***Hiring To Firing Podcast*: Navigating Noncompetes: A Comprehensive Guide – Part 2**
Host: Evan Gibbs and Tracey Diamond
Guests: Matthew DelDuca and Jim Earle
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Evan Gibbs:

Hey, everybody, and welcome to *Hiring to Firing*, the Podcast. I'm Evan Gibbs and with me as always is my very talented co-host, Tracey Diamond. We're both labor and employment partners at Troutman Pepper and together we've dealt with pretty much every employment issue under the sun, everything from hiring to firing, and all of the really crazy stuff that's in between.

Today, we're happy to welcome two guests. We've got Jim Earle, who's one of our fellow Troutman partners in our executive comp practice group, employee benefits and executive comp, along with Matt DelDuca. He's our practice group leader here in our Labor and Employment Practice Group, and we appreciate both of you guys joining us today.

Why don't we start out just letting you guys take a minute just to tell us just a little bit about your background, about your practices?

Jim Earle:

Sure. This is Jim, and I focus really on public company executive compensation. Been doing that for over 30 years. Everything that's in the life of an executive's experience with the company, the hiring, retaining, incentivizing, and sometimes letting go, and all the programs that go along with that, includes issues that relate to tax securities, law disclosures, governance, et cetera.

Evan Gibbs:

Thanks, Jim. What about you, Matt? Mr. DelDuca?

Matthew DelDuca:

Well, I'm a trial lawyer by training and I've been litigating employment matters for decades, I guess I could say. A long time. And among those, I've handled many, many restrictive covenant, non-compete cases in the courts around the country. And with that experience, I advise employers on how to use and enforce, and in some cases avoid enforcement, of a non-compete agreement.

Evan Gibbs:

Yeah, that's right. We never know which end of the stick we're going to be holding in one of these cases. You never know.

Tracey Diamond:

And it certainly is active these days for sure. This is such a hot area of the law.

Evan Gibbs:

Yeah, it really is.

Well, listeners, as you probably already know, today's episode is the second and final installment in our series on non-compete agreements. And as with part one of the series, we're going to be using clips from what's one of my favorite shows, *The Office*, to highlight the issues that we're discussing. There's so much fodder from *The Office* we could use here and elsewhere.

Tracey Diamond:

Evan would make this whole podcast *Hiring and Firing: The Office* if he could.

Evan Gibbs:

I know. Seriously. I mean, I feel like we could probably just take the series from episode one all the way through the finale and just make every episode be a part of our podcast.

Tracey, you alluded a minute ago, there's been a lot of talk about non-competes that we've been hearing, especially this year in light of the FTC's proposed rule banning non-competes, which we talked through briefly in part one of the series.

Matt and Jim, we're curious, what trends have you been seeing in recent years around non-competes and non-solicitation agreements in your practices?

Matthew DelDuca:

It's been an incredibly active time in the world of non-competes. I'll talk about both. Non-competes, you can't go out to work for our competitor after you leave us. And non-solicitation, you can't go and solicit our customers or our employees after you leave us. Together, it's an incredibly active time in that area of the law and it's not finished.

There have been statutes passed around the country either banning non-competes or limiting the use of non-competes and non-solicitation provisions, that it's not only been one or two states, it's been, I think over 30 states in the country have some form of statute that governs non-competes, some of which are quite broad as most people know about California.

But there's also provisions in Massachusetts, there's new provision in Minnesota, there's provisions in Washington State, Colorado, Washington DC. And there are some bills on governors' desks as we speak, that could have major impacts on the field, including one in state of New York and one in my home state of New Jersey as well. So it's an extraordinarily active time.

Virtually, all of the activity has been in the direction of restricting the enforcement of non-competes and non-solicitation provisions.

Evan Gibbs:

Unless you live in Florida, of course.

Matthew DelDuca:

So that's statutory developments. There's also been regulatory or non-statutory developments out of the federal government. You mentioned the FTC's proposed rule. There was also an opinion by the Chief Counsel of the National Labor Relations Board that calls for limitations on the use of restrictive covenants, at least for those employees covered by the National Labor Relations Act. So a lot of activity in the legislative and the executive branch.

