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Noncompetes Under New State Law Restrictions: Wage Requirements, Notice, Time, Layoffs, Proposed Federal Legislation

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Today's faculty features:

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Speaker

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- Jennifer Redmond is a partner in the Labor and Employment Practice Group in the firm's San Francisco office and is an active member of firm's Noncompete and Trade Secrets Team.
- Jennifer specializes in executive disputes and negotiations, negotiating and litigating restrictive covenants, trade secrets litigation, whistleblower litigation, and wage and hour class action litigation. She writes and teaches regularly on the topic of restrictive covenants in California and assists in the structuring of transactions and relationships to support the use of restrictive covenants. She has significant experience in the technology, biotechnology, financial services, entertainment, drug distribution, and national multi-housing industries.

Speaker

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Robert Milligan is the editor of the Trading Secrets blog and co-chair of Seyfarth's Trade Secrets, Computer Fraud & Non-Competes Practice Group.

Speaker

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- 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.
- 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*.
- Teaches negotiation seminars to senior executives. 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

- A non-compete clause prohibits an individual from working for a competitor.
- A non-solicitation clause prohibits an individual from soliciting another company's employees or clients.
- These clauses can be in employment agreements, equity agreements, and in non-employment agreements.
- There is no federal law regarding these covenants and each state treats these clauses differently.
- But federal agencies attempt to limit businesses from engaging in anti-competitive behavior.

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Non-competes in Employment Contracts

- A non-compete clause attempts to limit where an employee can work. It is estimated that 1 in 5 labor force participants are bound by a non-compete.
- A contract that restrains trade is void because it injures the public.
- But in many states (not all), a covenant will be enforced if it is reasonable and supported by consideration.
- In addition to employment agreements, these clauses are often included in equity agreements.

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Noncompetes in business sales, joint ventures, other non-employment contexts

- Commercial context – typically used to prevent employee or customer solicitation
- Business sales – noncompete and nonsolicit used to protect goodwill, customer relationships and employee relationships of the sold entity/assets
- NDA – Used to protect employees and customers from solicitation.
- In general, given greater deference than employment noncompetes with respect to duration, geographic scope and activity scope
- M&A noncompete under scrutiny by FTC-ARKO/Corrigan Complaint issued.

Common State Non-Compete Restrictions

- Minimum Income Requirements

States measure it in different ways:

