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Negotiating Enforceable Noncompetition and Nonsolicitation Agreements: Compliance With State Statutes and Case Law

WEDNESDAY, NOVEMBER 30, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Amit S. Bindra, Partner, **The Prinz Law Firm**, Chicago

Robert B. Milligan, Partner, **Seyfarth Shaw**, Los Angeles

Millie Warner, Senior Counsel, **Epstein Becker Green**, New York

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Negotiating Enforceable Noncompetition and Non-Solicitation Agreements:

Compliance With State Statutes and Case Law

November 30, 2022

Presenters

Robert Milligan

Partner
Seyfarth Shaw LLP
310.201.1579
rmilligan@seyfarth.com

Amit Bindra

Partner
The Prinz Law Firm, P.C.
Chicago, Illinois
abindra@prinz-lawfirm.com
312.212.4450

Millie Warner

Senior Counsel
Epstein Becker & Green, P.C.
mwarner@ebglaw.com
212.351.4752

Presented By Amit Bindra

Amit Bindra

Partner
The Prinz Law Firm, P.C.
abindra@prinz-lawfirm.com
312-212-4450

- Experience in all aspects of employment law, including restrictive covenant litigation and agreements, trade secret cases, employment and severance agreements, whistleblower matters, employment arbitration clauses, wage and hour lawsuits, and employment discrimination.
- Works with business owners, executives, hedge fund managers, and physicians on matters in Illinois and across the U.S.
- One of the lead architects and negotiators of the amendments to the Illinois Freedom to Work Act, which impacted non-compete and non-solicitation clauses. The law passed unanimously in the Illinois legislature.
- Publications in law journals, legal newsletters, and firm's blog. Quoted by *Crain's Chicago Business*, *Chicago Medicine*, and other media outlets. Co-host of podcast, "Employee to Lawyer." In 2021, named by *Crain's Chicago Business* among its list of "Notable Rising Stars in the Law." Since 2016, recognized as an Illinois Rising Star by *Super Lawyers Magazine*.
- Completed the Certificate Program in Mediation Skills Training from the Northwestern University School of Professional Studies in 2021. Taught a legal writing and advocacy course as an adjunct professor at Loyola University Chicago School of Law from 2018 through 2021.

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Overview of Recent Legislation and Court Decisions Impacting Restrictive Covenants

Federal Non-Compete Legislation Update

- **Workforce Mobility Act**
  - Bipartisan bill intended to limit the use of non-compete agreements
- **Freedom to Compete Act**
  - Stated purpose is to protect "entry-level, low-wage workers" from non-compete agreements that limit their employment opportunities and restrict their ability to negotiate higher wages and benefits
  - Restoring Workers' Rights Act (similar introduced in House)
- **Biden's "Promoting Competition in the American Economy" Executive Order**
  - Released in July 2021
  - Executive order "encourage[s]" the FTC to "consider" exercising its statutory rulemaking authority "to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

Federal Non-Compete Update

- **DOJ & FTC Virtual Public Workshop**
  - December 2021
  - DOJ & FTC jointly hosted a virtual public workshop to discuss efforts to promote competitive labor markets and worker mobility
- **Department of Treasury "The State of Labor Competition" Report**
  - Issued in March 2022
  - States that its purpose "is to summarize the prevalence and impact of uncompetitive firm behavior in labor markets," focusing predominantly on practices that firms use to restrain competition for workers in order to lower compensation, including in particular no-poach agreements and non-compete agreements

U.S. Chamber of Commerce View

- When used transparently and appropriately, noncompete agreements can benefit employers and employees alike.
- Do reasonable noncompete agreements stifle competition?

No. In fact, the U.S. Chamber recently submitted comments to the FTC arguing that reasonable noncompete agreements protect an employer's unique and competitive information—employee training, trade secrets, client lists—from being used against the employer to unfairly advance the interests of a competitor or new business.

"Considering the worker shortage and need for properly skilled talent, noncompete agreements are a way for employers to signal the value of an employee to the organization and the key role that employee plays in the business's performance."

https://www.uschamber.com/employment-law/6-questions-about-the-impact-of-noncompete-agreements-on-businesses-and-employees

March 2022 Treasury Report

- On March 7, 2022, the US Department of the Treasury issued a report entitled “The State of Labor Competition,” (the “Report”)[1] making clear once again that the regulation of anti-competitive practices, including curtailing the use of non-competition covenants, continues to be a core component of President Biden’s agenda.
- The Report states that its purpose “is to summarize the prevalence and impact of uncompetitive firm behavior in labor markets,” focusing predominantly on practices that firms use to restrain competition for workers in order to lower compensation, including in particular no-poach agreements and non-compete agreements.
- Citing various research studies and data points, the Report asserts in particular that the lack of labor market competition decreases wages “at roughly 20 percent relative to the level in a fully competitive market,” noting in particular the impact of these practices on low-income workers, workers of color, women, and immigrants, and their contribution generally to income inequality and economic stagnation.

March 2022 Treasury Report

- With respect to non-compete covenants, the Report similarly states in its executive summary that “[as] part of his Executive Order on competition, the President encouraged the Federal Trade Commission to consider banning or limiting the use of non-compete agreements.”
- The Report appears largely concerned in particular with “the huge number of low-skill workers subject to non-competes,” suggesting that they are routinely applied to “workers who do not possess trade secrets or customer lists and are not given specialized training.”
- The Report even takes aim at non-disclosure agreements, observing that they “can be so broad as to effectively operate as non-compete agreements,” and “prevent outsiders from learning about undesirable firm employment practices.”
- The Report concludes by supporting legislation designed to enhance worker bargaining power, including protecting workers’ rights to organize, and restricting use of arbitration clauses and class action waivers.
- The Report further advocates civil enforcement by the DOJ and FTC in cases where the effect of enforcement prevent workers from earning a living or violate public policy.

Criminal Prosecution and Civil Class Actions Against No-Poach Agreements

- On December 15, 2021, federal prosecutors obtained a criminal indictment against 6 executives of Pratt & Whitney and other engineering suppliers for conspiring to refrain from soliciting or hiring each others' workers.
- *Durbin v. Pratt & Whitney, et al.*, No. 3:21-cv-1682 (D. Conn.) – putative class action brought by workers alleging that the conspiracy adversely impacted their wages and careers.
- *Doe v. Raytheon Technology Corp., et al.,* No. 22-cv-00035 (D. Conn.) – Plaintiffs seek treble damages and injunctive relief for the employees harmed by defendants' alleged unlawful no-poach agreements.
- On April 15, 2022, a Colorado federal jury acquitted a national healthcare provider and its former chief executive on all counts of conspiring with competing employers to suppress competition for employees through the use of "no-poach" agreements. This case was particularly significant because it tested the DOJ's theory that entering into such "no poach" deals can be a per se violation of the Sherman Act. Although the judge presiding over the case had previously denied a motion to dismiss, finding that the indictment adequately alleged a per se violation of the Sherman Act, the jury found the evidence insufficient and acquitted the defendants on all charges.
- The Department of Justice (DOJ) Antitrust Division secured its first win in a criminal enforcement of labor market antitrust violations on October 27, 2022, when nurse staffing company VDA OC pleaded guilty to violating Section 1 of the Sherman Act by conspiring with an unnamed competitor to allocate nurses and suppress wages of school nurses.