There's also been a lot of activity in the courts. There hasn't been a sea change in what the standard is for enforcement of non-competes in the courts, but there has been a distinct tightening of the application of the standards to individual decisions, so that it's become much more difficult to enforce non-competes.

The courts are now requiring there to be a really tight fit between the employer's legitimate interest and the language of the agreement. And they're requiring that it not be unreasonable in virtually any respect or over-broad, and they're requiring that it not be vague that an employee, particularly in the case of employment non-competes, that the employee should be able to read it and know precisely what activity is prohibited and what is not.

That has made the world that Jim and I operate in where we're drafting non-competes much more difficult.

Jim Earle:

I'll just add to that real quick, Matt. In the world of compensation, it's incredibly common to have companies want to provide compensation that could continue after someone's employment ends, particularly executives where they don't want to pay that compensation if the executive goes off and competes or engages in other bad behaviors that hurt the company. And they want to have this condition on payments that the executives will behave.

And they sometimes don't care that they go to work for a competitor. They just don't want to have to pay the money to the executive if they've gone to work to a competitor or gauged other activities like solicitation. We have these provisions that are common referred to as Forfeiture for competition.

And a question I think that comes out of all those developments you're talking about in this hostility towards non-competes is, does that actually apply to Forfeiture for competition? Are those distinct things or are they part of the same thing?

Evan Gibbs:

So Jim, Matt, I mean, we're talking about the forfeiture for competition agreements like you just alluded to, Jim, and I think that's a really good place for today's first clip from *The Office*.

Now again, this is the same episode. We're still using the same show. This is the same episode that we use in part one of this series in which Michael Scott has left his former employer, Dunder Mifflin, to start a competing company called The Michael Scott Paper Company.

And in this clip Michael Scott calls one of Dunder Mifflin's sales employees, everybody's favorite Dwight Schrute, and tells him how he's going to aggressively steal Dunder Mifflin's clients. Let's take a listen.

> **Michael Scott:**
>
> Dwight, do you mind if we talk?
>
> **Dwight Schrute:**
>
> Sure. That'd be fine.
>
> **Michael Scott:**
>
> If you keep coming after us, the Michael Scott Paper Company cannot succeed.
>
> **Dwight Schrute:**
>
> This is war and that is what happens.
>
> **Michael Scott:**
>
> Oh, one more thing. I'm going to have you listen while I steal your biggest client.
>
> **Dwight Schrute:**
>
> Oh, no. No, no, no, no.
>
> **Michael Scott:**
>
> Oh, wow.
>
> **Dwight Schrute:**
>
> Michael! Michael!
>
> **Michael Scott:**
>
> I'm turning you down right now.

Dwight Schrute:

Michael?

Michael Scott:

You can hear me, but I can't hear you.

Secretary:

Mr. Scofield's ready to see you now, Mr. Scott.

Michael Scott:

Oh, great. Mr. Schofield's ready to see me. Thank you so much.

Dwight Schrute:

Don't let him in. He's a traitor.

Michael Scott:

Opening the door.

Dwight Schrute:

Michael!

Mr. Schofield:

Michael, good to see you.

Michael Scott:

Mr. Schofield, good to see you.

Tracey Diamond:

So I have to say when we sometimes find clips to use as jumping off points for discussions, we have to connect the dots, but this is just so on point for our discussion today.

Let's say that Michael Scott had received Dunder Mifflin stock options and he signed a forfeiture for competition agreement in connection with the stock grants. And what would be the company's remedy or leverage in this situation where Michael has gone out and started a competing business?

Evan Gibbs:

I think this is what Jim was talking about. This is exactly what those forfeiture for competition agreements are structured to prevent. Jim, in your experience, how strong is that leverage?

Have you seen or been involved with negotiations where, for example, an executive goes to work for a competitor and the company lets them know, "Hey, well, we're going to pull back this comp that we're paying you."

And the executive's, "Oh, well, I'm sorry. I don't want to forfeit that."