a) poverty guidelines

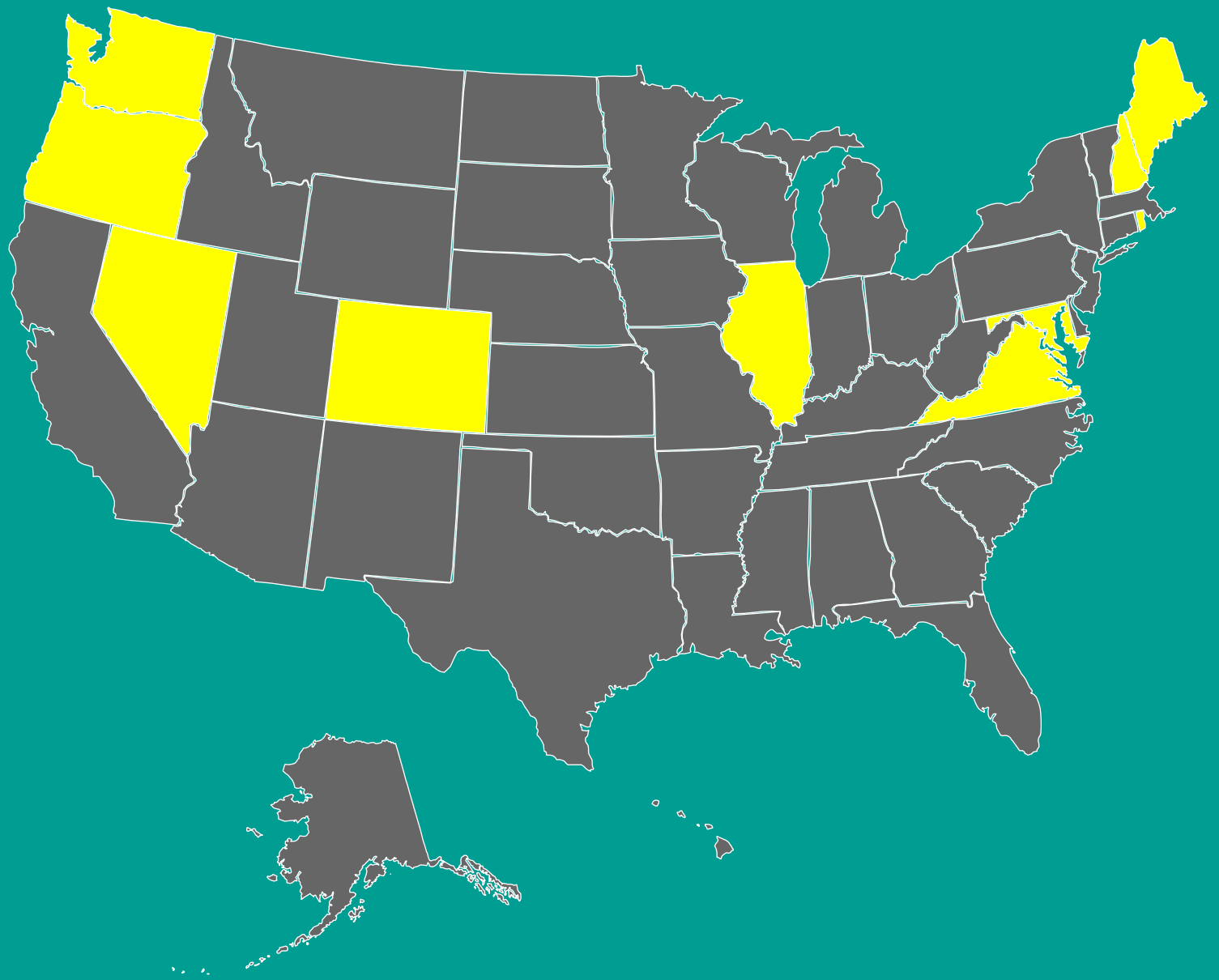
b) non-exempt classification

c) minimum wage

d) specific dollar amount

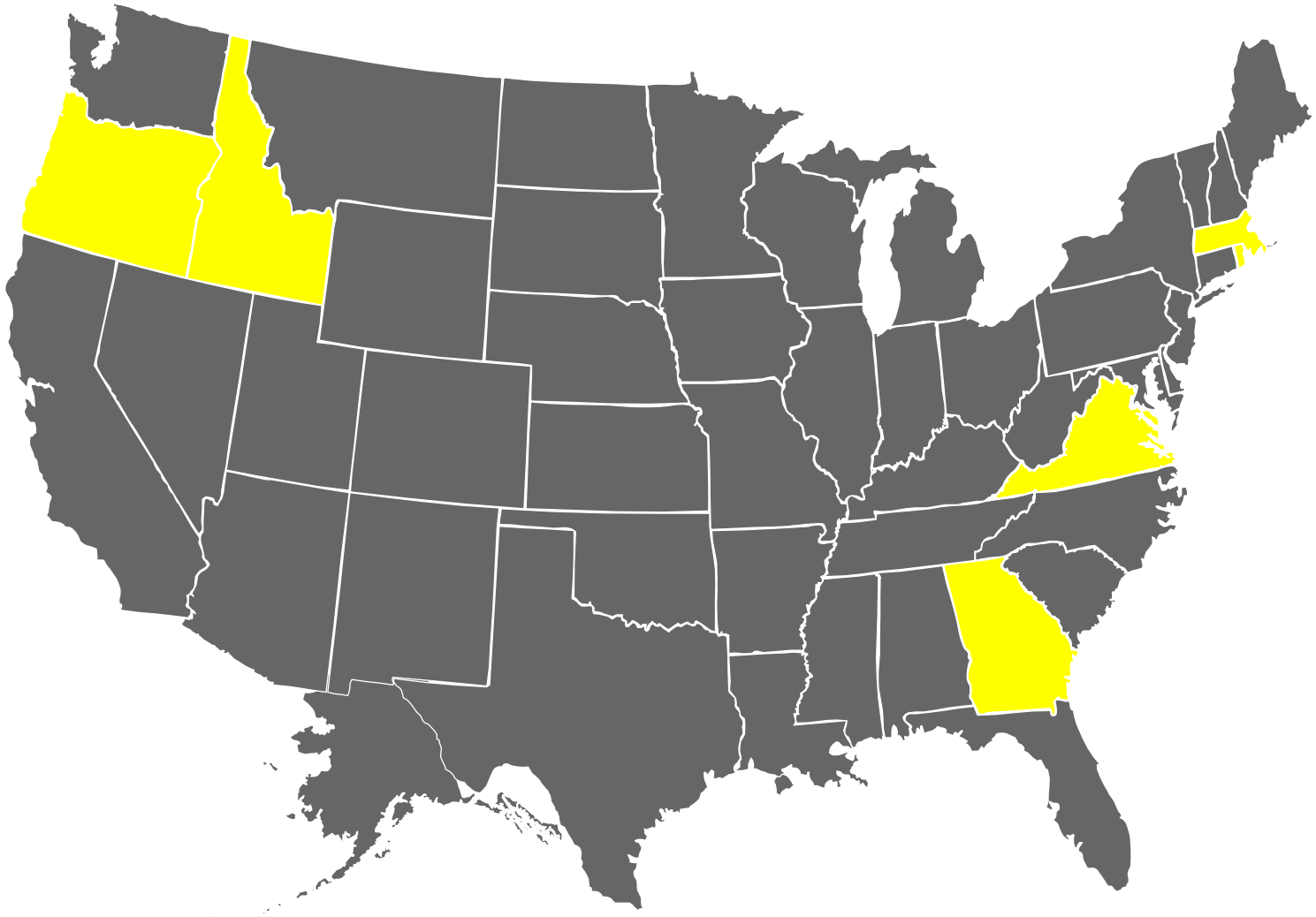
State Non-Compete Law Salary Thresholds

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



State Non-Compete Laws Tied to Exempt Status or Specific Job Duties

- Georgia
- Idaho
- Massachusetts
- Oregon
- Rhode Island
- Virginia



Common State Non-Compete Restrictions

- Release in Event of Layoffs

1. Nevada (if a reduction of force, reorganization, or similar restructuring of the employer results in the termination of employment, a non-compete agreement is enforceable only while the employer pays the employee's salary, benefits, or equivalent compensation, including severance pay (NRS 613.195(5)).
2. IL (if the employer terminates or furloughs or lays off as the result of business circumstances or governmental orders related to the COVID-19 pandemic or under circumstances that are similar to the COVID-19 pandemic, unless enforcement of the covenant not to compete includes compensation equivalent to the employee's base salary at the time of termination for the period of enforcement minus compensation earned through subsequent employment during the period of enforcement).
3. MA (if terminated or laid off without cause)
4. WA (“If the employee is terminated as the result of a layoff, unless enforcement of the noncompetition covenant includes compensation equivalent to the employee's base salary at the time of termination for the period of enforcement minus compensation earned through subsequent employment during the period of enforcement).
5. Common law in other jurisdictions (NY)

Independent Consideration

- Because a non-compete is a contract, it requires consideration. Many employers provide employment in exchange for the non-compete. But most employees are at-will.
- Some states and courts require additional consideration for the non-compete because the employment might be an illusory benefit.
- For example, Illinois requires either 2-years of employment or some other benefit for the non-compete or non-solicit.

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Legitimate Business Interest

- Many courts in states that enforce non-competes will conduct a reasonableness analysis. While this varies in each state, generally, a non-compete is enforceable if, in addition to consideration,
  - The restrictions protect a legitimate business interest, the restrictions don't impose an undue burden, and the restrictions don't harm the public.
- The legitimate business interest is determined based on the totality of the circumstances to protect critical information. Interests include
  - Protecting confidential information,
  - Protecting trade secrets, and
  - Protecting customer relationships.

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Highly Skilled Employees

