

# BUSINESS IN 2025

## WEEKLY WEBINAR SERIES



# Your Host



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Member

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# TODAY'S AGENDA

## Gabe Oberfield – (12:00PM-12:05PM)

- Welcome and agenda
- OBBBA and advocacy concerning MCO tax

## Marc Krawiec – (12:05PM-12:15PM)

- How the OBBBA affects AI — or doesn't

## Roger Bearden – (12:15PM-12:20PM)

- New OPWDD regulations increase scrutiny on emergency preparedness

## Jeremy Sher – (12:20PM-12:30PM)

- Do's and don't's concerning restrictive covenants — a litigation practice group primer

## G. Oberfield – (12:30PM)

- Questions / wrap up

# How the OBBBA Affects AI — or Doesn't



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# New OPWDD Regulations Increase Scrutiny on Emergency Preparedness



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# New York Restrictive Covenants Still Not Banned – Still Hard to Enforce



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# Restrictive Covenants

- In New York, courts, not the legislature, still decide what restrictive covenants are enforceable.
- Non-Compete – hardest to enforce.
- Non-Solicit
  - Customer – requires careful drafting.
  - Employee – relatively easy to enforce.
- Non-Disclosure/Confidentiality –  
Combine with Defend Trade Secrets Act  
Notice: 18 U.S.C. § 1833(b)(1).





# Restrictive Covenants – Standard

- Sufficient consideration
  - Initial employment
  - Continued employment
  - Promotion
  - Severance benefits
- Grounds for termination – may be relevant if the Court considers narrowing the covenant.
- Employee Choice Doctrine – restrictive covenants made in exchange for post-employment benefits are typically enforceable through forfeiting the benefits.
- Restrictive covenants against sellers of businesses are easier to enforce.



# Noncompetes and Nonsolicits

- Must be reasonable in time and area and no broader than necessary to protect legitimate interests
  - 2 years generally enforceable.
  - Area depends on geographic footprint of business and employee.
  - Must protect a recognized legitimate interest:
    - Trade secrets (not public information or “know-how” that can be remembered).
    - Unique or extraordinary employees (very rarely found).
    - Goodwill (if cultivated by the employer, not the employee).
- Nonsolicits must be written with precise language to ensure they do not capture goodwill that the employee created.

*BDO Seidman v. Hirshberg*, 93 N.Y.2d 382 (1999)

# Noncompetes and Nonsolicits

- It cannot be harmful to the general public and/or unreasonably burdensome to the employee.
  - Cannot impose undue hardship on the employee (e.g., cannot prohibit him/her from working any job in his/her chosen field)
  - The covenant cannot violate public policy (e.g., certain covenants in the professional context)

*BDO Seidman v. Hirshberg*, 93 N.Y.2d 382 (1999)

# Consequences of Overbreadth

- The *BDO Seidman* standard: to enforce the covenant at all, the **employer** must establish “an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct[ and that it acted] in good faith [] to protect a legitimate business interest, consistent with reasonable standards of fair dealing.”
- Because *BDO Seidman* has been the law since 1999, it is increasingly unlikely that the Court will permit any enforcement of an overbroad restrictive covenant.

# Consequences of Overbreadth

- The Court may strike down an overbroad restrictive covenant entirely.
- The Court typically suggests this result by deciding a motion for preliminary injunction in the employee's favor.

## ***Brown & Brown, Inc. v. Johnson*, 25 N.Y.3d 364 (2015)**

- Analyzed employment agreement containing customer non-solicitation and Florida choice of law provisions.
- Invalidated choice of law provision because Florida law was “truly obnoxious” to New York public policy.
- Held that a “without cause” termination did not render the non-solicitation provision unenforceable.
- In 2018, following remand, the Appellate Division refused to enforce the non-solicitation provision because it was overbroad and imposed on all employees, regardless of their position, as a condition of employment.

# Don't Panic: It Can Still Be Fixed

- Periodic reviews/updates essential
- Covenants can be updated as part of:
  - Continued employment
  - Promotion
  - Other positive change in employment
  - Severance

# Despite Rumblings, Nothing Has Changed

- In 2024, Biden's Federal Trade Commission (FTC) voted to impose a final rule banning noncompetes as unfair methods of competition.
- The FTC's final rule is held up in litigation and it is unlikely that Trump's FTC will support it. (The FTC Commissioner who most strongly opposed the rule, Andrew Ferguson, is now the FTC's Chairperson.)
- The New York Legislature has twice passed bills banning employment noncompetes, but neither became law.
- Governor Hochul vetoed the first bill in 2023. The second bill remains held up with no indication that the Governor will sign it into law. If a bill passes, it will likely only apply to individuals above a certain level of compensation.
- For now, New York courts still have the final say on noncompetes.



# Questions?



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## OBBBA and Advocacy Concerning MCO Tax

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Jeremy Sher, [jsher@bsk.com](mailto:jsher@bsk.com)

### Sexual Harassment Prevention Training

To combat harassment in the workplace, every New York State employer must provide harassment prevention training for all employees annually.

For more information on Bond's online sexual harassment training [click here](#) or email [bondonline@bsk.com](mailto:bondonline@bsk.com)

# Thank You

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