How have you seen this play out in the real world?

Jim Earle:

Well, as a practical matter in the real world, forfeiture for competition is really just a cost that a new employer is going to have to look to bear, right? It's sort of a buyout cost because the individual who is looking to change jobs will expect that they're going to lose that compensation that it will forfeit.

Some of our clients actually have annual certification processes for former employees where they have to certify in writing that they haven't engaged in the behaviors that they're not allowed to engage in to continue to vest. It really becomes a buyout by new employers, and that's how it one way is very distinguishable from a traditional non-compete.

The employer doesn't have the ability to go seek an injunction to prevent the employment. They can go do it. It's the employee's choice, and that's why sometimes states that are favorable towards this, they call it the Employee Choice Doctrine, freedom of contract. That's where it plays out as a practical matter though. It's a new employer realizing they're going to have to pay some money to get the person to be willing to come.

Tracey Diamond:

If a new employer hires the employee when there's a forfeiture for competition agreement in place, does the new employer risk liability for tortuously interfering with that contract or does the trigger of losing that, the forfeiture clause itself, is that the only remedy?

Matthew DelDuca:

The typical non-compete, the new employer would be at risk for a tortious interference claim, but the distinction with the forfeiture for competition clauses is the employee has a choice of whether to compete or not. So if the employee goes ahead and competes, there's no basis for a tortious interference claim against the new employer. It's the employee who's going to forfeit that provision. That was the choice the employee made, and it's not tortious for the new employer to allow that employee to go ahead and make it and come to work for them.

Tracey Diamond:

So you both just mentioned the Employee Choice Doctrine. Can you talk a little bit about that and how there is that concept in a state law, how that differs from states that don't have it?

Matthew DelDuca:

So in most non-compete agreements, the courts recognize that they are restraints on trade and that they have to be carefully reviewed and they're not interpreted or enforced like regular contracts because they are restraints on trade. So special rules apply to that.

As a threshold issue. The Employee Choice Doctrine avoids that more difficult treatment for enforcement of covenants because the idea is that since an employee has a choice whether to keep the money and not compete, or lose the money and go ahead and compete, the idea is it is either not a restraint on trade or less of a restraint on trade because the employee has the ability to choose.

And so, courts don't apply the more rigorous standard where the courts apply the Employee Choice Doctrine, which is the threshold question in a lot of these cases.

Jim Earle:

Right.

Evan Gibbs:

Wasn't there a case that came out recently, the Ainslie case, that addressed this issue in Delaware?

Jim Earle:

Yeah, there is a Delaware Chancery court case that's been appealed where the court analyzes a complicated fact pattern where there are both at once, traditional non-compete provisions in play, as well as what look like forfeiture for competition provisions in some equity compensation.

It involves individuals who are high paid limited partners in a large multinational financial services company structured as a limited partnership. And the court has to analyze both traditional non-compete covenants that are part of the controversy as well as some forfeiture for competition provisions.

And the court looks at those, but does specifically analyze the Employee Choice Doctrine and decides that on these facts that the Employee Choice Doctrine does not apply to those forfeiture for competition aspects of the facts. And decides that really more of a public policy, nuanced reasonableness analysis that you would apply to a traditional non-compete, which it applies to the underlying non-complete also applies to this forfeiture for competition clause.

And although it applies a softer version of that reasonableness analysis, because it applies an analysis you would apply to a non-compete in a sale transaction. So it's really kind of a case that has some odd angles to it. The court does end up finding that the non-compete or the forfeiture for competition provisions, whatever you want to look at in that case, were unreasonable in scope and a couple of respects and rejects them.

Evan Gibbs:

A lot of companies will, in these provisions, they'll use Delaware Choice of Law provisions, right? This can be pretty significant, or it's a pretty significant development in the law.

Jim Earle:

It's a significant development for that very reason. Many public companies have Delaware Choice of Law and have forfeiture for competition provisions in their equity award program.

Tracey Diamond:

And this is not like a statute where it would be forward facing, where there's not potential for retroactive application. This is an interpretation of existing law, so it could be applied across the board to existing agreements, right?