- In response to non-competes in contracts for Jimmy John's employees, many states passed laws barring non-competes for low-wage workers.
  - The Obama administration estimated that 14% of employees making less than $40,000 were subject to a non-compete.
- States have begun passing laws with higher compensation thresholds.
- Highly skilled employees are more likely to have access to sensitive information, and depending on the industry, direct customer interaction.

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Time, Geography, and Scope

- The time, geography, and activity restraints must be reasonable and are industry based.
- In some industries, prohibiting employment within 50 miles might be unreasonable. While in others, a global restriction might be reasonable.
- Courts have enforced employment restrictions of up to 5 years, depending on the other restrictions.
- Courts will not enforce restrictions to non-competitive activities.
  - In some states, courts will modify or blue-pencil such restrictions.
  - Some states are red-pencil states and will only strike overly broad provisions.

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California: Basics

- Business & Professions Code section 16600 bars noncompetes and customer nonsolicits except for limited statutory exceptions
  - Section 16601 – Sale of Business
  - Section 16602 – Dissolution of Partnership or Disassociation of Partnership
  - Section 16602.5 – Dissolution of LLC or Termination of Membership Interest

California: Basics

Section 16600 may bar employee nonsolicits

- *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc. et al.*,(2018) - Court affirmed trial court order which (1) invalidated the plaintiff's non-solicitation of employees provision in its Confidentiality and Non-Disclosure Agreements (CNDA), (2) enjoined AMN from enforcing or attempting to enforce the employee non-solicitation provision in its CNDA with any of its former employees, and (3) awarded $169,000 in reasonable attorneys' fees to defendants for plaintiff's use of the provision).
- Some federal district courts (*Barker, WeRide*) have extended AMN to bar all employee nonsolicits.
- Other federal courts have rejected the extension - *Hamilton v. Juul Labs Inc.* (employee non-solicitation provision potentially enforceable where the plaintiff did "not allege that the [covenant] prevents her from engaging in her profession like the plaintiffs in AMN who were recruiters"); *Solutionz Videoconferencing Inc. v. Davidson SACV* (denying motion to dismiss employer breach of non-solicitation provision, on the ground that the facts in AMN were "unique," and "the present law in the California is not as clear as defendant claims.")
- Some California trial courts have not followed suit – *Fox v. Netflix* (2019, LA Superior Court) rejected extension of *AMN*.