Will FTC Exercise Rule Making Authority to Regulate Non-Competes?

- May 2022 appointment of Alvaro Bedoya to the FTC, giving the Democrats a 3-2 majority.

- Lina Khan, the Chair of the FTC, told the Wall Street Journal, “We feel an enormous amount of urgency given how much harm is happening against the workers. This is the type of practice that falls squarely in our wheelhouse.”

- Other Commissioners disagreed at the time.

FTC Increasing Oversight

- On August 26, 2022, the Federal Trade Commission published its “Strategic Plan for Fiscal Years 2022–2026,” as required under the GPRA Modernization Act of 2010.

- “Objective 2.1: Identify, investigate, and take actions against anticompetitive mergers and business practices,” the FTC opines that “[a]nticompetitive mergers and business practices harm Americans through higher prices, lower wages, or reduced quality, choice, and innovation. Enforcement of antitrust laws provides substantial benefits to the public by helping to ensure that markets are open and competitive.” It identifies certain “[s]trategies” that the FTC intends to pursue over the next five years, including “[i]ncreas[ing] use of provisions to improve worker mobility including restricting the use of non-compete provisions.”

FTC Expanding Its Enforcement Powers

- On November 10, 2022, the FTC issued a “Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act,” in which it announced an expansion of its enforcement powers beyond just the antitrust laws.
- “The move—broadening its interpretation of the 1914 law that created the FTC—opens the door to more legal challenges against businesses engaging in alleged coercive or deceptive conduct that undermines competition, Chairwoman Lina Khan said in a briefing with reporters” according to the Wall Street Journal.
- The new policy was approved on a 3-1 party-line vote.

New Illinois Law: Overview

- Amendments to the Illinois Freedom to Work Act.
- Includes several prohibitions (salary thresholds, union workers, and COVID-19).
- Codifies case law regarding the 2-year rule, the legitimate business test, and reformation.
- Mandates attorneys' fees for prevailing employees (when employer initiates litigation).
- Requires employers to provide 14 days' notice to employees.
- Allows the Attorney General to enforce and investigate violations of the new law.

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New Illinois Law: Prohibitions

- Prohibits non-compete agreements for employees making less than $75,000 (increases to $90,000 by 2037).
  - "No employer shall enter into a covenant not to compete with any employee unless the employee's actual or expected annualized rate of earnings exceeds $75,000 per year." 820 ILCS 90/10(a).
- Prohibits non-solicit agreements for employees making less than $45,000 (increases to $52,500 by 2037).
  - "No employer shall enter into a covenant not to solicit with any employee unless the employee's actual or expected annualized rate of earnings exceeds $45,000 per year." 820 ILCS 90/10(b).
  - First state with a specific salary threshold for non-solicitation agreements.

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New Illinois Law: Adequate Consideration

- Under the statute, the term "adequate consideration" means

  "(1) the employee worked for the employer for *at least 2 years* after the employee signed an agreement containing a covenant not to compete or a covenant not to solicit *or* (2) the employer otherwise provided *consideration adequate to* support an agreement to not compete or to not solicit, which consideration can consist of a *period of employment plus additional professional or financial benefits or merely professional or financial benefits adequate by themselves*." 820 ILCS 90/5.

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New Illinois Law: Notice Period

- The statute requires employers to (1) advise employees in writing to consult with an attorney, and (2) provide employees with 14 calendar days to review the covenant. 820 ILCS 90/20.

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New Illinois Law: Attorneys' Fees

- The statute mandates remedies for employees:
  - If the *employer* files a claim, and the *employee* prevails, the *employee* recovers attorneys' fees. 820 ILCS 90/25.
  - Will discourage overall litigation, including employee-driven declaratory actions.

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New Illinois Law: Reformation

- The statute codifies legal decisions regarding reformation:

> (a) Extensive judicial reformation of a covenant not to compete or a covenant not to solicit may be against the public policy of this State and a court may refrain from wholly rewriting contracts.
>
> (b) In some circumstances, a court may, in its discretion, choose to reform or sever provisions of a covenant not to compete or a covenant not to solicit rather than hold such covenant unenforceable. Factors which may be considered when deciding whether such reformation is appropriate include the fairness of the restraints as originally written, whether the original restriction reflects a good-faith effort to protect a legitimate business interest of the employer, the extent of such reformation, and whether the parties included a clause authorizing such modifications in their agreement.

820 ILCS 90/35.

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New Illinois Law: Attorney General

- The statute provides the Attorney General with enforcement powers.
  - "Whenever the Attorney General has reasonable cause to believe that any person or entity is engaged in a pattern and practice prohibited by this Act, the Attorney General may initiate or intervene in a civil action in the name of the People of the State in any appropriate court to obtain appropriate relief." 820 ILCS 90/30(a)
  - The Attorney General may also "conduct an investigation." 820 ILCS 90/30(b).
  - The remedies can be severe: "the Attorney General may obtain . . . restitution, and equitable relief. . . . In addition, the Attorney General may request and the court may impose a civil penalty not to exceed $5,000 for each violation or $10,000 for each repeat violation within a 5-year period. For purposes of this Section, each violation of this Act for each person who was subject to an agreement in violation of this Act shall constitute a separate and distinct violation." 820 ILCS 90/30(d)(1).

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New Illinois Law: Future Litigation

- Future litigation regarding the statute will likely involve monetary consideration and interpreting older agreements.
  - The amount of monetary consideration that is "adequate" or "sufficient."
    - *See, e.g., W. Capra. Consulting Grp., Inc. v. Snyder*, No. 1:19 C 4188, 2019 U.S. Dist. LEXIS 140692, at *22–24 (N.D. Ill. Aug. 20, 2019) ("[The employee's] 18-month employment . . . and voluntary resignation, plus the explicit consideration of $1,000 to agree to the non-competition, thus likely satisfies the consideration prong.").
  - Application of certain provisions to agreements signed before January 1, 2022.

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California Update: Non-Solicitation of Employment Provisions

- Older *Loral* authority / rule of reason standard permits non-solicitation of employee provisions
- New *AMN Healthcare* authority focuses on Business and Professions Code Section 16600 and finds that such covenants are void.
- Several cases following *AMN Healthcare*
- Some trial court decisions still follow *Loral*
- Also consider use of fixed term contracts rather than at will arrangements for key employees.