Jim Earle:

Yes, a hundred percent.

Matthew DelDuca:

Yes. But it's on appeal to the Delaware Supreme Court, so the Chancellor Court didn't have the last word on it, but we'll have to see. And it's interesting because you mentioned the prominent use of Delaware choice of law provisions in lots of agreements including plans and just run-of-the-mill non-compete agreements. And there have been a number of developments in the Delaware courts.

In addition to the Ainslie case, there have been other cases where the court has really tightened down on the enforcement of non-competes. And there's a couple areas real quickly in particular. Number one, there's this concept in non-compete law where a court can blue pencil the agreement. That is, if it's too broad in terms of geography or time or the scope of the restriction on the employee, the court doesn't have to either enforce or not enforce, it can also blue pencil and only enforce it to the degree the court thinks it should be enforced.

And so the court is essentially revising the agreement. And the Delaware courts have always had the ability to blue pencil and have done it quite a bit over the years. But all of the recent cases, the Delaware Chancery Courts have declined to blue pencil. And not only that, they've applied some of the concepts behind the typical enforcement very narrowly. So they are requiring that the employer's legitimate interest and the restriction be really tightly overlapped, that there shouldn't be any way that the agreement restricts the employee that is beyond what's necessary to protect that employer.

And if there's vagueness, the Delaware courts are finding agreements to be unenforceable for that reason. Two examples. In that one case, in the Ainslie case, the agreement didn't have a geographical scope and the Defendant took the position that it was worldwide in scope.

The individuals competed with the employer essentially right down the block. It was a block over in Asia. It was right down the block from where they had been working for the employer. So

there really wasn't any question. It was very close in area to where they worked. It was in the same spot.

Yet the court found that the agreement was unenforceable because the employer could not show that they had a worldwide scope and therefore that it was over-broad in its application. That, and some vagueness aspects of the opinion, are really troubling for employers trying to enforce non-competes.

One of the vagueness restrictions was that the agreement not only dealt with competition with the employer, but with its affiliates.

Evan Gibbs:

Yeah, that's a common problem. We see that a lot now.

Matthew DelDuca:

We do.

Jim Earle:

Yeah. In a lot of public company programs, you try to sometimes draft for the specific, so it's not uncommon to see competition, meaning going to work for a specific list of known named competitors. But then there's often this catchall clause put in that also says, or any other activity that is competitive with the parent company or any of its subsidiaries.

And it's exactly that the court critiqued, because the argument was the individual wouldn't know whether they were actually violating the restriction or not in many cases, given how broad that provision was and how broad the company's business operations were.

Evan Gibbs:

Yeah, that's right. So many of these big companies, I mean, there's no way you would have any idea of what the affiliates and subsidiaries are. You couldn't even name them, let alone know precisely what line of business they're in. I think that's certainly an issue.

And then the nuances between state laws. I don't know about you guys, but it seems like every time we have a multi-state employer, the request is always we want an agreement that we can roll out to everybody in every state, and it's always going to be enforceable.

And I think Matt, the situation you were talking about where they craft the restriction really broadly, I think can be a problem in a lot of states.

Matthew DelDuca:

Yeah, I think when blue penciling was commonly done by judges, a lot of lawyers drafting these agreements intentionally drafted them very broadly so that they could... Oh, they'll be cut back later by the courts if it's over broad. Well, you can't count on that anymore. And that broad language, things like affiliates who are directly or indirectly, words like that, are what is causing

courts to say the whole agreement is unenforceable, which is a pretty extreme result for lawyers.

Tracey Diamond:

Yeah, I've been advising against that one-size-fits-all approach to restrictive covenant agreements that really used to be very typical, what? Five, six years ago or more. It really just doesn't work for multi-state employers anymore if they really have a prayer of trying to enforce these agreements.

Evan Gibbs:

I'm just curious, and this is just armchair conjecture, but what do you guys think is driving the trend of more employee friendly enforcement of non-competes? I was thinking about, I'm not really sure. I don't know if it's... There's not, for example, a particular political movement or anything like that that I can really point to that seems to take a focus on this.