California: "Trade Secrets Exception"

Contractual provisions tied to purported use of confidential information or trade secrets not enforceable absent proof of all elements of trade secret claim.

- *Conversion Logic, Inc. v. Measured, Inc.*, No. 219CV05546ODWFFMX, 2019 WL 6828283 (C.D. Cal. Dec. 13, 2019) (granting motion to dismiss breach of contract claims with prejudice after finding that broad contractual employee non-solicitation provision violated Section 16600 under *AMN* and *Barker*, and rejected the trade secret exception to contractual customer non-solicitation provisions.
- *First Foundation, Inc. v. Giddings*, No. SACV2000359DOCKES, 2020 WL 2095810 (C.D. Cal. Feb. 28, 2020) (applying trade secrets exception to Section 16600 and enjoining defendants from soliciting customers and employees using trade secret information contained in their memories, based on CUTSA and the DTSA).
- *Power Integrations, Inc. v. De Lara*, No. 20-CV-410-MMA (MSB), 2020 WL 1467406 (S.D. Cal. Mar. 26, 2020) (voiding non-compete and non-solicitation provisions after finding them to be overly broad, and rejecting the *Edwards* trade secret exception for enforcing such provisions under a breach of contract theory as dicta).

California: Section 925

California Labor Code Section 925 restrains ability of employers to require employees to litigate or arbitrate employment disputes:

- outside of California, or
- under the laws of another state
- (except where employee was individually represented by a lawyer negotiating the agreement)

California: Section 925

Impact of Section 925 on enforcement of choice of venue provisions by federal courts in CA is an open issue.

- In *Alabsi v. Savoya, LLC*, No. 18-cv-06510-KAW, 2019 U.S. Dist. LEXIS 49675 (N.D. Cal. Mar. 25, 2019), the court evaluated a vendor service agreement ("VSA") between a driver (Alabsi) and a limousine service (Savoya). The VSA included a Texas choice of law and forum selection clause, even though Alabsi worked exclusively in San Francisco. The court concluded that Section 925 "expresses California's strong public policy to prohibit forum selection clauses that require California residents to litigate their employment disputes outside of the state, and therefore the forum selection clause is unenforceable." Id. at *19.
- In *Karl v. Zimmer Biomet Holdings, Inc*., No. c-18-04176-WHA, 2018 U.S. Dist. LEXIS 189997 (N.D. Cal. Nov. 6, 2018), the plaintiff worked as a sales representative in Northern California for defendants, two Delaware corporations and two Indiana limited liability companies. In August 2015, plaintiff signed a sales associate agreement with an Indiana forum-selection clause. The court held enforcement of the forum-selection clause would contravene California's strong public policy, reasoning that section 925 "expresses a strong public policy to protect employees from litigating labor disputes outside of their home state."
- The Eastern District court reached the opposite conclusion in *Mostipak v. Badger Daylighting Corp*., No. 2:17-cv-00247-MCE-CKD, 2017 U.S. Dist. LEXIS 160281 (E.D. Cal. Sept. 28, 2017). In that case, the court evaluated a noncompetition agreement entered into in July 2013 between defendant Badger, a hydrovac excavation business, and one its California employees. Badger was incorporated in Nevada and had its principal place of business in Indiana. The agreement contained a noncompete provision and an Indiana forum selection clause. The court granted Badger's motion to dismiss, summarily rejecting plaintiff's argument that section 925 rendered the out-of-state forum selection clause void and stating: "[section] 925 does not prohibit employees like [plaintiff] from executing an agreement to that effect, particularly where, as here, [plaintiff] specifically agreed that its provisions were reasonable and would not prohibit him from earning a livelihood." Id. at *11.

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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New York

- Under New York law, restrictive covenants must be "rigorously examined" and courts apply "an overriding limitation of reasonableness."
  - *See Reed Elsevier Inc. v. TransUnion Holding Co.*, No. 13 Civ. 8739 (PKC), 2014 U.S. Dist. LEXIS 2640, at *17–18 (S.D.N.Y. Jan. 8, 2014) (citations omitted); *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 813 F. Supp. 2d 489, 506 (S.D.N.Y. 2011) (citations omitted).
- Employees must receive consideration (employment is sufficient) and clauses must be reasonable in time and area, protect an employer's legitimate business interest, not harm the public, and not unduly burden employees.