California Updated: Business to Business Non-Competes

In *Ixchel Pharma, LLC v. Biogen, Inc.,* 9 Cal.5th 1130 (2020), the California Supreme Court unanimously held:

1. to state a claim for tortious interference with an at-will contract, a plaintiff must allege that the defendant engaged in an independently wrongful act, and
2. in determining the validity of a competitive restriction in a business-to-business agreement under Business and Professions Code section 16600, the rule of reason applies, and such restriction is not *per se* void.

The Court's decision will impact how companies contracting under California law decide to set up their contracts and whether they will agree to the at-will termination of such contracts. The decision also provides some clarity for businesses that include competitive restraints with other companies in their commercial dealings, such as exclusive dealing and collaboration agreements, licenses, leases, and franchise agreements, as such restraints are not *per se* void under Section 16600 but subject to a rule of reason analysis. Employers may attempt to look for creative structures to use this authority with key employees and contractors.

California Update: Business to Business Non-Competes

- The Court explained that a rule of reason standard is not inconsistent with Edwards, which was "limited" to the context of employee non-competition agreements, and policy considerations "specific to employment mobility and competition"; "[n]othing about Edwards indicates a departure from that precedent to also invalidate reasonable contractual limitations on business operations and commercial dealings."

- The rule of reason standard asks **"whether an agreement harms competition more than it help by considering the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption."**

- "The Court stated it is mindful of the consequences of strictly interpreting the language of section 16600 to invalidate all contracts that limit the freedom to engage in commercial dealing, reasoning that:

  > "contractual limitations on the freedom to engage in commercial dealings can promote competition. Businesses engaged in commerce routinely employ legitimate partnership and exclusive dealing arrangements, which limit the parties' freedom to engage in commerce with third parties. Such arrangements can help businesses leverage complementary capabilities, ensure stability in supply or demand, and protect their research, development, and marketing efforts from being exploited by contractual partners."

California Update: B2B Case, *Quidel Corporation v. Superior Court*, 2020 WL 6534466 (Cal. App., Nov. 6, 2020).

- In *Quidel*, the question before the court was whether section 16600 invalidates all contractual non-compete provisions, even outside the employment context, without regard to reasonableness or whether the restraints might actually advance competition.
- The court reiterated that the "per se" ban on non-competition agreements is limited to employment agreements, distinguishing the case before it as an exclusive dealing agreement between two sophisticated biotechnology companies rather than a case affecting an individual's ability to engage in a profession, trade, or business.
- The court, after relying on *Ixchel*, found that "as long as a [business-to-business] noncompetition provision does not negatively affect the public interests, is designed to protect the parties in their dealings, and does not attempt to establish a monopoly, it may be reasonable and valid."
- Relying on the *Ixchel* case, the court required the application of the rule of reason from the Cartwright Act. *Quidel* found the application of such a rule of reason test required additional factual development and vacated the lower court's grant of summary judgment on the issue.

California Update: Overly Broad NDA

- *Brown v. TGS Management Co.*, LLC, 2020 Cal. App. LEXIS 1074 (2020)

- Brown argued that the confidentiality provisions in his employment contract illegally restrained him from working in statistical arbitrage after leaving TGS, and that the arbitration award left these unlawful anti-competitive provisions in effect, thereby exceeding the arbitrator's powers.

- In resolving this issue, the Court of Appeal looked at California Business and Professions Code section 16600, which creates a strong public policy of voiding contracts that restrict an individual's right to pursue lawful employment. The Court of Appeal then concluded that TGS's confidentiality provisions were so broad as to operate as a de facto non-compete provision barring Brown in perpetuity from doing any work in the securities field. For example, by defining "Confidential Information" as all information usable in or related to the securities industry at large, and not just statistical arbitrage, TSG effectively barred Brown from trading securities for the remainder of his life.
- The Court of Appeal thus held that the arbitration award improperly allowed the confidentiality provisions to stand as a perpetual restriction on Brown's right to compete with TGS, and that this was inconsistent with California's public policy of protecting Brown's rights under section 16600.

New Colorado Law

- Amendment to existing law – House Bill 22-1317 amends C.R.S. § 8-2-113.
- Effective as of August 10, 2022 (not retroactive application).
- Compensation thresholds (must be met at time of signing and enforcement).
  - Non-compete agreements: Highly compensated workers ($101,250).
  - Non-solicit agreements: 60% of highly compensated workers threshold ($60,750).
- Notice requirement: 14 days and in a separate document with "clear and conspicuous terms."

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New Colorado Law (continued)

- Forum selection and choice of law provision.
- Penalty provisions
  - Employer's can be liable for actual damages + $5,000 per worker.
  - Employees may recover attorneys' fees.
  - The Attorney General can also file a lawsuit.
  - Good-faith and reasonable grounds requirement.
- Excludes confidentiality agreements, and buy/sell agreements.

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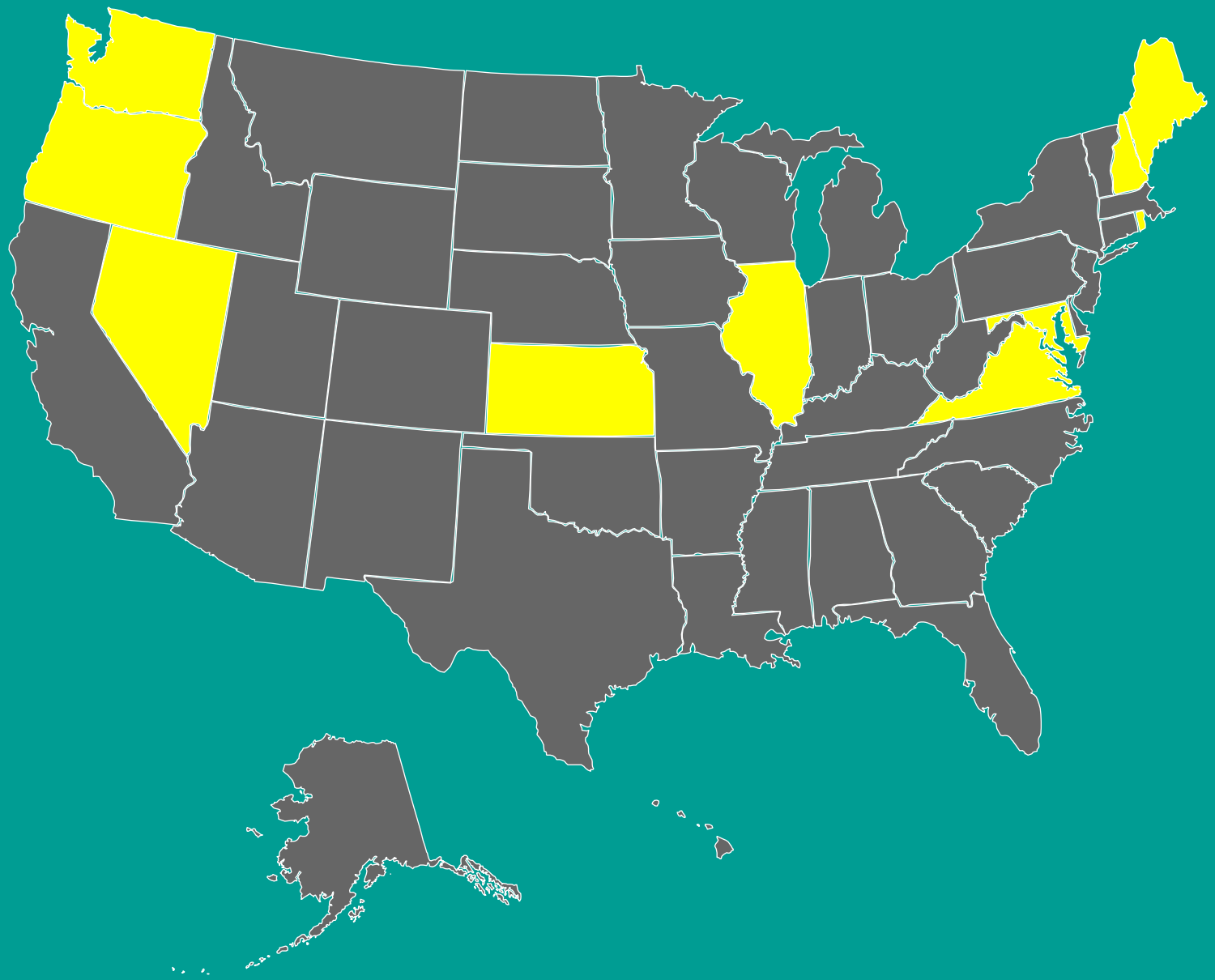
State Non-Compete Law Salary Thresholds