But it seems like it's taken a life of its own and it seems like it's like we were talking about, it's a multi-state trend. And I'm just curious if anybody has any thoughts on what's behind that?

Matthew DelDuca:

It's interesting. It may be one of the few areas where people on the right and people on the left tend to agree that the individual should be restricted as little as necessary in their employment.

And the other thing is that, honestly, I think there's been really overreaching by some employers. There are employers that, over the years I've had them, where they want to have everybody sign the non-competing, including the receptionist. I think there has been a belief that by having people sign them when they come in the door, when they really don't have a choice, people will sign them and then many of those people will just comply with them. They're not going to be in court to enforce these covenants because people are just going to sign them. And people comply because they really can't afford to fight the company.

I think there is a little bit of a backlash to the idea that it's just unfair, and so they'll enforce them if the employer has a really strong interest and doesn't overreach, but that's about it.

Tracey Diamond:

Yeah, I think to your point earlier, Matt, about putting it into context of what else is going on in the evolution of this area of the law, the FTC is looking at an outright ban. The general counsel of the National Labor Relations Board opined that, at least with regard to non-managers covered by the National Labor Relations Act, that it's overreaching to have a non-compete.

And then the Department of Justice also has been really trying to go after no-poach agreements, which is a form of non-solicitation where two companies are agreeing to not hire each other's employees. So I think we're seeing this being hit from all sorts of different angles, and to your point earlier, across political spectrums as well.

Jim Earle:

Matt, something you said just struck a chord with me about both right and left on a non-compete could agree around the notions of individual freedom, the ability to take the job you want, which totally makes sense. But I'd argue there that the forfeiture for competition kind of fits into that thematically because we're also a country that has celebrated freedom of contract.

And the forfeiture for competition concept is that hey, I'm agreeing as an employer to pay you certain compensation, provide opportunities to you, but I'm going to condition those on certain behaviors that are reasonable to me. I don't want to be investing my money in you and having you go out and reduce my future profits by using what you've learned here in some competitive manner. And so I'm going to condition this compensation on you staying in service with us. And if you leave, I may continue to give you the opportunity to earn this compensation, but only if you engage in proper behaviors. And I'm laying out what those are as a matter of contract law. We can understand what those are, and you have agreed to that freedom of contract. Why isn't that respected?

That to me is where the Employee Choice Doctrine and forfeiture for competition concept maybe is distinguishable and maybe could be considered separately from these other trends against non-competes more generally, although oftentimes they're not thought of as separate things or not distinguished.

Matthew DelDuca:

Yeah, the Chancellor in Delaware didn't agree with you on that though, Jim.

Jim Earle:

Exactly.

So far that's the case there. The US Chamber of Commerce and a host of others have put a full throated endorsement to that concept up to the Delaware appellate courts, so I guess we'll see what happens.

Matthew DelDuca:

We sure will. The argument though that the Delaware Chancery judge made is one we really haven't talked about here, which is that he reviewed the forfeiture on competition clause in the context of forfeiture clauses in the law. There's an equitable maximum. The law abhors a forfeiture, and the question was whether these provisions... Typically if you have a breach of a contract, the non-breaching party has to prove they've been damaged and by how much, and they have to prove their damages.

So you could look at it as a forfeiture or as a liquidated damage provision.

Evan Gibbs:

Penalty.

Matthew DelDuca:

You could have capital, in that case, worth hundreds of thousands of dollars, maybe even more. Some of these cases involve millions of dollars. And it's binary, right? It's on or off. And if you breach, you lose it all and the employer essentially gets to have self-help because they're the ones who don't pay out the benefit.

The Ainslie court looked at whether that violates public policy because it isn't really compensating the employer for the actual damage caused by the competition, but rather it's in some cases a large amount of money that the employee has to walk away from. That analysis was a whole other body of law, this forfeiture liquidated damage provision analysis. So the Delaware Supreme Court has a lot of work to do in reviewing that decision. That's for sure.

