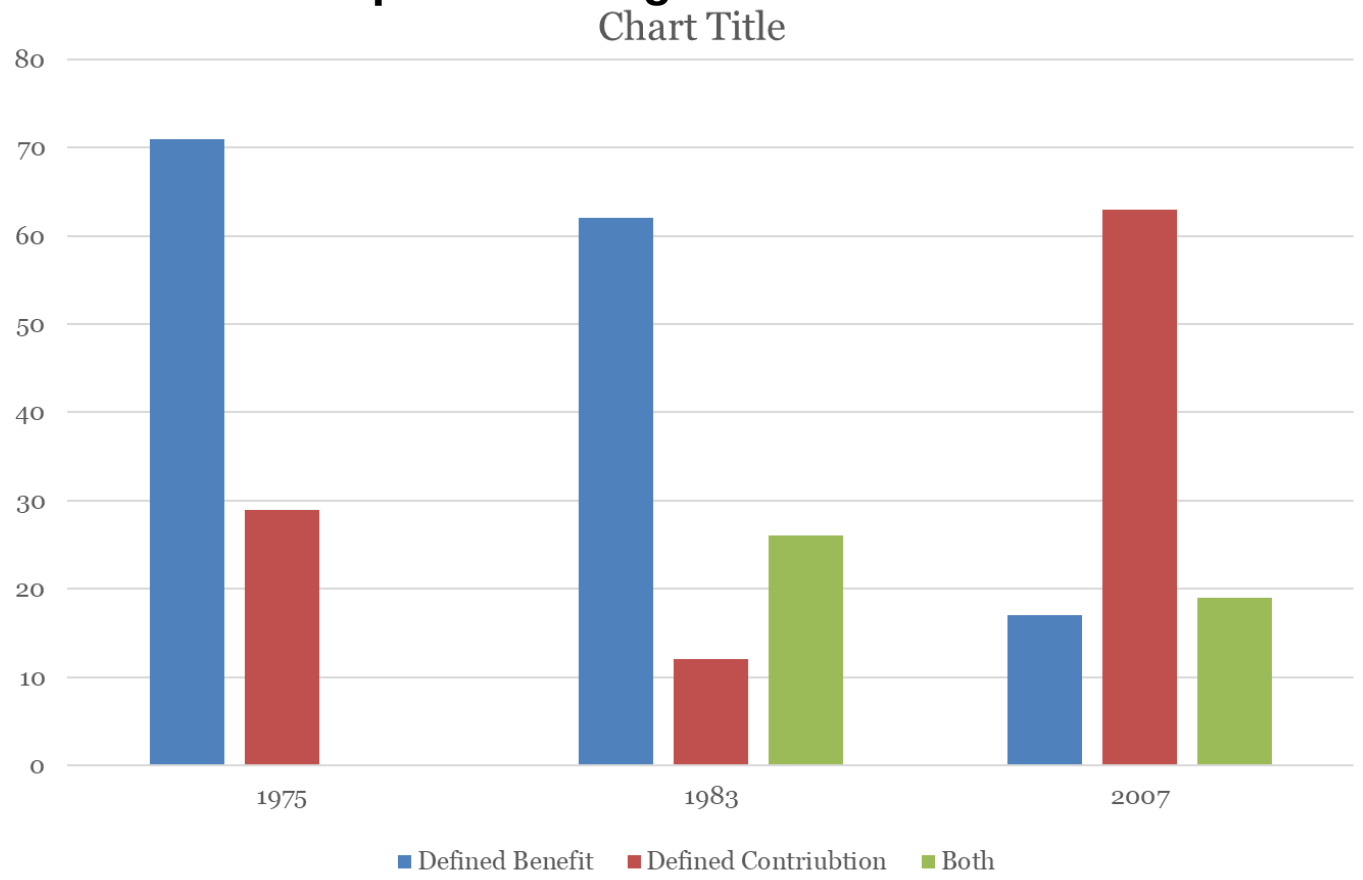
- **1970s – Regulatory Environment (Cont.)**
  - U.S. Dept. of Labor Regulation, § 2510.3-21(c)(1) (Fed. Reg., Oct. 10, 1975) (the "1975 Rule")
    - USDOL narrows the definition of ERISA Investment Advice Fiduciaries
      - FIVE PART TEST: A person is an Investment Advice Fiduciary if the person:
        - renders advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property
        - on a **regular** basis
        - **pursuant to a mutual agreement**, arrangement, or understanding with the plan or a plan fiduciary that
        - the advice will serve as a primary basis for investment decisions with respect to plan assets, and that
        - the advice will be individualized based on the particular needs of the plan.