- Colorado
- Illinois
- Maine
- Maryland
- New Hampshire
- Nevada
- Oregon
- Rhode Island
- Virginia
- Washington
- D.C.



New Laws Regarding Non-Competes

Delaware

- Delaware Chancery courts have rejected Delaware choice-of-law provisions in recent years.
  - *Cabela's LLC v. Wellman et al.*, No. 2018-0607-TMR, 2018 Del. Ch. LEXIS 511, at *19-20 (Del. Ch. Oct. 26, 2018) (Neb*Ascension Ins. Holdings, LLC v. Underwood*, No. C.A. No. 9897-VCG, 2015 Del. Ch. LEXIS 19, at *7-8 (Del. Ch. Jan. 28, 2015) (California); raska); *see also FP UC Holdings, LLC v. Hamilton*, No. 2019-1029-JRS, 2020 WL 1492783, at *9-11 (Del. Ch. Mar. 11, 2020) (collecting cases) (Alabama).
  - Vice Chancellor Laster explained: "a court should not save a facially invalid provision by rewriting it and enforcing only what the court deems reasonable." *Del. Elevator, Inc. v. Williams,* C.A. No. 5596-VCL, 2011 Del. Ch. LEXIS 47, at *28-31 (Del. Ch. Mar. 16, 2011).
- Delaware Chancery Court recently held that a contractual waiver by an employee to contest the reasonableness of restrictive covenants does not preclude judicial scrutiny of the restrictions. Kodiak Bldg. Partners, LLC v. Adams, No. 2022-0311-MTZ, 2022 WL 5240507, at *5 (Del. Ch. Oct. 6, 2022) (explaining that "[p]ublic policy requires Delaware courts to evaluate noncompetition and nonsolicitation contracts holistically, carefully, and nonmechanically, with an eye towards reasonableness, equity, and the advancement of legitimate business interests").

New Laws Regarding Non-Competes

Maine

- **26 M.R.S.A. Sec. 599-A**
  - Applies to non-compete agreements entered into or renewed on or after Sept. 18, 2019
  - Prohibits non-competition agreements with employees earning 400% of the federal poverty level or less.
  - Noncompete enforceable only if reasonable and necessary to protect an employer's trade secrets, confidential information, or goodwill.
  - Must notify prospective employees of non-compete requirement before making offer of employment.
  - Mandatory 3 business day review period.
  - Terms cannot take effect until the later of (1) one year after the employee begins employment, or (2) six months after the non-compete was signed.
  - Civil fines of "not less than $5,000" may be imposed on employers by the Maine DOL
  - Prohibits no-poach agreements between employers.

New Laws Regarding Non-Competes

Maryland

- **MD. Code Ann., Lab. & Empl. Sec. 3-716: effective October 1, 2019**
- Bars employers from enforcing non-compete agreements against workers earning $15 per hour or less, or $31,200 per year
- Only bars non-compete agreements; does **NOT** apply to other types of restrictive covenants, e.g., non-solicitation agreements
- Expressly reserves employers' right to enforce contracts prohibiting "the taking or use of a client list or other proprietary client-related information"

New Laws Regarding Non-Competes

Massachusetts

Case law after Massachusetts Noncompetition Agreement Act of 2018 ("MNCA")

- ***Automile Holdings, LLC v. McGovern***, 136 N.E. 1207, 1271 n. 15, (Mass. 2020): Employee breached "anti-raiding" restrictive covenant but equitable remedy inappropriate absent finding that damages would be inadequate
- ***Nuvasive, Inc. v. Day*, No. 19-1611 (1st Cir. April 8, 2020):** MNCA does not bar out of state employers from enforcing reasonable restrictive covenants against MA employees
  - **Involved pre-MNCA non-solicitation agreement**
    - **Court:** MNCA does not apply to (i) pre-MNCA agreements or (ii) non-solicitation agreements
  - **Choice of law provision: Delaware, where employer incorporated**
    - **Court:** Appropriate choice by employer (but see Nebraska case, discussed next)
  - **MA's material change doctrine (must execute new restrictive covenants with each material change in employment relationship)**
    - **Court:** Doctrine inapplicable where employee chose to terminate one position to take another with employer
- ***Nuvasive Inc. v. Day and Richard*, 19-cv-10800 (D. Mass. May 29, 2019)**
  - **Garden Leaves:** MNCA requires payment of 50% of employee's highest annualized base salary in last 2 years or other mutually-agreed upon consideration
    - **Court:** No garden-leave provision, but reference to compensation and access to company's good will and proprietary information in pre-MNCA agreement constituted "mutually agreed upon consideration"

New Laws Regarding Non-Competes

New Hampshire

N.H. Rev. Stat. Ann. Sec. 275:70-a

- Effective September 8, 2019
- Prohibits non-competes for employees who make less than 200% of the federal minimum wage

New Laws Regarding Non-Competes

New York (Proposed)

