



Emerging Trends in Non-Compete Law

October 21, 2021

* Although we will be providing legal information during this webinar, we will not be providing legal advice. If you have a legal question about your specific situation, we suggest consulting a lawyer.

Agenda

- Introduction
- Basics of Non-Compete Law
- Enforceability of Non-Compete Provisions
- Federal and State Emerging Trends
- Use of Technology to Comply with Laws
- Questions and Answers

Types of Restrictive Covenants

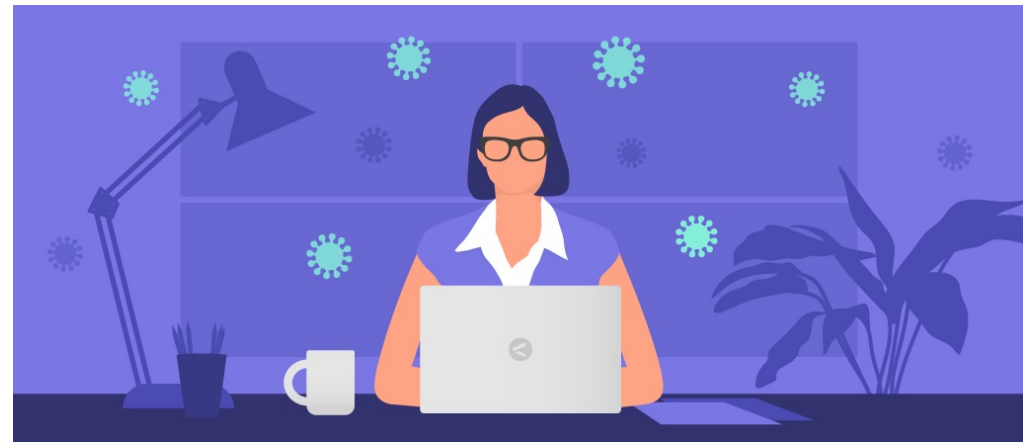
- Non-compete: A contract where an employee agrees to not compete with a company for a certain period after employment ends.
- Non-solicit: A contract where an employee agrees not to solicit the company's clients, employees, or other individuals with whom the employee worked.
- Non-disclosure: A contract where an employee agrees not to disclose the company's confidential information.

Basics of Non-Compete Law

- Limitations
 - Legitimate business interest
 - Professions and industries
 - Length of restricted period
 - Restricted area
 - Definition of competition

Basics of Non-Compete Law

- Consideration
 - Offer of employment usually sufficient
- Notice requirements
 - Some states require notice that employees will be asked to sign a non-compete or non-solicitation provision



Enforceability

- Strike unenforceable provision
 - Blue pencil
 - May include power to reform an unenforceable provision
 - Red pencil
- Monetary penalties
- Attorney's fees



Trends in Non-Compete Law

- Non-compete agreements are under increasing scrutiny

Jimmy John's under fire for worker contracts

by Ben Rooney @ben_rooney

October 22, 2014: 12:00 PM ET



Lawmakers take aim at Jimmy John's labor practices.

It's one thing for a high paid exec to be prohibited from working at a competitor. But Jimmy Johns actually imposes non compete clauses on its low-wage workers.

- An estimated 40% of American workers have been subject to non-compete clauses

Trends at the Federal Level

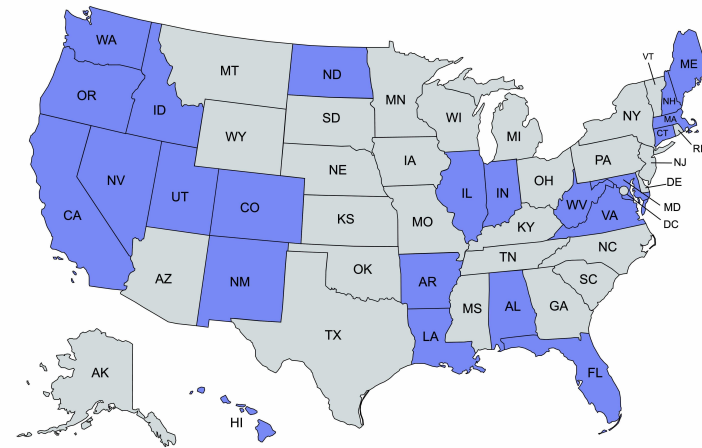
- In July, President Biden issued an executive order “encouraging” the FTC “to curtail the unfair use of non-compete clauses”
- What does this mean for companies who use non-competes now?
 - Executive Order does not ban or limit non-competes. Nor does it encourage FTC to ban them. Order is focused on reining in “unfair use.”
 - FTC will have to go through rulemaking process.
 - Questions remain about FTC’s authority to limit use of non-competes.
 - Executive Order reflects current widespread skepticism over non-competes, and now is a good time for companies to rethink how they use non-competes

