



How to Compete Without Non-Competes

August 3, 2023

Agenda



Which state's laws govern your employment relationships?

Lawyer answer: it depends

General rule: the law of the state where the employee works

Non-Compete Bans Expand at State Level

- **Minnesota** became first state to completely ban non-competes since 1890
 - Applies to employees and contractors
 - If employee “primarily resides and works” in MN, MN state law must govern and any dispute has to be heard in MN courts
 - Doesn’t apply to non-solicitation agreements, NDAs, confidentiality agreements, or agreements restricting use of client/contact list
 - Exception for sale/dissolution of business
 - Savings provision means other parts of agreements containing unlawful non-competes may still be enforceable
 - Permits award of attorney fees
 - Went into effect July 1. Not retroactive.



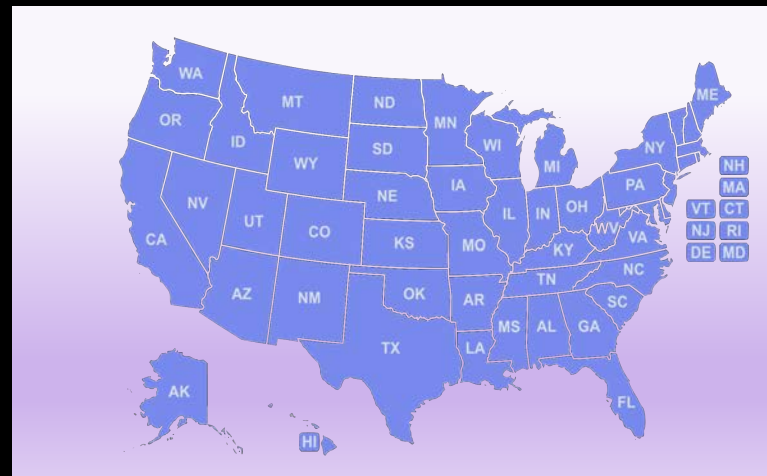
Non-Compete Bans Expand at State Level

- **New York's** state legislature passed a full non-compete ban. Currently awaiting governor's signature.
 - "Non-compete" is any agreement that prohibits or restricts employee from obtaining a new job
 - Doesn't apply to customer non-solicitation, NDAs, or confidentiality agreements
 - No explicit exception for sale of business
 - Permits award of "all appropriate relief," including attorney fees
 - Requires award of liquidated damages of up to \$10k
 - Not retroactive - takes effect 30 days after signed



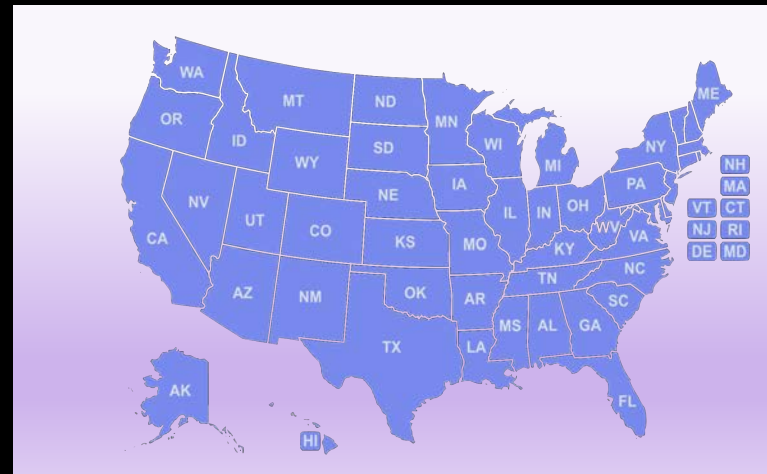
More State Non-Compete Regulation

- **Connecticut** - additional restrictions on non-competes with physicians
- **Indiana** - non-competes banned for primary care physicians and new restrictions for other types of physicians
- **Maine** - non-competes banned for veterinarians
- **Maryland** - updated wage threshold beginning Oct. 1
- **Tennessee** - temporary healthcare staffing agencies banned from using non-competes with direct care staff



Pending State Non-Compete Laws

- **Hawaii** - law would ban non-competes and non-solicitation agreements for an employee of a restaurant, retail store, newspaper, magazine, news agency, press association, wire service, or radio or television transmission station or network
- **Michigan** - law would ban all employee non-competes
- **Nevada** - law would ban physician non-competes both during and after employment
- **New Jersey** - law would make use of non-competes evidence of an antitrust violation
- **Oregon** - law would ban physician non-competes with limited exceptions for sale of business
- **Pennsylvania** - law would ban physician non-competes



NLRB Challenges Non-Compete Legality

- On May 30, 2023, NLRB General Counsel issued memo opining that non-competes violate the NLRA.
- Non-compete provisions violate the NLRA because they “could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences as to type and location of work.”
- This opinion isn’t a rule, but it is effective immediately, and indicates the NLRB will increase its scrutiny of non-compete agreements, especially those with low- or middle-wage workers.
- Importantly, this does not affect non-competes with supervisory or managerial employees because they aren’t protected under the NLRA.



U.S Chamber of Commerce Responds

Criticizes Effort Altogether

- Titled “The NLRB General Counsel’s Misguided and Unsupported Attempt to Outlaw Non-Compete Agreements”

Challenges Cited Precedent

- Alleges supporting cases have “little or nothing to do with non-compete agreements” in context
- States the GC’s precedent cases merely list categories of protected classes

Questions Viability

- Proposes slippery slope argument that the GC’s logic could also mean great pay and benefits also violate the NLRA
- Questions judicial support

Workforce Mobility Act of 2023

- Previously introduced in 2019 and again in 2021
- Would ban employee non-competes for all workers
- Prospective only
- Sale of business and dissolution of partnerships are exempt



FTC Enforcement Actions

“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” 15 U.S.C. § 45.