- Bill A7193 (Introduced April 11, 2019):
  - **Prohibits non-compete agreements for workers earning less than $75,000 per year**
  - **For all other employees:** non-compete agreement must be in writing, signed by employer and employee
- **Definition of "non-compete":**
  - Prohibits or restricts employee from obtaining employment after separation
    - For a specified period of time;
    - In any specified geographical area; and/or
    - "With any particular other employer or any particular industry"
- **Notice requirements**
  - For new employees: earlier of formal offer of employment or 30 days before non-compete goes into effect
  - For existing employees not subject to a non-compete: 30 days before the agreement goes into effect
  - Non-compete unenforceable if employee "discharged without cause"
- **Allows civil cause of action for violations**
  - Permits award of up to $10,000 in liquidated damages, plus lost compensation, reasonable attorneys fees and costs, and "a consideration payment if the employer failed to provide one when due"

New Laws Regarding Non-Competes

Rhode Island

- **Noncompetition Agreement Act, R.I. Gen. Laws 28-58-1 *et seq.***
- Effective July 15, 2020, regardless of date signed
- **Non-competes unenforceable against:**
  - Employees age 18 or younger
  - Certain undergraduate and graduate students" – whether paid or unpaid
  - Nonexempt worker under the Fair Labor Standards Act
  - "Low-wage" employees
    - Annual "earnings" not more than 250% of federal poverty level
    - "Earnings" does not include OT or Sunday/holiday rates
- **Act does NOT apply to:**
  - "Covenants not to solicit employer's customers, clients, or vendors
  - Nondisclosure or confidentiality agreements
  - Covenants not to solicit or hire employees
  - Certain noncompetition agreements made in connection with the sale of a business entity
  - Non-competes originating outside of an employment relationship
  - Forfeiture agreements
  - Invention assignment agreements
  - Non-competes made in connection with separation of employment if:
    - employee is granted 7 business days to rescind acceptance (e.g., severance agreement)
    - employee agrees not to reapply for employment to same employer (e.g., settlement agreement)

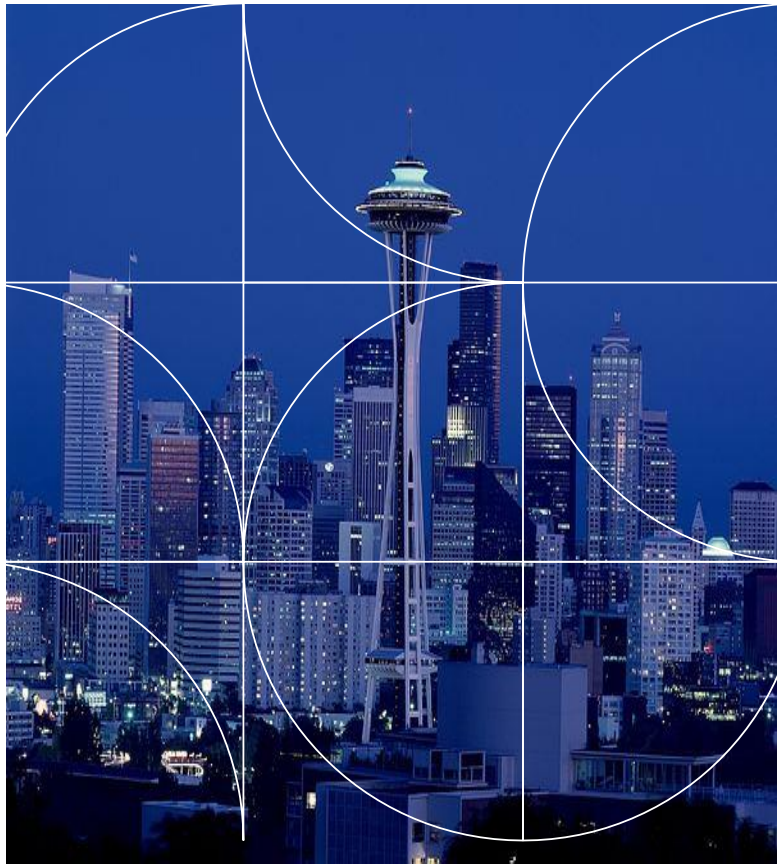
New Laws Regarding Non-Competes

Virginia

- Va. Code Ann. Sec. 401.1-28.7:8: Bans agreements with "low-wage" employees entered into on or after 7/1/2020 that restrain, prohibit, or otherwise restrict worker's ability to compete with former employer after termination
- **"Low-wage employee":** Average weekly earnings during previous 52 weeks "are less than the average weekly wage of the Commonwealth, as per the Virginia Employment Commission ("VEC").
  - For 2022, the average weekly wage is $1,290 per week (about $67,080 annually)
    - Could cover roughly half of Virginia employees!
  - VEC issues new calculation every quarter— agreement enforceable now would become unenforceable if the average wage increases
- **Covers** interns, students, apprentices, and trainees, and independent contractors earning lower hourly rate than Virginia's median hourly wage for all occupations for preceding year (currently $22.69 per hour)
- **Not covered:** Employees whose compensation is derived "in whole or in predominant part" from sales commissions, incentives, or bonuses
- **Non-solicitation agreements prohibited?**
  - Not directly addressed
  - Arguably, no: a non-compete agreement "shall not restrict" an employee from providing services to the employer's customers or clients "if the employee **does not initiate contact with or solicit** the customer or client"

Washington

- Effective **January 1, 2020**
- Deters overly broad agreements
- Sets income thresholds
- **Effective January 1, 2023: The new adjusted earning threshold for employees is $Washington is going up by 8.66% to $116,593.18 and the new adjusted earning threshold for independent contractors is $291,482.95**
- Sets 18 month duration
- Requires mandatory “garden leave”
- Establishes choice of law rules
- Sets disclosure requirements



Washington

- **Income Thresholds**
  - One of the law's primary goals is to prevent non-competes from being used for "low level" employees.
  - The law voids non-compete agreements for any employee earning less than salary threshold per year.
  - In the case of independent contractors, the law voids non-competes with them unless the contractor was being paid less than compensation threshold per year.
- Some have criticized the salary threshold because it arguable exempts large Seattle tech companies from non-competes. The original threshold was around $180,000, but lobbying efforts by tech companies apparently brought the threshold down.

Washington

- **Mandatory "Garden Leave"**
  - Under the new law, in order to enforce a non-compete, employers who lay off an employee must provide compensation equivalent to the terminated employee's base salary at the time of the termination for the period of enforcement (less compensation earned through other employment during the period of enforcement).
- Example: Mary is hired by Space Z at $107,301.04 a year, but gets laid off 8-months later. Mary is subject to a 18-month non-compete but can't find any work outside of the space industry. Unless Space Z continues to pay Mary a $107,301.04 annual salary for the 18-month period of enforcement, her non-compete will be invalid.

