

## # Swell AI Transcript: Understanding the Impact of the Latest Non-Compete Legislation with Amy Mulchay

Announcer: You're listening to HR Mixtape, your podcast with the perfect mix of practical advice, thought-provoking interviews, and stories that just hit different so that work doesn't have to feel, well, like work. Now, your host, Shari Simpson.

Shari Simpson: Joining me today is Amy Mulchay, experienced in-house counsel at Paylocity, skilled in corporate employment law, litigation management, regulatory compliance, and advising executive leadership on enterprise risk management issues. Amy, thank you so much for jumping on the podcast with me today.

Amy Mulchay: Oh, thanks for having me, Shari.

Shari Simpson:

So this is a very timely topic. We're going to do a quick turnaround to get this out the door, because I think everybody is trying to figure out how they are going to handle this new non-compete law. So maybe we could just start with there. What is the overview for this non-compete law that's coming into effect potentially in August?

Amy Mulchay: Yeah, we have 120 days after the for the effective date after it gets published in the register, which we're expecting to be the end of August. But it's sitting in legal challenge as well. So we'll get into that. But this is some of the most overarching regulation we've seen in this space on non-competes and basically, with very limited exception, would prohibit the use of non-compete clauses and preempt all the state laws that exist providing any lesser protection. So, it would mean a lot of big changes for employers. A lot of employers use forms of non-compete clauses in, you know, pre, you know, upon employment agreements in their RSU agreements and severance agreements as an example. So it's going to affect a lot of things for employers if it goes into effect without being delayed by the courts.

Shari Simpson: It seems to me like there isn't necessarily a quote unquote change from one previous law to this law. It seems like it's a complete rollback. Maybe you could walk us through the differences.

Amy Mulchay: Yeah, it's really brand new from a federal legislation standpoint. The FTC has been interested in this area in terms of unfair competition for years, and more recently have cited different employers under investigation, and found issue with their use of non-competes for certain employees. So it's, it's sort of an area they've been trudging into, but there wasn't official rule or regulation behind it. And it's really been an area that has been wholly regulated or legislated by the states. And we've seen more and more come from the states, you know, in the last 5 to 10 years on this topic, but from a federal standpoint, this is the first kind of restriction of its kind.

Shari Simpson: How do you see this impacting different employees throughout the organization? Because there are definitely roles that probably don't have non-competes in their roles in some organizations

and then some employees that do.

Amy Mulchay: Yeah, I think, you know, a lot of employers, I think, over this course of the 5-10 years that I just mentioned, have really been more thoughtful about how they use non-competes anyway. So a lot of times, the vernacular in business is non-compete, and we're talking about actual non-competes, and we're talking about non-solicits, or something that looks like just a non-disclosure, but we use the term kind of broadly. And so we really got to parse those, you know, into the categories they actually are. What the final rule prohibits is a true non-compete. And I think that's going to vary organization to organization, industry to industry, about how broadly that is used today and how many employees it will affect given in any given employer. Because there are non-solicits out there and those maybe become more important. We're really trying to protect our clients and the business relationships. The scary thing about this rule and how it's written is The FTC kind of says, if those are too broad, they can be considered a type of non-compete clause that falls under this rule. So I think it's really important to review and know what you have out there. That's going to be your starting point, no matter what happens with the law going into effect is. Know where you have true non-competes. You're really going to prohibit an employee from leaving to go work for a competitor and where you have the non-solicits that are meant to protect business interests or trade secrets or proprietary information.

Shari Simpson: Let's talk a little bit about what too broad means. I suspect, I'm going to take a stab in the dark here, as I am not a lawyer by trade, I would suspect that a non-solicit that is broad as, hey, you can't contact anybody in a small business in the state of Illinois, is probably too broad of a non-compete for a salesperson. So maybe you could give some examples where employers should start to think if they have something that broad, how do they think about removing the non-compete to prepare for that, but also putting in place a more realistic non-solicit to protect their customers?

Amy Mulchay: I think that's so important, Sherry. I think that's especially if this rule doesn't come to fruition and go into effect, there's still so many state laws that do regulate the space. And in most of those, you are going to have to do something more tailored. So to your point, I think they're going to say a clause, a non-solicit clause like that is overbroad because it is really prohibiting the person from going and working, you know, realistically. It's prohibiting their job movement. So what we look at in order to comply with the various jurisdictions that we're in is, is it narrowly tailored in terms of geography? the protections required. So sometimes even just limiting their employment or solicitation in a certain area can be overbroad. What we're seeing more and more states regulate and find more reasonable is, Sherry, your non-solicit is going to cover anyone you had material contact with during you know, the prior year or two years of your employment, those types of restrictions are going to tend to be more reasonable under the state laws that exist. And I think under the FTC rule, those would be not so overbroad as to

prohibit, you know, an employer or an employee from moving between jobs.

Shari Simpson: If you have non-competes in place now, will the new law let you roll those over or do you have to get rid of them as well?

Amy Mulchay: It depends if you're a senior executive or not, is the answer. Generally, for most of your employee base, the answer is no. Now, the new rule compared, the final rule compared to the proposed rule gives employers a little bit of reprieve. So instead of having to formally rescind all those agreements or contracts in place, you're simply going to have to provide notice to the employees that you will no longer enforce those unlawful provisions. But there is this small exception they built in to the final rule for senior executives. And that's somebody making over, I think it's \$151,164 per year. Very easy number to keep in your head, obviously. And that senior executive is involved in policymaking for the organization. So the way they talk about it in the rule is senior executives that have that authority for the organization. What will that mean? How far can we stretch that? Because I think we all can think about our organizations and think of folks that definitely are those highly compensated individuals, but would we consider them in a policymaking position? I'm not sure. So I think that the FTC's focus is going to be really your your senior executive officers, folks that you're, you know, reporting. on your SEC filings if you're publicly traded, those level individuals. But that exception even is narrowed further because that's only in place for those employees that already exist with you. If you have to replace a senior executive, you cannot enter a non-compete with a new senior executive if it's after the effective date of the rule.