Jim Earle:

Part of the challenge in Ainslie was that you had two things going on at once, I think. You had individuals who had both capital investments in a partnership and a traditional non-compete obligation and obligations that would refuse to repay them their capital if they engaged in that conduct.

But part of it was equity compensation to be earned in the future with a four-year vesting schedule subject to continued service with a condition that you would lose your right to earn that compensation if you engaged in the bad behaviors. And in the more traditional circumstance that I'm familiar with, we don't have these two things happening at once. There's one thing.

There's a restricted stock unit award agreement that vests over four years under several conditions. One is you continue in service. In some cases, if you don't continue in service because it's a good circumstance like retirement, you can continue to have that compensation become earned invested.

So it's not really a forfeiture so much, but you still have an opportunity to have that compensation to become earned invested on those feature dates if certain conditions are met, among them don't engage in these bad behaviors we laid out contractually.

So it's another way to formulate it that was harder to do in Ainslie because of the fact pattern, to say this is about a condition subsequent to being able to earn the compensation. You had to meet these conditions to have earned it in the first place. And it's just like service.

I have a four-year vesting and I got to stay in service. If I leave, doesn't mean I still get to vest automatically if the contract says I forfeit it. It wasn't earned yet.

Tracey Diamond:

The condition precedent instead of forfeiture, it certainly sounds better. It certainly sounds a lot less like you're taking something away. I think this is probably a good time for our second clip. I don't want to forget about that.

Evan Gibbs:

I think it is. This is the last clip from this particular episode of *The Office*, and it sort of ties it up with a nice bow. And so in this last clip, Dunder Mifflin Management, they've approached Michael and his team over at the illustrious Michael Scott Paper Company to try and negotiate a buyout of Michael's company because they've taken so many of Dunder Mifflin's clients.

So here's a clip from the negotiations of the buyout.

> **David Wallace:**
>
> Here's the situation. Your company is four weeks old. I know this business. I know what suppliers are charging. I know you can't be making very much money. I don't know how your prices are so low, but I know it can't keep up that way. I'm sure you're scared, probably in debt. That's the best offer you're going to get.
>
> **Michael Scott:**
>
> I'll see your situation and I'll raise you a situation. Your company is losing clients left and right. You have a stockholder meeting coming up and you are going to have to explain to them why your most profitable branch is bleeding. So they may be looking for a little change in the CFO. So I don't think I need to wait out Dunder Mifflin. I think I just have to wait out you.

Evan Gibbs:

Okay. And yeah, so I think David Wallace's position is certainly not enviable by anybody. We've been talking about how the forfeiture for competition provisions can work. I mean, it seems like in this situation, if Michael had had some type of Dunder Mifflin equity, which maybe he does, they didn't mention it in the show, but I guess this is a situation where they could leverage that and say, "Oh, hey. Look. You've formed a competing company downstairs in the store room in the basement, so you're going to forfeit this," whether it's a vesting schedule or some type of future compensation.

This is the type of situation they're designed for, right?

Matthew DelDuca:

Yeah. Well, certainly one of them. Yes. It's interesting in that case that we talked about, the Delaware case, the employer didn't bring the action. It was the employee who brought the action for a declaration that the forfeiture couldn't be enforced.

And so, the Defendant didn't have the choice in that case, which a lot of employers do have, of just not enforcing something in a particular set of circumstances. Picking and choosing when they enforce.

Evan Gibbs:

That raises a great point, right? Because I was talking about this with someone else recently. We'll use Washington State for example. They have a statutory provision where there's a $5,000 minimum penalty plus attorney's fees in a situation where a company has required an individual to sign a non-compete agreement that doesn't meet the requirements of the Washington statute.

Tracey Diamond:

Colorado is very similar.

Evan Gibbs:

Yeah, that's right. And so in states that are like that, it may be that the company chooses. They look at the statute, look at the non-compete, and they say, "Okay, we don't think it's enforceable, so we're just going to let it go. Let them compete and not make a big deal about it."

But just like in the Ainslie case, the employee could, of course, file a declaratory judgment action and go to a judge and say, "Hey, judge. I want you to declare this agreement invalid."

