

Non-Competes and Restrictive Covenants: Recent and Potential Changes at the State and Federal Level

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General Overview

- General trend of non-compete law
- Federal Update
- State Update
- Potential State Action
- Criminal Antitrust
- Employer Best Practices

Federal Update

- President Biden's critical comments regarding non-competes
- The Federal Trade Commission and Chairperson Lisa Khan
- President Biden's Executive Order
- Congressional action

State Update: Illinois

- Effective January 1, 2022
- Income threshold
- Banned for some employees
- 14 day review period

State Update: Illinois

- Seek counsel notice requirement
- Consideration
 - 2 years of employment
 - “Additional professional or financial benefits”
- The law does not apply to (1) non-competes in sale of business or (2) non-disclosure, confidentiality, trade secrets, or invention assignment agreements
- COVID-19 or COVID-19 *like* circumstances

State Update: Oregon

- First amendment in 2020
- New amendment effective January 1, 2022
 - Shorter temporal limit
 - Income threshold
 - “Garden leave” safe harbor

State Update: Washington

- Effective January 1, 2022
- Does not apply to non-solicitation agreements
- Must provide written notice of terms before employment is accepted
- Salary threshold

State Update: Washington

- Temporal limit
- Damages if non-compete is found void and unenforceable
- Damages if non-compete has to be modified by the Court to be enforceable
- Choice of law provision

State Update: Colorado

- Effective March 1, 2022
- Adds criminal penalties if an employer violates the state's non-compete law
 - Misdemeanor: \$750 fine or up to 120 days in prison or both
- Colorado law prohibits non-competes except for certain categories

State Update: Nevada

- Effective October 1, 2021
 - Previous revision in 2017
- Bans non-competes for hourly employees
- Restricts the scope of non-competes
- Fees, costs, and expenses available if noncompete is found unenforceable

State Update: Washington D.C.

- Originally passed in 2020 but delayed enforcement
- Effective April 1, 2022
- Prohibits non-competes for all employees
- Does not apply to Federal or D.C. government employees
- Notice requirements
- Liquidated damages

Potential State Changes

- New York
 - Recent bills seeking to ban non-competes
 - Governor Hochul's recent comments calling to ban non-competes
- New Jersey
 - Recent bills seeking to ban non-competes

Criminal Antitrust Activities

- First criminal indictments
- Latest indictment in January 28, 2022
 - The allegations: price fixing and no-poach agreements
- Business agreements with other businesses

Employer Best Practices

- Review form agreements
 - Including before entering into any new agreement
- Consider the cost of an unenforceable agreement
 - Competitive loss, trade secrets and confidential information
 - Potential statutory damages, penalties, and fees
- Consider where the employee is
 - Consider how employing remote workers may affect the enforceability of an agreement