

States' Action Still Viable Despite Ban of FTC Noncompete Rule

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The Northern District of Texas's nationwide ban on the Federal Trade Commission's noncompete rule isn't a complete bar to government enforcement. The rule sought to curb unfair methods of competition and would have voided employees' noncompete provisions. It required employers to send notice that noncompete agreements are no longer enforceable.

Meanwhile, states' attorneys general have ramped up their own enforcement efforts targeting noncompetes under their respective unfair and deceptive practices acts. All 50 states have unfair, deceptive, and abusive practices or UDAP statutes, which permit their attorneys general to "investigate any unfair or deceptive acts or practices affecting consumers in their states."

More states are adopting legislation that bans noncompete agreements entirely. While the Texas federal court has (at least absent an appeal) prevented federal action against employers, it does nothing to prevent state scrutiny and enforcement.

California, Minnesota, North Dakota, and Oklahoma have entirely banned all noncompetes. California and Minnesota proactively ban noncompetes whether signed within, or outside of, the state and regardless of choice of law provisions attempting to circumvent their states' borders.

Many other states have banned noncompetes entirely for certain classes of workers—such as health care—but with exceptions for high-wage earners or key employees.

Only 11 states haven't enacted legislation restricting noncompetes. These states—Alaska, Kansas, Michigan, Mississippi, Nebraska, Ohio, North Carolina, South Carolina, West Virginia, Wisconsin, and Wyoming—still have common law protections, and UDAP statutes, that allow courts and state regulators to void noncompetes.

In July, Valvoline entered into a settlement with seven states' attorneys general to resolve allegations of unfair labor practices in connection with its noncompete agreements.

Valvoline required its hourly employees to sign noncompete agreements that prohibited them from working in the oil change business at any store within 100 miles of a Valvoline location for one year after leaving the company.

The settlement agreement explained that the seven states' attorneys general alleged those agreements "constitute[d] unfair methods of competition and/or unfair or deceptive acts or practices in the conduct of trade or commerce" in violation of those states' UDAP statutes. The settlement also required Valvoline to pay \$500,000 to each settling state.

On Aug 26, California Attorney General Rob Bonta announced the filing of a stipulated judgment with CK Franchising and SDX Home Care Operations, to resolve allegations that the companies violated California's Unfair Competition Law by using unlawful "no-hire" and non-solicitation provisions.

Those contracts were entered into with clients and sought to prevent them from hiring any of the companies' employees. The stipulated judgment requires the companies to pay \$500,000, delete the offending provisions, provide notice to both their clients and employees, and update their audit process of franchisees to review their agreements.

Notably, even states without statutory bans on noncompetes have joined multistate coalitions to investigate employers under their states' UDAP statutes.

In 2020, North Carolina Attorney General Josh Stein announced a settlement with multiple fast-food companies over their unfair use of no poach agreements. North Carolina was part of a 15-state coalition investigating eight major fast-food restaurant chains, even though North Carolina doesn't have a noncompete ban in place.

However, like the Valvoline settlement agreement, the states alleged the agreements may constitute, among other things, unfair or deceptive acts and practices.

These settlements signal that noncompete agreements remain at the forefront of state attorney generals' focus. Notwithstanding state statutes banning noncompetes, state consumer protection acts typically authorize state attorneys general to investigate "unfair" or "deceptive" acts or practices impacting consumers in their states.

This matters because, under those statutes, states attorneys general may (in most states) issue civil investigative demands or subpoenas if they have reasonable cause to believe a violation has occurred, is occurring, or is likely to occur.

There is a relatively low bar for state attorneys general to investigate conduct that they suspect may be unfair or deceptive. And, their prior investigations, enforcement actions, and settlements show that they consider restrictions on worker mobility and the freedom to contract—such as noncompetes and no poach agreements—to fall within those categories.

State UDAP statutes typically allow the recovery of civil penalties and attorneys' fees—with multiple states' penalties set as high as \$25,000 per violation or even trebling damages for "willful" violations. For companies that operate across state lines or have a large employee footprint, those penalties can add up quickly.

For companies operating in more than one state, there is also a high possibility that they would face a multistate investigation if their employee restrictions spark attorney general interest. This is because of a rising trend in states' attorneys general working together to investigate companies they suspect of engaging in unfair or

deceptive acts or practices.

These investigations can result in corresponding consumer litigation in each corresponding state. Larger companies may quickly find themselves preparing to responses to multiple states' attorneys general and defending against multiple lawsuits.

Despite the nationwide impact of the Texas court's ruling against the FTC's noncompete rule, all companies should remain very modest in their approach to noncompete agreements.

Employers should consider implementing processes that ensure their employee restrictions, at the very least, comply with each state's noncompete restrictions and, even for states without statutory bans, are narrowly tailored for terms such as duration and place.

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