And in that situation, at least in the Washington statute, they would have a claim for attorney's fees and some of those statutory damages. So I think that's just another issue that companies have got to think through when they're going to apply these agreements across jurisdictions.

Tracey Diamond:

It certainly takes it to another level, because now we're talking about companies having liability just for asking employees to sign the agreements, even if they really have no intention and don't take any action to enforce the agreements.

So that's a whole nother ball of wax.

Evan Gibbs:

Yeah. And like in Oregon, it's a criminal violation to force someone to sign a non-compete agreement. It's either unlawful or in Washington and Oregon, they have minimum income thresholds for employees who can be subject to them.

For example, if you required somebody who's making $50,000 a year to sign a non-compete, then that's a criminal violation right there.

Jim Earle:

Our larger public company clients typically where they're having forfeiture for competition provisions and equity award agreements, those are going to very high paid people. But they do look and consider the various state law developments because even though the agreements may have a choice of law provision in there, there's not necessarily a guarantee that a given court will respect that choice of law provision.

The classic case, of course, is California. We'll have clients that operate in multiple jurisdictions, both inside and beyond the US, who may have special provisions in their equity board agreements that make exceptions or changes to the scope of their post-employment covenants depending on location of the employee.

So they might have a forfeiture for post-employment conduct provision that, for someone in California, doesn't include competition.

Tracey Diamond:

It certainly gets complicated.

Last question for you guys. In light of the Ainslie case and the way the law is evolving, what are you thinking about in terms of advising clients about Delaware as a choice of law? I know it's such a go-to state when it comes to big corporate deal work.

Is this enough of a concern that companies should maybe think about going elsewhere in terms of their choice of law provision?

Matthew DelDuca:

Well, it is. That doesn't mean you're going to no longer use Delaware law, but you should think about whether or not your other options are better for what you want and whether you're going to get them applied. There's lots of nuances to that, whether your own state is going to enforce its law and how you're going to get your law applied in particular cases.

But in any event, if there is more certainty in the state where you have your headquarters, for instance, even if you're incorporated in Delaware, if your headquarters is in another state, you may decide that you're better off with that state's law. We've done this a little bit with some clients of late. Every state has its own nuance, and for many of those states, they're in a state of change, and so it's a little hard to predict.

So it's a hard choice to make, but it's one I think employers who have a lot of these provisions, especially forfeiture provisions, they ought to decide whether they use another state.

Jim Earle:

The companies that have the forfeiture for competition provisions in their equity award agreements often are Delaware incorporated entities, and by inertia and default in their equity plans, have Delaware as a choice of law, because it is sensible for issues that have to do with generally equity of the company and the governance issues around that, and securities law issues that might arise.

So there's some sense to it, but it has caused some of our clients to reconsider and think, as Matt was saying. And otherwise, it's a question of monitoring what happens in Delaware, what is going to happen at the appellate and maybe Supreme Court level in the Ainslie case.

Evan Gibbs:

Yeah.

Jim Earle:

One of the states where forfeiture provisions were really started and were most prevalent was New York. A lot of agreements with New York choice of law have this type of clause in them and later the financial industry there.

So that's really a big question, right? Because in New York, there's a bill on the governor's desk that would significantly impact non-competes.

Evan Gibbs:

I still wonder, Matt, will that law apply to something that's strictly a forfeiture for competition provision or not? I don't think that the face of that statute answers that question.

Matthew DelDuca:

Yeah. Well, that's one of the problems with that bill is that it's really vague and it's a little unsophisticated because it doesn't really cover some of the important issues that one would need to cover to really have an effective statute in this area.

I would say that our clients still want these forfeiture for competition or forfeiture for post-employment conduct provisions. There are really important business purposes served by them, so there's a strong business pressure to continue to include them. And it's become sort of a risk management question and risk appetite question as these laws develop.

Tracey Diamond:

All the things we've discussed today are aspects of the law that touch on each of our practices, and it's something we're all going to be keeping a close eye on. But in the meantime, we want to thank our listeners for joining us today.

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