Shari Simpson: So what happens to employers if they're listening to this and they're like, yeah, we'll wait and see what happens. I'm not going to do anything now. But then it goes live September. Yeah. What's the penalty for not providing those notices?

Amy Mulchay: So that's a great question. The rule itself doesn't provide any for any specific penalties to be assessed. the FTC will have jurisdiction to continue to investigate, seek injunctions against the use of those agreements. So I think they will do that. Time will tell. That can be very expensive for an employer to have to deal with that kind of investigation and the results of all of that because it is very public. But I think right now what we're recommending and what we're looking at internally is We're not going to make a change right now. What we're trying to do is assess our landscape, know what we have in place, understand the legal challenges that exist out there. There are at least two lawsuits that have been filed in Texas. People are expecting that by June to July, we'll get sort of initial rulings from the district courts on those challenges. That's not going to be the end of it. Whoever wins, whoever loses, I should say, is going to appeal to the next level. I expect this will go to the Supreme Court. And that's depending on the timing where we'll see a potential stay or pause in the rule going live. So all that to say, I think you need to prepare as though it's coming and it's going to go into effect. But there's no reason to, I don't think, run out and make the changes

right now. I think it's more preparing your teams to implement and be ready to go live. Because if this doesn't go through, as I mentioned, there's still a lot of state compliance issues. This gives you a chance to look at it holistically and make updates you might need from a state by state perspective. But if this doesn't go live, there's a lot of protections employers get out of these agreements being in place where they have, you know, reasonably drafted non-competes and the like. And so, you know, do we want to push that all aside and kind of toss it out the window before we know where the legal landscape is going to land?

Shari Simpson: I could not agree more with prepare, prepare, prepare. Don't pull the trigger yet, but be ready to pull the trigger because you might have to do it very quickly. How do you think, as you are preparing, as you're in that mindset and you're preparing for the future, how do we think about hiring that we may or may not need to do during this time frame that typically maybe we have done non-competes? Do we pull them back? Do we do them now? Do we do them with the caveat? What are you hearing on that?

Amy Mulchay: I think it depends for different groups and how they exist. We've already tried to go through an exercise, because we're in a lot of states that have some salary threshold limitations on non-competes. Illinois being one of those. So we already kind of work within a framework where we've said, where do we feel a non-compete is necessary to protect business interests? And we try to use them in those limited spaces and levels of the organization already. So I think there's that to consider as just your normal path forward. Is that worth looking at? If you're just using them across the board right now, if you are a multi-jurisdictional employer, you probably should be looking at that anyway because depending which states you're in, you might have some issues with enforcement with some of those anyway. And so I think it's a good time to kind of evaluate your go-forward approach and where you would want to use them if you can use them in the future. And you know, you can start implementing some of those things ahead of the effective date of the rule.

Shari Simpson: Well, this seems to be the kind of year right now where we are evaluating a lot of things. If you didn't have audit all your employee records on your bingo card this year for HR, it has already been added for you.

Amy Mulchay: Yeah, I mean, it's so important to do that anyway. But, you know, I'm the lawyer in the room. So I appreciate when the regulation gives us a reason to deep dive into these things. And, you know, to fix maybe what's broken in some circumstances, because it's a lot easier communication when you're doing it in time with a change in the law. It's just easier for employees to understand. It's easier to answer the question of why.

Shari Simpson: As you think towards the future, is there any anticipated further changes or adjustments to non-compete laws that you might see? I mean, I think

Amy Mulchay: My gut is this is going to get challenged all the way up, and I think it's very broad as written. There's a lot of opposition to

it. I really think we're going to see a significant delay in the implementation, and probably the challenge about whether the FTC has authority to make the rule is kind of forefront to some of the challenge, and so I do think that we're not going to see this come all the way through. However, this is not the end. We have states that have been regularly, you know, focusing in this space. So you have over 30 states and the District of Columbia that have amended their restrictive covenant statute since 2011. They're only going to continue to look to do things that are, you know, in the same vein. And I think it's going to make it more and more challenging for employers, even if the FTC rule doesn't go into effect. There's several other bills that are circulating through Congress that touch on pieces of this notion of non-compete and how narrowly tailored they need to be, or whether we can use them at all. So I don't think this will be the end of it. And I think we will continue to see the regulation move that way. But with some of these things, we try like the government tries the easy way, right, the FTC rulemaking, okay, then we get slapped on our hand, that wasn't the right way. But we get a bill passed in Congress that does the trick right, and so I think we'll still see it move that direction, so I think it's important you go through the evaluation, especially again if you're a multi-jurisdictional employer. You know those states there's 12 that have minimum salary requirements there's 16 that require a specific non-compete rider if you're including non-compete language. There's 12 that require a non-solicitation rider. And there's 14 that have very specific timing and notice requirements if you are asking somebody to sign a non-compete. And all of those things can affect the enforceability of those agreements.

Shari Simpson: I love that. Well, Amy, this has been such a great discussion. I'm sure I will have you back on in a few months as this kind of plays out. But this was a really good starter for us in HR to start thinking about how we prepare for non-competes going away.

Amy Mulchay: Yeah, I think it's an exciting time. There's definitely a lot to do to prepare and start early and, you know, review often. I hope you enjoyed today's episode.

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