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New York

- Courts recognize four legitimate business interests: (1) protection of trade secrets, (2) protection of confidential information, (3) protection of the employer's client base, and (4) preventing irreparable harm. Courts will refuse to enforce a covenant that is not limited to an employee's specific job duties.
  - *See IBM Corp. v. Visentin, No. 11 Civ. 399 (LAP)*, 2011 U.S. Dist. LEXIS 15342 (S.D.N.Y. Feb. 16, 2011).
  - A recent decision re-affirmed "uniqueness." *JLM Couture, Inc. v. Gutman*, 24 F.4th 785 (2d Cir. 2022).
    - Explaining that the non-compete "appears to be enforceable under New York law. . . . New York recognizes the availability of injunction relief 'where the non-compete covenant is found to be reasonable *and the employee's services are unique*." *Id.* at 795 (emphasis in original) (citation omitted).
- Key exception: forfeiture or competition for choice clauses.

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New Washington D.C. Law

- New Legislation – the Ban on Non-Compete Agreements Amendment Act of 2020.
  - Not effective until at least October 2022.
  - The new law bans non-compete clauses for the majority of employees.
  - Applies both during and after an employee's employment.
    - Employees can have other jobs while employed.

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New Washington D.C. Law

- New Legislation includes notice requirements, penalties, and remedies.
  - Requires employer's to provide the following notice to employees:

    "No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020."
  - Prevents an employer from retaliating against an employee.
  - A private cause of action for employees to file a lawsuit against an employer.
  - The city's mayor can also impose penalties on companies.

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New Washington D.C. Law

- New Legislation does not impact
    - Confidentiality agreements,
    - Non-solicitation agreements, or
    - Buy-sell agreements

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New Washington D.C. Law

- New Legislation does not apply to
    - Unpaid volunteers for educational, charitable, religious, or non profit organizations,
    - Certain medical specialists who earn at least $250,000,
    - Religious officials, or
    - Babysitters.

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Washington D.C.

- Previous law
  - Washington D.C. has a statute that prohibits any contract that unreasonable restrains trade. *See* DC Code § 28-4502.
  - Similar to other jurisdictions, D.C. enforces a restrictive covenant if there is consideration, the restraint is reasonable, it protects the employer's business interest, and does not harm public policy.
    - Employment is sufficient consideration at the start of employment. But if the agreement is signed after the job begins, additional consideration is necessary.
    - Some courts may not enforce the non-compete if an employee was terminated without good cause.

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Washington

- Effective **January 1, 2020**
- Deters overly broad agreements
- Sets income thresholds
- **Effective January 1, 2022: The new adjusted earning threshold for employees is $107,301.04 and the new adjusted earning threshold for independent contractors is $268,252.59.**
- 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 **$107,301.04 per year**.
  - In the case of independent contractors, the law voids non-competes with them unless the contractor was being paid less than $**268,252.59 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 invalidate 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.

Maryland – Restricts Non-Competes for Low Wage Workers

- New non-compete law went into effect on October 1, 2019.
- Law bars employers from enforcing non-compete agreements against workers earning less than or equal to $15 per hour or $31,200 per year.
- The law only bans the enforcement of non-compete agreements and explicitly reserves employers' rights to enforce contracts prohibiting "the taking or use of a client list or other proprietary client-related information."

New in 2021: 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

New in 2021: 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 (like Washington state)
- Non-compliant agreements **void**, not just voidable

New in 2022: Colorado

Governor Jared Polis (D) signed the bill into law on June 8, 2022, giving it an effective date of August 10, 2022.

Colorado

- Any restrictive covenant executed by a Colorado worker after the law's effective date will be deemed presumptively "void." This includes both non-compete and non-solicitation agreements. There are, however, several stated exceptions, which include: (a) restrictive covenants associated with the sale of business; (b) restrictive covenants executed by a "highly compensated worker" when the non-compete is no broader than reasonably necessary to protect trade secrets; and (c) restrictive covenants executed by workers earning sixty percent or more of the "highly compensated worker" threshold. Under the new law, a "highly compensated worker" is someone who is currently earning $101,250 per year or more. (NOTE: This figure is tied to the threshold set by the Colorado Department of Labor and will be modified annually).
- Non-compete agreements only permitted with workers that are paid at or above the highly compensated worker threshold (currently $101,250 annually) if such covenant is reasonably necessary to protect the employer's trade secrets.
- Customer non-solicit agreements only permitted with workers earning 60% or more than the highly compensated worker threshold if such covenant is reasonably necessary to protect the employer's trade secrets.
- Confidentiality agreements still remain valid but can only be used if they do not prohibit disclosure of information arising from a worker's general training, knowledge, skill, or experience.
- In order for any restrictive covenant to be enforceable under the new law, the employer must provide sufficient notice of the restrictions. In cases of a prospective worker, notice must be provided before they accept the offer of employment. In cases of a current worker, notice must be provided at least 14-days before the earlier of the effective date of either the covenant or the additional consideration to be provided to the worker. (NOTE: The law spells out numerous steps employers must follow to provide proper "notice." These notices must: (a) be in writing and signed by the worker; (b) in a separate document with clear and conspicuous language; (c) include the agreement containing the non-compete; (d) identify the non-compete agreement by name and state that it contains a covenant that could restrict the worker's future employment options; and (e) direct the worker to the specific paragraphs of the non-compete agreement that contain the non-compete).

