



The Trend Continues: New Laws Further Restrict Non-Competition and Non-Solicitation Agreements

August 25, 2022

* Although we will be providing legal information during this webinar, we will not be providing legal advice.

AGENDA

Broad trends in
restrictive covenant
laws



Specific updates to
state restrictive
covenant laws



Alternatives to non-
compete
agreements



Common Restrictive Covenants

Non-competition agreement

A contract where an employee agrees to not compete with a company for a certain time period and within a certain geographic area after employment ends.

Non-solicitation agreement

A contract where an employee agrees not to solicit the company's clients, employees, or other third parties like vendors/suppliers for a certain time period after employment ends.

The “Reasonableness” Requirement



- In every state, a non-compete or non-solicit agreement must (1) protect a legitimate business interest and (2) be “reasonable” in order to be enforceable.
- Legitimate business interests typically relate to the protection of company confidential information. A non-compete must be no greater than necessary to protect the company’s legitimate business interest
- Must be reasonable in:
 - Duration
 - Geography
 - Scope

State-Level Trends

- Every year, more states are passing laws limiting employers' use of non-competes.
 - Complete bans: CA, ND, OK
 - Wage thresholds: CO, DC, IL, ME, MD, MA, NV, NH, OR, RI, VA, WA
 - Notice requirements: CO, DC, IL, ME, MA, NH, OR, VA, WA
 - Additional consideration required: IL, MA



Colorado



CO Non-Compete Statute

- Income thresholds
 - Non-Solicitation: \$60,750
 - Non-Compete: \$101,250
 - Must be met both at the time of signing and enforcement.
- Trade secrets are now the only protectable interest.
- Notice
 - Employees must receive at least 14 days' notice that a non-compete will be required.

District of Columbia



D.C. Amendments

- Applies to employees who work mainly in DC
- Employees earning \$150,000/year are exempt
- Medical specialists earning \$250,000/year are exempt
- Effective date: November 10
 - Applicable date?
- Presumption that agreements of acceptable duration of 1 year for highly compensated employees and 2 years for medical specialists

Medical Professionals



- Iowa
 - Healthcare agencies cannot enter into non-compete agreements with their agency workers.
- Illinois
 - Non-competes are unenforceable against physicians and nurses and nurse aids.
- Kentucky
 - Health care services agencies may not enter non-competes with “direct care staff.”

Costs of Non-Compliance



State approaches: Penalties

- State prosecutors have been aggressive in going after companies who abuse non-competes by subjecting low-wage workers to them.
- Washington: companies can face penalties of \$5k plus attorney's fees for violating non-compete law.
- Colorado: employers can be fined up to \$5,000 plus attorney's fees for even presenting a non-compliant non-compete to an employee with criminal penalties for employee intimidation.
- DC: employers may face administrative penalties between \$350 and \$1,000 for each violation. Violation of retaliation protections is penalized by not less than \$1,000.

Non-solicitation Agreement



- More limited for both the company and former employee
- For some professions, like sales, a non-solicitation is almost as good as a non-compete
- Protects a company's customer and employee base

Non-solicitation Limitations



- Time Restrictions (1 year is usually safe)
- Geographic Limitations
- Scope
- Income Threshold
- Consideration

Non-Disclosure Agreements

- Limitation on the information that former employees can use
- Often use NDAs to protect company trade secrets and proprietary information
- Some employers use NDAs to prohibit employees from talking about unlawful employment practices like harassment and discrimination



NDA Limitations

- States have begun limiting NDA use
- Some states limit NDAs with respect only to sexual harassment/abuse claims
- Other states limit NDAs related to all workplace discrimination claims of any protected class like race, sex, religion, national origin, etc.
- States with restrictions: California, Illinois, Maryland, Nevada, New Jersey, New Mexico, New York, Oregon, Tennessee, Vermont, Virginia, and Washington



Company Property and Return Policy



- Essential to have a policy to protect your physical and intellectual property
- Especially important with the increase in remote working
- Policy in Handbook or Employment Agreement is good but actually follow through

Takeaways

- Don't use the same form non-compete or non-solicit agreement for employees in different states (and even for different employees within the same state)
- Be as narrow as possible when drafting non-compete and non-solicit agreements
- Routinely check whether you need to update your non-compete/non-solicit agreements (and check now if you have employees in D.C. or Colorado)
- Consider alternatives to non-competes to protect your company's confidential information