Background

- **Regulatory Environment - 1975 to 2024**
  - **<u>NO</u>** Change to 1975 Rule
    - Many failed attempts to do so
- **Investment Environment – 1975 to 2024**
  - **<u>MAJOR Change</u>**
    - In 1975, defined benefit plans held 71% of retirement assets while defined contribution plans held 29% of retirement plan assets
    - In 1983, 62% of workers were covered by defined benefit plans, as opposed to 12% in defined contribution plans only, and 26% in both.
    - In 2007, 17% of workers were covered by defined benefit

Investment Environment 1975-2007

Share of Retirement Plan Assets/Participants among Defined Benefit Plans and Defined Contribution Plans



Source: ABA, Employee Benefits Law, 5-7 n. 25 (4th Ed. 2017) (citations omitted). Please note that 1975 data is based on share of asset value whereas 1983/2007 is based on share of participants.

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Policies Driving Transition from 1975 Rule to 2024 Rule

- **Protect Retirement Investors**
  - Today, individuals, as opposed to sophisticated pension fund administrators, are primarily responsible retirement assets.
    - In 2022, Americans rolled over approximately $779 billion from defined contribution plans, such as 401(k)s, into IRAs
      - Source: White House Press Release, “The Retirement Rule0Strengthening Protections for Americans Saving for Retirement,” (Oct. 31, 2023) (citing Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience*, p.145).
    - Individual Investors require more protection than in 1975 Rule based on new investment environment.
- **Closing Loopholes**
  - Biden Administration identified “blind spots” in the 1975 Rule, including:
    - one-time financial advice over transactions like a 401(k) rollover
    - Transactions concerning purchase of non-securities, such as real estate, certain kinds of annuities (esp. fixed index annuities), or commodities like gold
    - Advice to plan sponsors concerning which investments to put on a 401(k) lineup.

The 2024 Retirement Security Rule

U.S. DOL Labor Reg. § 2510.3-21(c), as amended April 2024

- Investment Advice Fiduciaries is a person that:
  - make an investment recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property.
  - to a retirement investor
  - for a fee or other compensation; and
  - The person either [Trust and Confidence Element]:
    - directly or indirectly (*e.g.,* through or together with any affiliate) makes professional investment recommendations to investors <u>on a regular basis as part of their business and</u> made the recommendation in such a manner that would <u>indicate to a reasonable investor that it was particularized</u> to that investor based on the person's professional experience permitting reasonable reliance on the recommendation; or
    - represents or acknowledges that the person is acting as a fiduciary under ERISA with respect to the recommendation.

- New Definitions
  - Investment Recommendation
    - recommendations concerning acquiring, managing, rolling over, transferring, or distributing assets
  - Retirement Plan Investor
    - ERISA plan, plan participant or beneficiary, IRA, IRA owner or beneficiary, and any fiduciary that exercises discretionary authority or control with respect to the management of a plan or the investment of its assets

Impact of the New Rule

- **Closing "One-Time Advice" Loophole**
  - The 1975 Rule only applied if the person *regularly* provided investment advice to the investor
  - Under the New Rule, there is *no requirement* that the person "regularly" advise the investor.
    - Instead, any person can become a fiduciary, provided they provide a recommendation after establishing "trust and confidence" with the investor.
- **Eliminating Mutual Agreement Condition**
  - The 1975 Rule only applied pursuant to a mutual agreement, arrangement or understanding that the investment advice will serve as a primary basis for a retirement investor's investment decision.
  - The New Rule may apply without any such understanding

Impact of New Rule (Cont.)