Colorado

- If the worker in question primarily resided or worked in Colorado at the time their employment ends, any “choice-of-forum” clause in the non-compete agreement cannot require adjudication outside of Colorado. Additionally, in these situations, Colorado law must govern the enforceability of the non-compete agreement.
- Employers can be fined $5,000 per worker if they enter into, attempt to enforce, or present to any current or prospective worker a restrictive covenant that violates the new law. That said, the new law also gives Colorado judges full discretion to determine whether or not to issue a monetary penalty (or to issue a penalty less than $5,000), if the employer can successfully demonstrate that they acted in good faith and had reasonable grounds for believing they were not violating the new law.
- Workers and prospective workers, along with the Colorado Attorney General, may obtain injunctive relief if they demonstrate a violation of the new law. Workers and prospective workers, may also recover reasonable attorneys’ fees and costs if they can establish the restrictive covenant(s) in question do not comply with the new law.

Effective March 1, 2022: Colorado

- Any violation of Colorado's restrictive covenants statute will constitute a class 2 misdemeanor, with a penalty of a $750 fine or up to 120 days' imprisonment per violation – or both.
- Unlawful to use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation.

Massachusetts

New law took effect October 1, 2018 and generally bans employment-related non-compete agreements unless they meet certain statutory requirements.

- The agreement must be in writing, signed by both the employer and employee, and must state the employee has the right to consult counsel prior to signing.
- The employer must also provide notice of the agreement to the employee, the form and timing of which depends on when the employee is asked to sign the agreement:
- Employers who require employees to sign a non-compete at the beginning of employment must provide a copy of the agreement to the employee either before making a formal offer, or 10 days before the employee starts, whichever comes first.
- Employers who require employees to sign a non-compete during employment must provide notice of the agreement not less than 10 business days before the agreement becomes effective.

Massachusetts *(cont.)*

- Non-competes entered during employment must be supported by independent consideration beyond continued employment.
- In terms of time, geography, and activity restraints, a non-compete will be enforceable only if the time restriction is for one year or less post-employment (unless the employee breaches his or her fiduciary duty or steals the employer's property, in which case the non-compete can last up to 2 years).
- A non-compete will be presumed reasonable in scope if it is (i) limited to the geographic areas in which the employee provided services or had a material presence or influence within the last 2 years of employment, and (ii) limited to the specific types of services the employee provided during the last 2 years of employment.
- The law also recognizes three legitimate business interests that can support a noncompete: trade secrets, confidential information, and employer goodwill.

Massachusetts *(cont.)*

- The non-compete agreements must include a "garden leave" clause or other mutually-agreed consideration. A "garden leave" clause requires the employer to pay the employee for the duration of the non-compete period at least 50 percent of the employee's highest salary within the last 2 years of employment. The employer's obligation to pay the garden leave is relieved only if the employee breaches the agreement.
- The new law bans non-competes with employees who are classified as "non-exempt" under the FLSA, or who are terminated without cause or laid off.
- Does not apply to customer or employee nonsolicits, or noncompetes entered into in connection with the sale of a business.

What To Expect in 2022

- Approximately 20 non-compete bills pending in over 9 states
- Connecticut
- New Hampshire
- Minnesota
- West Virginia
- Iowa
- New York
  - Multiple bills in the works, including one that would outright ban non-competes
- Wyoming
  - Full ban on non-competes being considered
- New Jersey
  - Four separate bills, including one that would require an employer to pay 100% of a restricted individual's salary and benefits for the full restricted term
- Plus others: Illinois, Massachusetts, Ohio, Pennsylvania, South Carolina, and Vermont…

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."

Federal Non-Compete Legislation Update

- **Workforce Mobility Act**
  - Introduced in February 2021
  - Bipartisan bill intended to limit the use of non-compete agreements
- **Freedom to Compete Act**
  - Introduced in July 2021
  - 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
- **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.

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.

