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Key Employer Updates for 2024/2025 – ?Part Three: State Law Trends for Restrictive ?Covenant Agreements?

Labor & Employment Workforce Watch

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As year-end nears, many employers are updating their key employment policies and agreements to ensure they align with ever-evolving federal, state, and local laws and changes to business needs. In Part One of this series, we explored key updates to offer letters and job descriptions, and in Part Two we looked at updates to employee handbooks. This article is Part Three and focuses on restrictive covenant agreements.

State Laws Continue to Govern Restrictive Covenants

This year all eyes have been on the Federal Trade Commission's (FTC) proposed nationwide rule banning non-competes and the subsequent litigation bringing its enforcement to a halt.

One reason for the downfall of the FTC's proposed rule was that states have been responsible for regulating non-competes and other restrictive covenants, including non-solicitation of customers, non-solicitation of employees, and related obligations. Many states have long histories of statutory and/or common law reasonableness or other enforceability requirements for the scope of restrictive covenants, especially non-competes, and they continue to impose new restrictions.

Companies with employees in more than one state are faced with determining the best method for drafting restrictions to comply with the laws of each state where their employees work. How to do so most effectively is a legal and practical matter that takes into account a number of factors that may vary from company to company.

In addition to reasonableness limitations, many states have more stringent statutory requirements, with *some examples* listed below:

- Income thresholds. Almost 20% of states and the District of Columbia use income thresholds to limit which employees may be subject to certain restrictive covenants. Generally, the thresholds increase annually by statute, as determined by state administrative agencies or based on consumer price indexes.
  - As of 2024, employees in the following states and Washington, D.C. earning less than the noted amounts annually cannot be restricted by non-compete agreements: Colorado ($123,750 for non-competition, $74,250 for non-solicitation), D.C. ($154,200), Illinois ($75,000 for non-competition, $45,000 for non-solicitation of customers), Maine ($60,240), Maryland ($46,800), Massachusetts (non-exempt at any rate of pay), Nevada

(hourly employees at any rate of pay), New Hampshire ($30,160), Oregon ($113,241), Rhode Island ($37,650 or non-exempt at any rate of pay), Virginia ($73,320), and Washington ($120,560).

- Additional consideration. Many states do not require an employer to provide any financial or other benefit to an employee for signing a restrictive covenant because the restrictions are supported by the consideration of new or continued employment. In some states, including Texas, the consideration includes the promise and receipt of confidential information or training or goodwill which supports the need for the restrictions.
  - However, some states have financial or other additional consideration requirements: Idaho (if longer than 18 months), Illinois (two years of employment or additional financial consideration), Massachusetts (garden leave during restricted period), Oregon, West Virginia, Washington (pay during restricted period), Wyoming, and others if the restriction is entered into *after* the employee commences employment.
- Advance notice of restrictive covenant terms. Effective June 6, 2024, Washington joins some states and Washington, D.C. in requiring notice of the terms of the restrictions including Colorado and New Hampshire (prior to acceptance of employment), Maine (before the offer is issued), D.C. and Illinois (14 days before employment begins), Massachusetts (earlier of formal offer of employment or ten business days before the start of employment).
- Specific geographic restrictions. Some states, like Louisiana, require each parish or county or municipality covered by the restrictions to be specifically named.
- Duration of restrictions. Courts have long required restrictive covenants to be reasonable in duration when determining whether such a restriction is enforceable. Now, many state statutes set maximum limitations for post-employment restrictions.
  - One year maximum: D.C., Massachusetts, Oregon, and Utah
  - 18 months maximum or presumption of reasonableness: Alabama (non-solicitation of customers unless post-separation consideration paid), Idaho (if no additional consideration), and Washington
  - Two years maximum or presumption of reasonableness: Alabama (non-compete only), Louisiana, South Dakota, Georgia, and Florida (more than two years presumed unreasonable)
- Non-compete bans. Two California bills (AB 1076 and SB 699) went into effect this year, strengthening California's public policy against restrictive covenants. Except for a few narrow sale of business exceptions, non-competes are now void and unlawful in California (regardless of where and when the contract was signed). Minnesota (for agreements entered on or after July 1, 2023), North Dakota and Oklahoma (but allows restriction on direct solicitation of established customers) all impose near complete bans on non-competes in the employment context.
- Healthcare industry. Many states have additional rules limiting or eliminating restrictive covenants in certain industries, with healthcare being a common target.
  - Some new healthcare-related restrictions are going into effect this year in Rhode Island (void for advanced practice registered nurses) and Iowa (prohibited for health care employment agencies and their workers and health care technology platforms and their independent nursing services professionals).
  - And even more healthcare-specific restrictions are on the horizon in 2025, including in Pennsylvania (maximum one year restriction for certain healthcare practitioners), Illinois (unenforceable for certain licensed health care professionals who serve veterans and first responders), Louisiana (maximum three year restriction from date of agreement with primary care physicians or two year maximum if agreement is terminated by the physician) Maryland (minimum salary for some healthcare providers $350,000, plus limited geographic and durational scope).

These are just some of the most prevalent statutory restrictions. However, there are numerous additional requirements imposed by state statutes, and state common law requirements found in caselaw are often even more nuanced than statutory mandates. This patchwork of requirements for restrictive covenants that change at each state's border creates a considerable challenge for employers with employees in multiple states. Because of the continued autonomy of the states in this area, employers must regularly review and update their restrictive covenant agreements to ensure compliance with all applicable state and local regulations.

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