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Noncompete Landscape Recent Developments and Trends

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Following the Federal Trade Commission's largely unsuccessful attempt to implement a nationwide ban on most post-employment noncompete agreements last year, states have stepped in to fill the legislative gap. The result has been a growing divergence in how these covenants are regulated at the state level. In this update, we describe what you need to know about the latest developments shaping the use and enforceability of noncompete and other restrictive covenants.

Federal update: FTC rule in limbo, but enforcement focus remains

Last August, we reported that a federal court in Texas issued an order blocking the FTC rule from taking effect on September 4, 2024. While the FTC initially appealed the ruling, the agency, under new leadership, has since moved to pause the appeal to reassess its position. A status update is due to the court by July 2025.

Despite the procedural pause, the agency has not retreated from its focus on restricting the use of noncompetes as an unfair labor market practice. New FTC Chair Andrew Ferguson recently announced the formation of a "Joint Labor Task Force" composed of senior leadership from the Bureaus of Competition, Consumer Protection and Economics, as well as the Office of Policy Planning. According to the directive, the task force is charged with investigating and prosecuting unfair or anticompetitive labor practices, including no-poach, nonsolicitation, no-hire and wage-fixing agreements. The task force also will create protocols for information sharing and identify opportunities for legislative or regulatory advocacy aimed at enhancing labor mobility and competition.

State legislative activity

Virginia expands noncompete ban for 'low-wage employees'

Effective July 1, 2025, Virginia's SB 1218 expands the definition of "low-wage employee" to include employees entitled to overtime compensation under the Fair Labor Standards Act (FLSA), regardless of their earnings. This change significantly broadens the scope of Virginia's existing noncompete ban, which previously only applied to employees earning less than the commonwealth's average weekly wage (currently $1,463 per week, or $76,081 annually).

Employers found to have entered into, enforced or threatened to enforce a noncompete in violation of the law may be subject to a civil penalty of $10,000 for each violation. Affected employees also may bring a private right of action for damages, including liquidated damages and attorneys' fees and costs. Based on this expansion, Virginia employers should update the required poster summarizing the state's noncompete requirements for SB 1218. The law applies prospectively and does not affect agreements entered into before July 1, 2025.

Wyoming bans noncompetes with exceptions

Wyoming's SF 107, effective July 1, 2025, bans using noncompetes, unless one (or more) exceptions apply. Significantly, for employers, these exceptions include noncompetes used "to the extent" necessary for the protection of trade secrets, along with noncompetes used with certain "[e]xecutive and management personnel" and "officers and employees who constitute professional staff" to such personnel. These terms, however, are undefined under the law.

In addition, the law provides that noncompetes contained in a contract for the purchase and sale of a business or

assets of a business remain permissible, as well as contractual provisions providing for the "recovery of all or a portion of the expense of relocating, educating and training an employee" if they meet certain repayment criteria tied to the length of employment, with recovery amounts decreasing based on the length of the employee's service, i.e., training repayment agreement provisions (TRAPs). For example, the law permits a TRAP recovering up to 100% of expenses if employment lasted less than two years and recovery of up to 33% if employment lasted between three and four years.

The law applies prospectively and does not affect agreements entered into before July 1, 2025.

Kansas presumes certain nonsolicits enforceable

Effective July 1, 2025, Kansas's SB 241 amends the Kansas Restraint of Trade Act to establish a presumption of enforceability for nonsolicitation provisions meeting certain criteria and to **require** judicial reformation of overbroad restrictive covenants.

Under the new law, employee and customer nonsolicitation covenants are conclusively presumed enforceable if they meet specific requirements. The law clarifies that a nonsolicit in which an employee agrees not to solicit employees is "conclusively presumed to be enforceable" where it protects confidential trade secret business information or customer/supplier information, **or** is limited to two years post-employment.

Similarly, a nonsolicit clause in which an employee agrees not to solicit customers is presumed to be enforceable if the covenant is limited to "material contact customers" and does not exceed two years post-employment. "Material contact customers" include any customer or prospective customer with whom the employee had direct or indirect contact, or about whom the employee had access to confidential business or proprietary information during employment. Significantly, the law also now requires that a court **must**modify an overbroad restrictive covenant covered by the act and enforce the covenant as modified.

Proposed state legislation

2025 has been no exception to the trend of states continuing to actively legislate in this area, reflecting the ongoing attempt to strike the appropriate balance concerning restrictive covenants.

- **New York**: Sen. Sean Ryan recently introduced S4641, which attempts (again) to ban noncompete agreements, following Kathy Hochul's veto of his proposal in December 2023. If passed, the law would prospectively prohibit employers from entering into noncompetes, except for highly compensated individuals who make an average of $500,000 or more per year.
- **North Carolina**: The "Workforce Freedom and Protection Act" would prohibit noncompetes for employees making less than $75,000 annually, among other things.
- **Ohio**: Bipartisan-backed SB 11 seeks to broadly ban employers from entering into or attempting to enter into a noncompete with a worker or "prospective worker," signaling a significant shift in the state's approach to restrictive covenants.

On the opposite side of the spectrum, Florida has introduced a sweeping proposal **bolstering** noncompetes that currently awaits Gov. Ron DeSantis' signature. If signed, the Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth (CHOICE) Act would significantly strengthen the already employer-friendly restrictive covenant landscape in Florida. The legislation would:

- Create a presumption of enforceability for noncompete and garden leave agreements of up to four years.
- Require courts to issue a preliminary injunction enjoining a covered employee from violating a covered agreement.
- Limit the ability to dissolve or modify the preliminary injunction unless the employee can prove by clear and convincing evidence that:
    1. The employee will not provide similar services to the new employer as those previously provided to the covered employer or use confidential information or customer relationships.
    2. The new business is not engaging in or planning to engage in a competing business.
    3. The covered employer failed to provide the salary or benefits provided for in the garden leave or noncompete agreement.

Next steps

The injunction against the FTC rule has not stopped states from jumping into the restrictive covenant fray by enacting and proposing legislation either limiting the use of restrictive covenants or doubling down on their enforceability. This emerging patchwork of laws demonstrates the evolving and increasingly complex challenge multistate employers face in using such agreements.

Employers should review their restrictive covenant agreements to ensure compliance with these new laws, and continue to ensure that the covenants are narrowly tailored as needed to protect their legitimate business interests. Employers also should consider alternative means of protecting sensitive or confidential business information or intellectual property.

Employers with questions about restrictive covenants should contact their Cooley employment lawyer or one of the lawyers listed below.

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