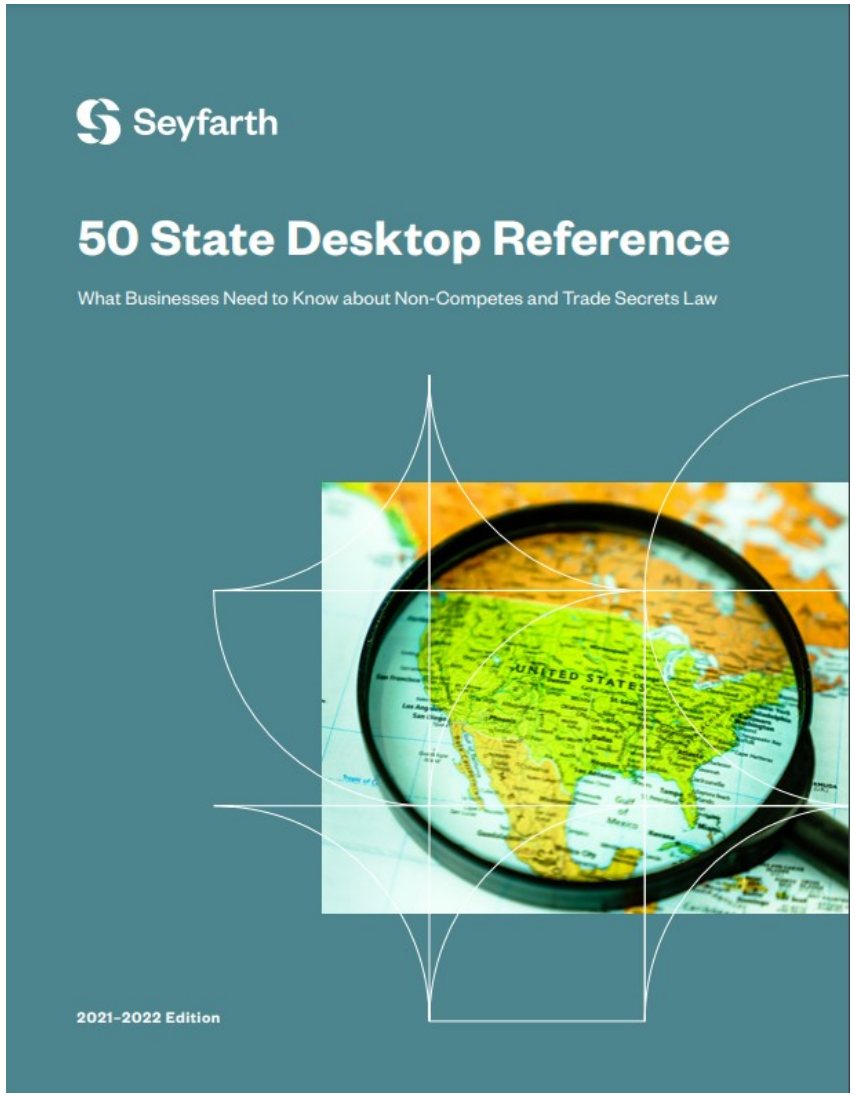
- Lina Khan, the Chair of the FTC, told the Wall Street Journal, “We feel an enormous amount of urgency given how much harm is happening against the workers. This is the type of practice that falls squarely in our wheelhouse.”

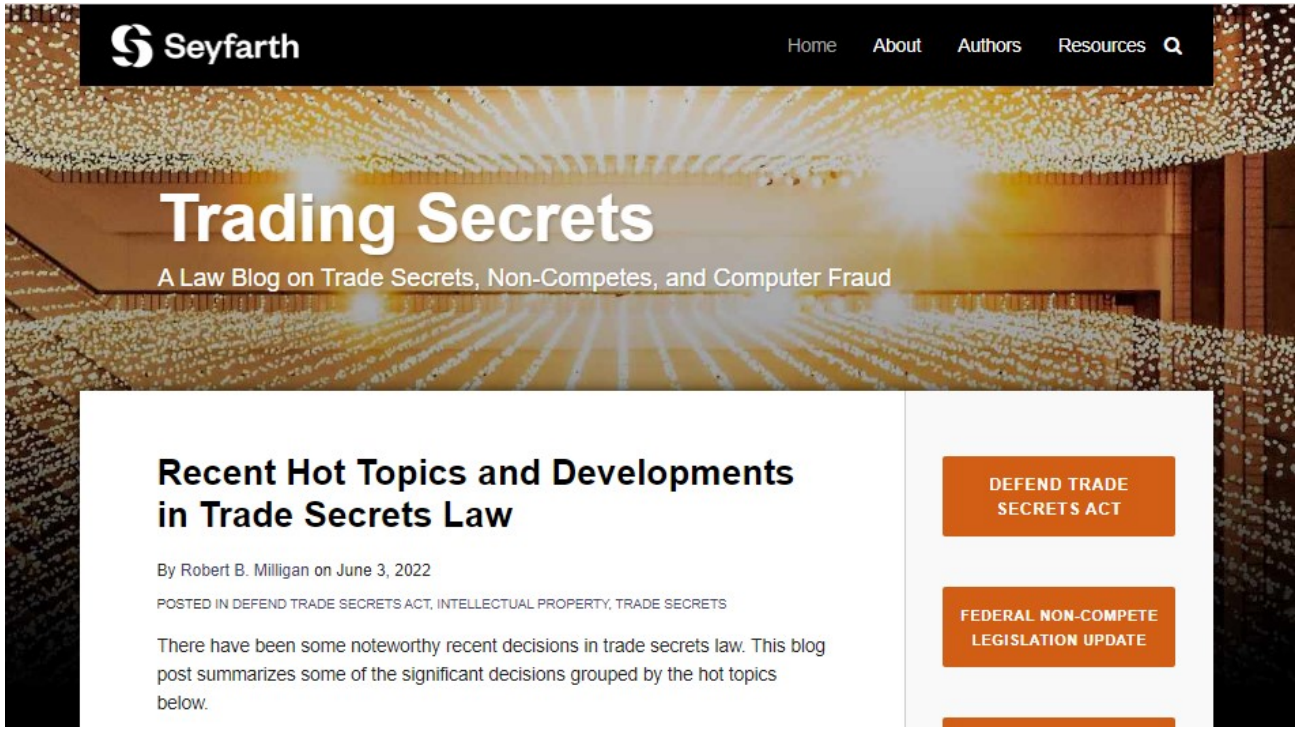
- Other Commissioners disagree.