- **No More "Fine Print"**
  - The New Rule explicitly prevents persons from disclaiming fiduciary duty in written statements.
    - Any such writings are a nullity.
    - Fiduciary duty is determined by the facts and circumstances of the "recommendation"
- **Expansion of Fiduciaries**
  - Anyone affiliated with a brokerage/investment firm can be a fiduciary.
  - *Steps to minimize fiduciary proliferation*:
    - Train sales staff to minimize recommendations in contexts that establish "trust and confidence;"
    - Review and revise brochures and marketing material for the same

Change of Survival

- **Past attempts**
  - More than a dozen other attempts to change.
    - All Failed.
- **Current Lawsuit**
  - On May 2, 2024, a group of insurers filed a lawsuit to prevent the implementation of the New Rule on grounds that it exceeds the DOL's authority to promulgate regulations.
    - "…In its zeal to reach the desired result of turning every financial product salesperson who deals with a retirement investor into a fiduciary, the DOL has rushed this latest rule package through at extraordinary speed and without any substantial consideration of the consequences or the effect it will have on the insurance industry in particular."
      - *Federation of Americans for Consumer Choice, Inc., et al. v. U.S. Dep't of Labor*, 6:24-cv-0163 (Dist. Ea. Tex. 2024).

Updates on Credit Card Surcharges in New York State

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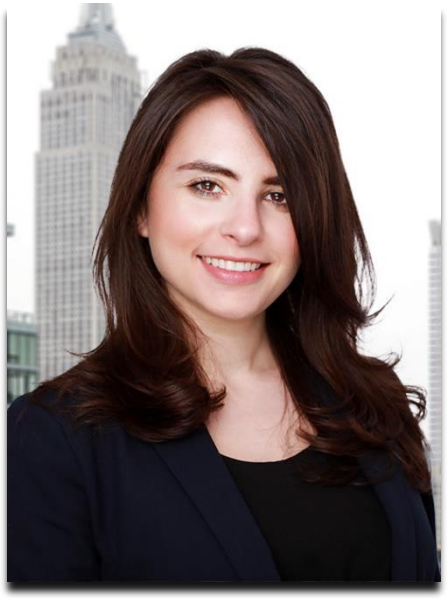
Practice Pointer: Takeaways on new Form ETA 9089



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Takeaway 1- 3

- **Takeaway 1**: No substantive changes to PERM practice : Regulations, FAQS, DOL Guidance, and BALCA decisions have not changed
- **Takeaway 2:** “Warning” in FLAG: Even if you receive a warning while completing FORM ETA9089 in FLAG, this does not mean your answer is wrong
- **Takeaway 3**: Final Determination Version Available for I-140 : Applications that do not require certified PERM but do require PERM submission--- Final Determination Version Available

Takeaway 4-6

- **Takeaway 4:** No separate attorney/employer account necessary : Employers cannot view new Form ETA9089; Employers will not need to receive new sponsorship verification questionnaire post-filing
- **Takeaway 5**: Legacy PERM system remains active for post-filing functions
- **Takeaway 6**: Cannot upload information into the FLAG system after Form 9089 is filed; Contact Technical Help Desk (not PERM help desk) at plc.help@dol.gov

Takeaway 7-8

- **Takeaway 7**: Attorney Representation Instructions: “Identify whether attorney/agent representing the foreign worker is also contracted with the employer by checking “Yes” or “No”
- OFLC commented that this question concerns whether the employer is receiving payment of any kind from foreign national employee for obtaining labor certification.
- **Takeaway 8:** Question E, 1-5, page 2, 9141 issues

- If new agent/attorney, do not link 9141 prevailing wages– manually type the PWD Case Number
- Cannot linked PWD after it expired
- Additional 9141 forms if more than 2 requirements
- Annual wage/ Not hourly wage
- If PWD has 2 different wages, use higher wage (if higher wage not reflected in 9141 linked determination use free text box)

Takeaway 9-11

- **Takeaway 9:** If worksite unknown, rely on 1994 Barbara Farmer Memo principles
- **Takeaway 10:** All Worksites/MSA; In this section, list all worksites even if in the same MSA AND even if contrary to instructions on FORM ETA 9141 (Same box where an employer may include language such as “telecommuting is an option” and “various unanticipated worksites)
- **Takeaway 11**: Question G,4,Page 4
  - *Matter of Francis Kellogg*, 1994 INA 00465 (Feb.2, 1998) “Kellogg language”
  - Document all recruitment efforts

Takeaway 12-15

- **Takeaway 12**: Question G, 6-12, page 4
  - OFLC uses ONET (Not OFLC)
  - Answers here determine Audit
- **Takeaway 13:** Physical Notice of Posting still necessary
- **Takeaway 14**: “Foreign Worker Education” : Show all education qualifications even if not related to the minimum requirements degree
- **Takeaway 15**: “Foreign Worker Experience” : --- tech team working on this.

Your Questions

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WORKPLACE 2024

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Thank You

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