- O-I Glass: prohibited over 1,000 employees from connected, in any manner, with a business selling similar products
- Ardagh Group S.A.: 2-year restriction for 700+ employees from working with anyone similar in the U.S., Canada, or Mexico
- Prudential Security: hourly guards prohibited from working for other security companies within 100 miles. \$100,000 penalty for violations.
- Anchor Glass: 1-year restriction, barred working with anyone providing “the same or substantially similar” products in the US or from dealing with any current or prospective customer they dealt with

Current State of FTC's Proposed Non-Compete Ban

- The rule:
 - Proposes a categorical ban on worker non-compete agreements, with one exception for the sale of a business
 - Covers virtually all workers, including independent contractors
 - Applies retroactively to non-competes already signed
 - Imposes strict notice requirements
- The FTC is wading through almost 27,000 comments on the proposed rule. It could be April 2024 before the FTC issues its final rule.
- For more information, see [SixFifty's webinar](#) on the FTC's proposed rule.

The Ban

1 Worker Non-Competes Prohibited

- “Non-compete” is any agreement that prevents worker from accepting new job or operating a business, no matter the label
- Requiring repayment of training costs is a “non-compete” unless payment is reasonably related to the costs incurred
- Exception: in the context of a sale of business, an employee who owns at least 25%

2 Retroactive

- Applies to all agreements going forward and existing agreements
- Within 180 days of the final rule’s effective date, employers must rescind all existing non-compete clauses

3 Notice Requirements

- If company rescinds existing non-compete, it must provide notice to worker within 45 days of rescission that the non-compete is no longer in effect
- Notice must be provided to current and former workers who are still under a non-compete
- FTC provides model notice language that complies with the rule

Possible Alternatives to Complete Ban

Rebuttable Presumption

- Worker non-competes are presumed unlawful unless employer shows by clear and convincing evidence that:
 - the non-compete has no anti-competitive effect

OR

- there's no other way to protect the company's legitimate business interest

Worker Position/Earnings

- Non-competes banned for senior executives, highly skilled workers, and/or highly paid workers
- A ban could be based on
 - job function
 - earnings
 - combination of job function and earnings

Guaranteed Uncertainty

- Even if the categorical ban goes into effect and survives legal challenge, expect years of litigation trying to resolve ambiguities in the rule.
- We don't know what the final rule will look like. Complete ban? Alternative proposal? Something else?
- Whatever the final rule looks like, it will be challenged.
 - Does the FTC have the authority to issue the non-compete rule?
 - Is this an area reserved specifically for Congressional action?
 - Can the FTC invalidate private contracts retroactively?
- What will the NLRB decide to do going forward?
- What kind of challenges will NLRB decisions face?
- Will they get judicial support when their decisions are inevitably challenged?

How are businesses protecting themselves without non-competes?



Senario: You hire Jeff to oversee your sales team in the Western Region. He works with your customers, partners, suppliers, and other employees. You show him the special way that you make your product. You spend a significant portion of your company's training budget sending Jeff to sales training.

Six months after you hire Jeff, he leaves to be the head of sales at your biggest competitor.

What protections could you have in place if you can't use a non-compete?

Businesses that can't use non-competes are trying to protect themselves with three different types of employee contract provisions.

Non-Solicitation
Agreements

Non-Disclosure
Agreements

Training
Repayment
Agreement
Provisions
(TRAPS)

Non-Solicitation Agreements

- Can be used to keep former employees from soliciting your customers, employees, partners, and suppliers.
- There are fewer limitations on non-solicitation agreements than there are on non-compete agreements.
 - Federal limitations on non-competes generally do not apply to non-solicitation agreements.
 - Colorado and Illinois have put income limitations on non-solicitation agreements.

Non-Disclosure Agreements

- Can be used to help prevent former employees from disclosing your company's confidential and proprietary information.
- Federal law prohibits employers from using NDAs to prevent employees and former employees from disclosing information about sexual harassment and sexual assault.
- Some states prohibit employers from using NDAs to prevent employees from disclosing information about any type of discrimination or unlawful activity.

Training Repayment Agreement Provisions (TRAPs)

- Can be used to require employees to repay the cost of training if they leave a company within a designated period of time.
- TRAPS can be limited by state law.
 - **Example:** California law prohibits an employer from requiring a worker to repay training costs unless the training is (1) necessary to legally practice the profession at issue, or (2) undertaken by the worker voluntarily and not employer-mandated.
- TRAPS can appear heavy handed.

Headline from Above the Law

BIGLAW

Cheapskates At Jones Day Bill Former Associate For Bar Prep

Just because you CAN bill someone doesn't mean you SHOULD.

By JOE PATRICE on December 15, 2022 at 12:53 PM



Key

Takeaways

- The landscape around non-competes, on both the state and federal levels, is complicated and dynamic.
- Even if you can't use non-competes, you may be able to protect your business with well-drafted non-solicitation and non-disclosure agreements.
- Training Repayment Agreement Provisions (TRAPs) are becoming more popular but are also receiving greater scrutiny from regulators and lawmakers.
- Regardless of what agreements you execute, be sure they are narrowly tailored and necessary for your purpose. It's not just the names that matter.

A woman with curly hair and glasses is sitting on a red rug, using a laptop. She is wearing a white long-sleeved shirt and blue jeans. The background shows a modern living room with a white sofa and a large potted plant. A purple geometric shape is in the top right corner, and a light green geometric shape is on the left side containing the text "Questions?".

Questions?

Thank you!



Scan to see SixFifty's
Employment Tools