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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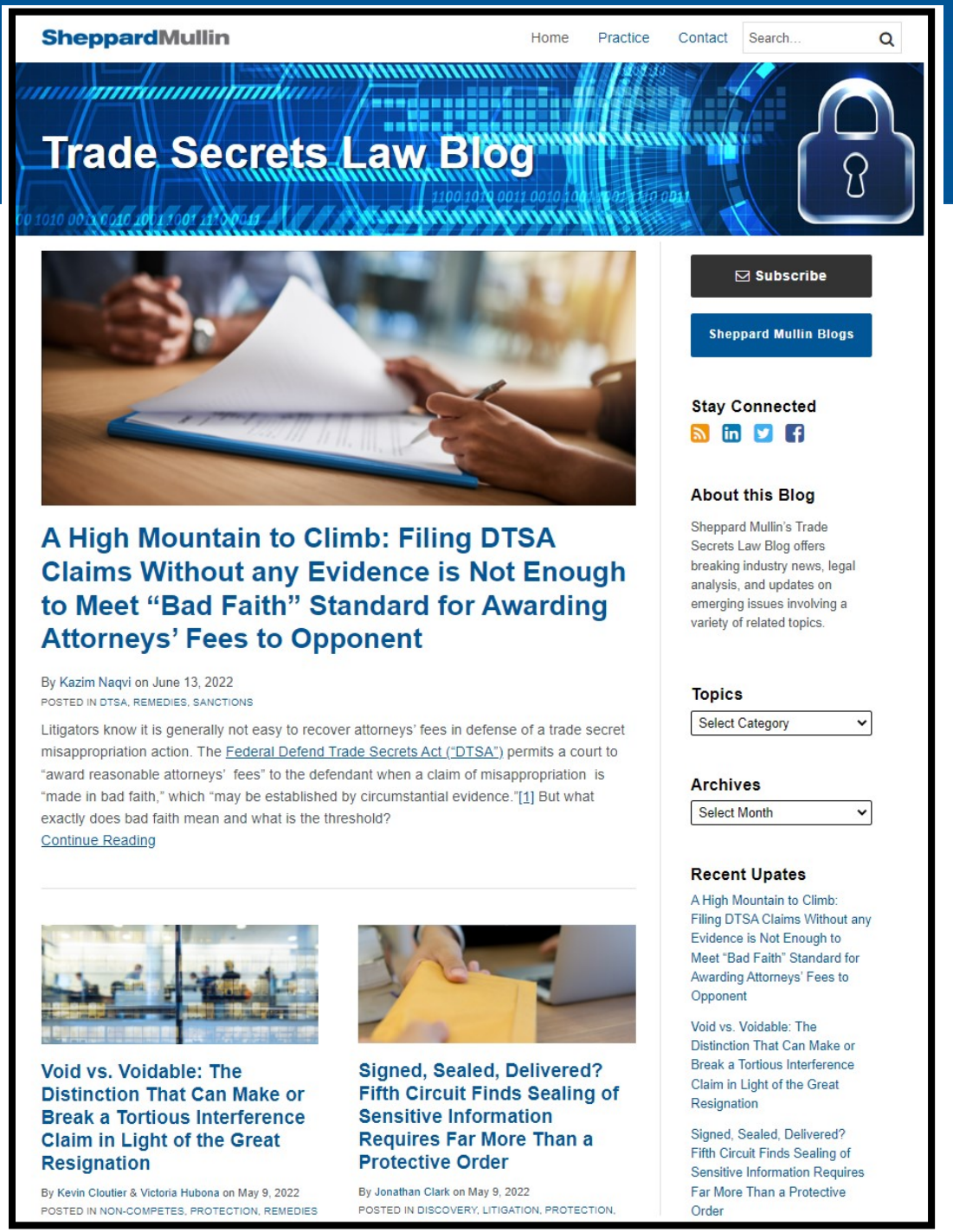

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Questions?