Washington

- **Forum Selection & Choice of Law**
  - The law invalidates any non-compete that requires an employee or independent contractor to adjudicate a non-compete outside of Washington.
  - The law also invalidates any non-compete that deprives an employee or independent contractor of the protections or benefits of the new law.
- Takeaway: Washington employers will not be able to evade the restrictions of the new non-compete law by invoking the laws of another state.

Washington

- **Disclosure Obligations**
  - Under the new law, employers must disclose the terms of the non-compete to an employee in writing and no later than the time the employee accepts the offer of employment.
  - Failure to do so will invalid the agreement.
- Takeaway: Washington employers should make sure that the exact terms of the non-compete are included in a prospective employee's offer letter (even if the non-compete language is contained in other employment-related agreements, like a confidentiality or proprietary rights agreement).
- **Government Enforcement and Fees**

Under Washington's non-competition agreement law, the Attorney General's Office may pursue relief for violations of the law. Aggrieved individuals may also pursue relief on their own through the courts.

The law provides a private right of action for a person who is a party to a noncompetition covenant that does not comply with the law, and the state attorney general can pursue action on behalf of any aggrieved individual.

Penalties include the greater of actual damages or a statutory penalty of $5,000, plus reasonable

attorneys' fees, expenses, and costs. Even if a court or arbitrator decides to partially enforce an unlawful noncompetition covenant after January 1, 2020, the employer will still be subject to the penalties listed above.

Washington

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Nevada

Nevada

- Effective October 1, 2021
- Prohibits non-competes for “low-wage” employees
  - Joins a growing group of states, including IL, VA, MA, MD, NH, WA
  - In Nevada, that means unenforceable against employees paid solely on hourly basis, exclusive of tips or gratuities
- Employers may not enforce customer non-solicit that prohibits even acceptance of business
- Mandatory fee-shifting
  - Employer liable for employee’s attorneys’ fees and costs if restrictive covenant violates foregoing provisions
  - Fee-shifting applies even to employee’s declaratory judgment suit


Oregon

Oregon

- Fourth update in six years!
- Effective: May 21, 2021
- Maximum duration of a non-compete is now **12 months** (decreased from 18 months)
- New compensation threshold:
  - Non-competes only enforceable where gross annual salary and commissions at termination exceed $100,533
  - Threshold adjusted annually for inflation
- Non-compliant agreements **void**, not just voidable
- Oregon SB 1586, Nondisclosure Agreements, clarifies provisions that prohibit employers from entering into nondisclosure agreements that include, but are not limited to, discrimination, sexual assault, or workplace harassment, effective January 1, 2023

Hawaii

- Section 480-4 of the Hawaii Revised Statutes governs non-compete agreements generally.
- A covenant or agreement by an employee or agent not to use the trade secrets of the employer or principal in competition with the employee's or agent's employer or principal, during the term of the agency or thereafter, or after the termination of employment, within such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.
- A desire to prevent an employee from forming a competing firm is not a legitimate purpose for a noncompetition clause.
- It is prohibited to include a noncompete clause or a nonsolicit clause in any employment contract relating to an employee of a technology business. The clause shall be void and of no force and effect.
- “Technology business” is defined to be “a trade or business that derives the majority of its gross income from the sale or license of products or services resulting from its software development or information technology development, or both.”

Hawaii

- The state's Supreme Court in *Prudential Locations, LLC v. Gagnon*, 151 Hawai‘i 136, 146, 509 P.3d 1099, 1109 (2022) held that the appellate court erred in failing to address whether the noncompete and solicitation clauses were ancillary to a legitimate purpose not violative of HRS Chapter 480, as required by HRS § 480-4(c).
- Further, restricting competition is not a legitimate ancillary purpose, as HRS § 480-4(a) prohibits contracts in restraint of trade or commerce in the state and here, the noncompete agreement, which was subject to a rule of reason analysis, was overly restrictive under the circumstances.
- In addition, to establish a violation of a nonsolicitation clause, there must be evidence that the person subject to the solicitation clause actively initiated contact.
- Finally, the Hawaii Supreme Court held that the appellate court properly granted summary judgment in favor of the employee as to the noncompete clause, but summary judgment should not have been granted for one agent as to the nonsolicitation clause

Wyoming

- In February 25, 2022, the Wyoming Supreme Court issued a decision prohibiting courts from blue penciling noncompete agreements to be reasonable and enforceable under the law.
- In *Hassler v. Circle C Resources*, the Wyoming Supreme Court overruled Hopper v. All Pet Animal Clinic, Inc., which adopted the "liberal blue pencil rule" and authorized courts to narrow the terms of noncompete agreements to render them enforceable under Wyoming law. The Supreme Court noted that public policy and "established black letter rules of contract interpretation" supported its decision to prohibit employers from requesting that the court revise noncompetes that are otherwise unenforceable.
- If the noncompete restrictions appear overly burdensome or overly broad, employers may want to consider revising the restrictions to avoid the risk of having noncompete provisions deemed void.

New Laws Regarding Non-Competes

Washington, D.C.

- Non-Compete Clarification Amendment Act of 2022, effective October 1, 2022
- Non-competes banned for any employee who is not a "highly compensated" employee and (1) spends more than 50% of his or her work time for the employer working in D.C., or (2) whose employment for the employer is based in D.C. and the employee regularly spends a substantial amount of his or her work time for the employer in D.C. and not more than 50% of work time for the employer in another jurisdiction.
- A "highly compensated employee" is an employee who is reasonably expected to earn in a 12-month period (or who has earned in the prior 12 months) compensation at least equal to the "minimum qualifying annual compensation" (currently $150,000), or, if the employee is a medical specialist, $250,000.
- Beginning January 1, 2024, these thresholds will increase each year based on increases in the DOL's Consumer Price Index for All Urban Consumers in the Washington Metropolitan Statistical Area.
- "Compensation" is broadly defined as all monetary remuneration, including hourly wages, salary, bonus, commissions, overtime premiums, vested stock.

New Laws Regarding Non-Competes

Washington, D.C.

- A banned "non-compete provision" is defined as "a provision in a written agreement or workplace policy that prohibits an employee from performing work for another for pay or from operating the employee's own business.
- This does **not** include:
  - Non-compete provisions in the sale of business context.
  - Non-disclosure or confidentiality provisions.
  - Anti-moonlighting provisions that prohibit or restrict an employee from "[a]ccepting money or a thing of value for performing work for a person other than the employer during the employee's employment with the employer, because the employer reasonably believes" that this will (a) result in the employee's disclosure or use of confidential information, (b) conflict with the employer's, industry's, or profession's established conflicts of interest rule, (c) "constitute a conflict of commitment if the employee is employed by a higher education institution," or (d) impair the employer's ability to comply with District or federal laws or regulations, a contract, or a grant agreement."
  - A provision that provides a "long-term incentive" (*i.e.*, bonuses, equity compensation, stock options, restricted and unrestricted stock shares or units etc., and "other performance driven incentives for individual or corporate achievements typically earned over more than one year."