Trends at the State Level

- Three states ban employee non-competes: California, Oklahoma, North Dakota. D.C is set to join the club in 2022.
- States that have laws limiting the use of non-competes include Colorado, Illinois, Maine, Maryland, Massachusetts, New Hampshire, Nevada, Oregon, Rhode Island, Virginia, and Washington

Trends at the State Level

- Expect more state-level restrictions in the near future:
 - Over the past several years, 37 states have been reevaluating their non-compete laws and 24 states and D.C. have made changes



Created with mapchart.net

- In 2021 alone, there have been 66 non-compete bills introduced in 25 different states spanning the political spectrum from Mississippi to Vermont

Trends at the State Level

State approaches: Income Thresholds

- Many states are prohibiting non-competes for low-wage or low-skilled workers
- Examples:
 - **Illinois** – banned for employees earning \$75k or less
 - **Washington** – banned for employees earning less than \$100k
 - **Oregon** - banned for employees earning less than \$100,533
 - **Maryland** – banned for employees earning less than \$31,200 annually or \$15/hour
 - **Nevada** – banned for all employees paid an hourly wage
 - **Massachusetts** – banned for all non-exempt employees under the Fair Labor Standards Act
- Other states with income thresholds are Maine, New Hampshire, Rhode Island, and Virginia

Trends at the State Level

State approaches: Notice Requirements

- Many states are requiring employers to provide employees advance notice that signing non-compete is required
- Examples:
 - **Illinois** – Must advise employee to consult with attorney, and must provide copy of non-compete 14 days before starting work
 - **Massachusetts** – Must advise employee of right to consult with attorney and provide non-compete the earlier of 10 days before starting work or prior to a formal offer
 - **Washington** – Must disclose terms of non-compete before acceptance of offer or before agreement becomes effective
 - **D.C.** – Must disclosure that non-competes are unlawful
- Other states with notice requirements are Maine, New Hampshire, and Oregon.

Trends at the State Level

State approaches: Consideration



- Historically, an offer of employment is enough consideration to make a non-compete enforceable.
- Some states have begun requiring more:
 - **Illinois** – 2 years of employment or “additional financial or professional benefits”
 - **Massachusetts** - “Garden leave” or “other mutually-agreed upon consideration”

State approaches: Penalties

- State prosecutors have been aggressive in going after companies who abuse non-competes by subjecting low-wage workers to them.
- In Washington, for example, companies face penalties of \$5k plus attorney’s fees for violating non-compete law

Trends at the State Level

The screenshot shows the header of the Washington State Attorney General's Office website. It includes the state seal, the text "Washington State Office of the Attorney General", and the name "Attorney General Bob Ferguson". A navigation menu contains links for Home, News, Office Information, Serve The People, Initiatives, Resources, AG Opinions, and Employment. The main content area features a news release titled "Bellingham medical providers must end illegal non-compete contracts, pay \$110K as a result of AG Ferguson consent decree". The release is dated August 26, 2021, and includes the text: "FOR IMMEDIATE RELEASE: Aug 26 2021. Ending exclusive contracts with area medical clinics saves patients money. BELLINGHAM — Attorney General Bob Ferguson today announced that, as a result of his antitrust consent decree,". On the right side, there are buttons for "News Re" and "News F", and a search field.

Trends in Non-Compete Law

TAKEAWAYS

1. There is a clear and rapid trend at both the state and federal level to restrict the use of non-compete agreements
2. Expect more states to impose bans on non-competes for low-wage workers
3. Expect more states to require employers to give potential hires notice that a non-compete is a condition of employment and time to review the terms of the non-compete
4. Companies should not be using non-competes as a matter of course in every employment contract.
5. Now is a good time for companies to take a fresh look at their use of non-competes

Using Technology

- Factors to consider when drafting non-compete provisions:
 - Legitimate business interest
 - Appropriate restricted period
 - Limited geographic scope
 - Reasonable protected activity
 - Income thresholds
 - Prohibited professions
 - Consideration
 - Notice periods
 - And more!

Using
Technology

SixFifty tool coming soon!

sixfifty.com/employment