New Laws Regarding Non-Competes

Washington, D.C.

- Requirements for non-compete agreements with "highly compensated employees":
  - Agreement must include:
    - "the functional scope of the competitive restriction, including what services, roles, industry, or competing entities the employee is restricted from performing work in";
    - the geographic scope of the restriction; and
    - the term of the restriction (cannot exceed 365 days, or 730 days if employee is a medical specialist).
  - Employer must provide employee with a written copy of the non-competition provision at least 14 days before the individual commences employment, or, if the individual is already employed, at least 14 days before the individual must execute the agreement.
- Employer must provide employee with a statutory notice regarding D.C.'s Ban on Non-Compete Agreements Amendment Act of 2020.

Health Care Carve Outs

- Three states passed laws related to certain health care workers.
  - Illinois passed House Bill 4666 to amend the Nurse Agency Licensing Act: "Nurse agencies are prohibited from entering into covenants not to compete with nurses and certified nurse aids."
    - The new amendment is effective July 1, 2022.
  - Iowa passed House File 2521: "A health care employment agency shall not do any of the following: (1) Restrict in any manner the employment opportunities of an agency worker by including a non-compete clause in any contract with an agency worker or health care entity."
    - Effective July 1, 2022.

Health Care Carve Outs (continued)

- Kentucky passed two laws:
  - House Bill 282: "A health care services agency shall not: (a) restrict in any manner the employment opportunities of any direct care staff that is contracted with or employed by the agency including but not limited to contract buy-out provisions or contract non-compete clauses;"
  - House Bill 506: "Nothing in any professional employer agreement, or in Sections 1 to 11 of this Act, shall: . . . (b) Affect, modify, or amend any contractual relationship or restrictive covenant between a covered employee and any client in effect at the time a professional employer agreement becomes effective or any contractual relationship or restrictive covenant that is entered into subsequently between a client and a covered employee. A professional employer organization shall have no responsibility in connection with, or arising out of, any existing or new contractual relationship or restrictive covenant between the covered employee and client unless the professional employer organization has specifically agreed otherwise in writing."

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Louisiana

- The appellate court denied an employer's request for a preliminary injunction in *Advanced Medical Rehab, LLC v. Manton*, No. 21-CA-315, 2022 La. App. LEXIS 275 (La. App. 5 Cir. Mar. 10, 2022).
  - Louisiana disfavors non-compete agreements and such agreements are against public policy with limited exceptions consistent with La. R.S. 23:921.
    - Non-compete agreements (1) must be less than 2-years, (2) must include the areas in which the employee is restrained, and (3) requires competition between the former employee and employer.
  - Court held the agreement's activity restraints were too broad.
  - Court held that the agreement failed to identify the specific geographic area.
  - Court held that the time restraint violated the state law because it was longer than 2-years.

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Consequences of Not Adhering to State Law Restrictions

Criminal Penalties

Colorado: Non-Compete Act makes it "unlawful to use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation at any place he sees fit." As of March 1, 2022, violations of the Act will constitute "a class 2 misdemeanor." In Colorado, a class 2 misdemeanor is punishable by up to **120 days imprisonment and/or a fine of $750.**

Unenforceability

Illinois: Any "covenant not to compete" entered into with an employee that does not meet the applicable earnings threshold at the time the employee signs the agreement is "**void and unenforceable."**

Monetary Penalties

Washington: Imposition of **$5,000 minimum in damages to employee** (plus attorney fees and costs) if a court reforms, rewrites, modifies or only partially enforces a non-compete

Other Potential Consequences: Fee Shifting Provisions Have Teeth

- California Labor Code § 925(c)
  - "In addition to injunctive relief and any other remedies available, a court may award an employee who is enforcing his or her rights under this section reasonable attorney's fees."
- Illinois (820 ILCS 90/25)
  - "In addition to any remedies available … if an employee prevails on a claim to enforce a covenant not to compete or a covenant not to solicit, the employee shall recover from the employer all costs and all reasonable attorney's fees regarding such claim to enforce a covenant not to compete or a covenant not to solicit, and the court or arbitrator may award appropriate relief."
- Nevada AB 47
  - "Any person injured or damaged directly or indirectly in his or her business or property by reason of a violation of the provisions of this chapter may institute a civil action and shall recover treble damages, together with reasonable attorney fees and costs."

What To Expect in 2023

- Approximately 20 non-compete bills pending or previously pending in over 10 states
- Connecticut
- New Hampshire
- Minnesota
- West Virginia
- Iowa
- New York
- Wyoming
- New Jersey

Best practices to

comply with laws and decisions

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Notice

- How much notice to provide?
- How to provide notice?
- When should employee's sign their agreements?
  - *Rouses Enters., LLC v. Clapp*, No. 21-30293, 2022 U.S. App. LEXIS 5980 (5th Cir. Mar. 8, 2022) (holding that non-compete was unenforceable under Louisiana law because employee signed covenant prior to start to the start of the employment).

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Consideration

- What is the goal?
- The most effective agreements will change based on the jurisdiction.
  - Some options include an additional payment or a paid restrictive covenant period.
  - Can also tie employment benefits to the covenants (for example, equity, signing bonus, other bonus opportunities, etc.).

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Choice of law/Forum Selection

- Courts and legislatures increasingly rejecting contractual choice-of-law and forum selection clauses.
  - *Medtronic, Inc. v. Walland*, No. 21 Civ. 2908 (ER), 2021 U.S. Dist. LEXIS 172235 (S.D.N.Y. Sept. 10, 2021) (rejected New York choice of law provision and applied California law).
  - *Cabela's LLC v. Wellman et al.*, No. 2018-0607-TMR, 2018 Del. Ch. LEXIS 511, at *19–20 (Del. Ch. Oct. 26, 2018) (Nebraska); *Ascension Ins. Holdings, LLC v. Und*erwood, No. C.A. No. 9897-VCG, 2015 Del. Ch. LEXIS 19, at *7–8 (Del. Ch. Jan. 28, 2015) (California); *see also FP UC Holdings, LLC v. Hamilton*, No. 2019-1029-JRS, 2020 Del. Ch. LEXIS 110, at *20–26 (Del. Ch. Mar. 11, 2020) (collecting authority) (Alabama).
- Depends on the goal of the agreement. The most effective agreements will include provisions in the employee's home state.

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Remedies: Attorneys' Fees

- Attorneys' fees clauses:
  - States are beginning to pass laws allowing employees to recover their attorneys' fees.
  - Thoughtful consideration to make language silent, one-sided, or mutual.
  - Consider implications on other aspects of the agreement as well.

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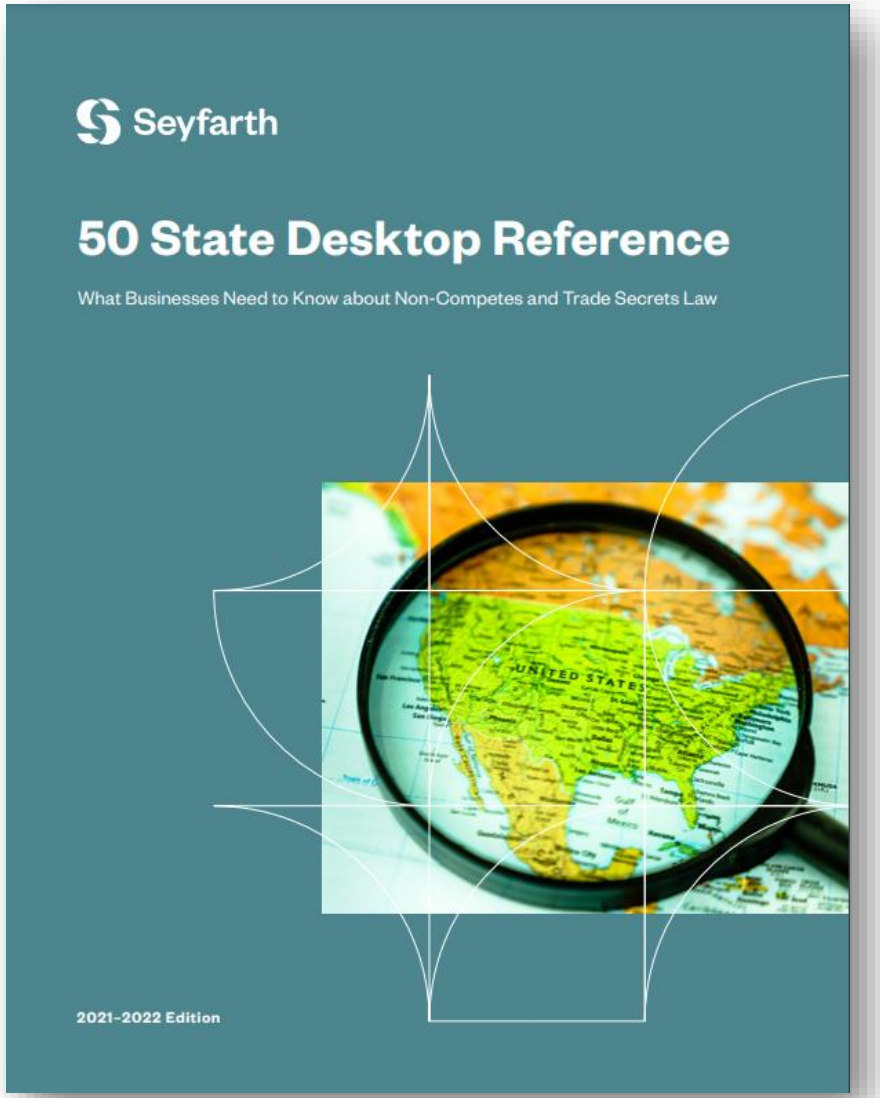
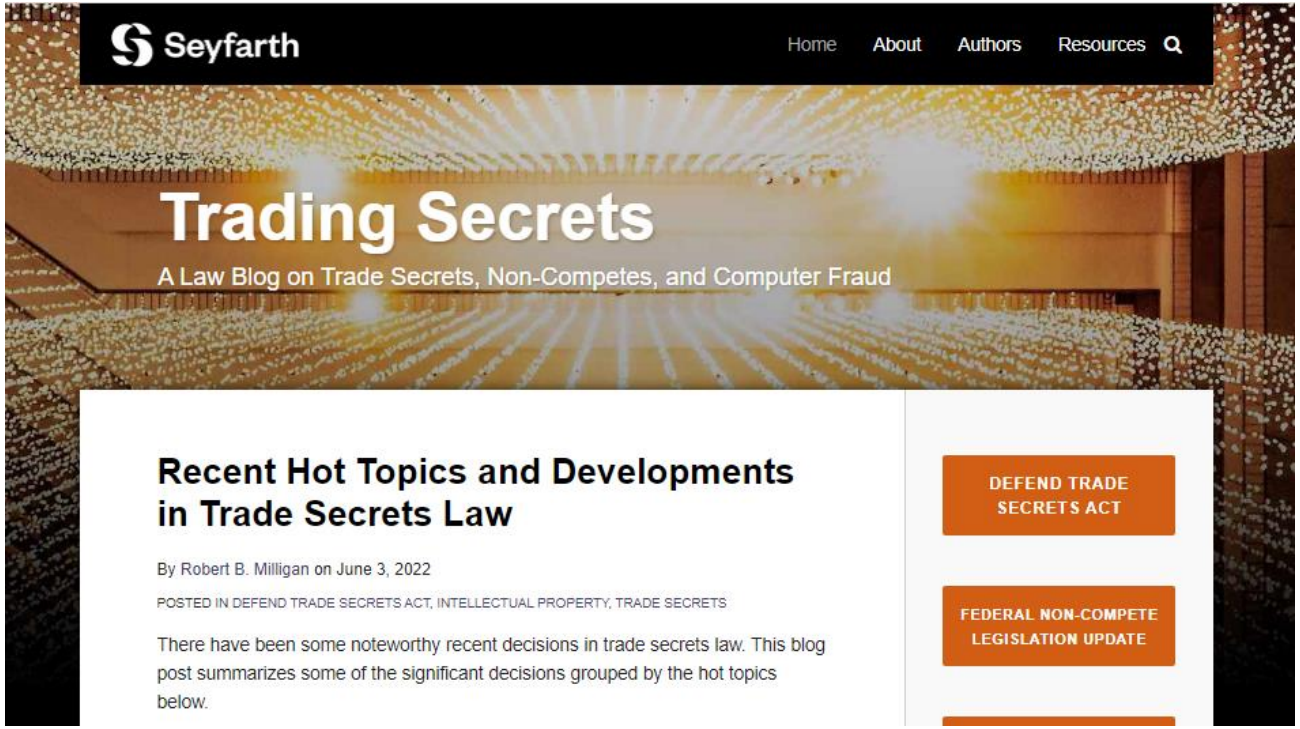
Summary of Tips &Takeaways

- Complex and evolving landscape for non-competes
- Strategic and targeted use of non-competes
- Draft narrowly tailored non-competes
- Follow explicit statutory requirements
- Other restrictive covenants may provide sufficient protection and must still be narrowly tailored and aimed at protecting LBIs
- Annual Compliance Review of RCAs
- Training on Protection of Confidential Information
- Trade Secret Audits

Stay Up to Date on Trade Secrets & Non-Compete Issues





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Questions?