Insights: Alerts

A Comprehensive Update on Recent Federal and State Efforts to Limit the Use of Employee Non-Compete Agreements

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Federal and state efforts to limit or outright prohibit the use of employee non-compete agreements have gained considerable momentum in the past year. As Kilpatrick's labor and employment team has written about previously, the National Labor Relations Board ("NLRB") and Federal Trade Commission ("FTC") are actively working to curtail the use of non-compete agreements. Meanwhile, the list of jurisdictions imposing limitations on, or prohibiting altogether, the use of non-compete agreements, including certain non-solicitation agreements, continues to grow.

NLRB General Counsel Targeting Non-Competes and Non-Solicitation Agreements

Last May, the NLRB's General Counsel Jennifer Abruzzo released a controversial memo claiming that the "proffer, maintenance, and enforcement" of non-compete provisions in employment agreements violate Section 7 of the National Labor Relations Act ("NLRA"). In the memo, GC Abruzzo asserted that non-competes chill employees from engaging in several forms of protected activity under Section 7, including making concerted threats to resign, to demand better working conditions, seeking out or accepting employment with a local competitor to obtain better working conditions, and soliciting their co-workers to work for a local competitor as part of a broader course of protected concerted activity.

In September, and as foreshadowed by the memo, the regional director of the NLRB in Cincinnati, Ohio, issued a complaint against a medical clinic and spa, alleging it violated the NLRA by, among other things, issuing certain policies and requiring employees to execute agreements containing restrictive covenants:

- **Two-Year Non-Compete:** Restricting employees from practicing "aesthetic medicine" or having an ownership interest in, investing in, or providing services at any other medical practice within a 20-mile radius.
- **Two-Year Non-Solicitation:** Prohibiting employees from soliciting the spa's employees, whether current or former, or enticing away from the spa any contractor, adviser, employee, or clients of the spa or its affiliates. The provision even prohibited departing employees from notifying clients of their departure or employment status and required them to pay $150,000 for every employee solicited away, and $25,000 for any client solicited away.

- **Training Repayment Policy:** Requiring repayment of up to $105,000 for the cost of training and continuing education provided during employment in the event an employee left within two (2) years of being hired.
- **Non-Disparagement Policy:** Prohibiting employees from making "negative comments" about the spa during and after employment.

The Regional Director announced a settlement earlier this month. As part of the settlement, the spa agreed to rescind the unlawful policies, cease any demand for training repayments, pay more than $25,000 to employees affected by the challenged policies, post a remedial Notice to Employees at all of its facilities in the United States, and post a copy of the aforementioned notice to the company's Slack messaging application.

More recently, the Board issued a memo, which called into question the legality of policies or contractual provisions banning outside or secondary employment. Specifically, the memo took issue with a "Duties of Employees" provision in an employment agreement, which read much like a standard duty of loyalty clause, which are commonplace in most industries. The provision prohibited an employee from engaging in activity competitive with or adverse to the company during the employee's employment. In the memo, the Board's Division of Advice expressed its belief that any rule or agreement interfering with an employee's right to moonlight or access other employment is unlawful. The policy, the Division explained, effectively prohibits "salting"—the tactic whereby union agents acquire jobs in particular workplaces for the sole purpose of unionizing that business—in violation of the NLRA.

In the memo, the Division next addressed a standard customer non-solicitation provision, which limited an employee from soliciting or seeking the business of a customer, client, or account for a one-year period. The Division deemed the provision lawful because it did not prevent the employee from "accessing other employment opportunities." Notably, however, the Division seemed to suggest that a customer non-solicitation provision would be unlawful where the employee produced evidence that there was a "limited pool of customers in the industry" such that the non-solicitation provision effectively barred other employment opportunities.

The FTC's Looming Final Rule and Enforcement Actions

In January 2023, the FTC proposed a rule that would ban nearly every non-compete agreement in the United States. More than 13 months later, the FTC still has not issued a final rule, though the consensus is that it will be issued in April 2024.

Even without the benefit of the final rule banning non-competes, the FTC commenced enforcement actions against several employers over their use of non-compete agreements in the past year. In the enforcement actions, the FTC alleged that the employers' use of non-compete agreements blocked the employees from accepting employment at higher wages with competitors while also impeding the entry and expansion of competitive entities. More generally, the FTC characterized the use of non-compete agreements as an "unfair method of competition." In all of the cases, the FTC ordered the companies to cease enforcing the non-compete agreements and to notify all affected employees that they were no longer bound by the non-competes. In at least one settlement, the FTC prohibited the company from entering into, enforcing, or even threatening to enforce non-competes against certain workers.

It is unclear how far the FTC will go in the final rule. However, the FTC's continued advocacy for a full ban coupled with its enforcement activity across the past year suggests the final rule may closely track the proposed

rule. Though the final rule is expected to be immediately challenged in court, it will take effect unless and until it is enjoined. Regardless of the success of any legal challenge, the final rule will generate yet another layer of uncertainty for employers using non-competes.

New State Laws Limiting Non-Compete Agreements

In addition to the two federal entities above, many state governments have enacted changes to their restrictive covenant laws in the last year that employers must consider when drafting employment agreements.

Minnesota

Minnesota became the fourth state to outright ban employment non-compete agreements. The ban only applies to contracts entered into on or after July 1, 2023. The Minnesota law is broad in that it applies to agreements with both employees and independent contractors, including business entities that an employer may require an individual to form in order to receive a contract under an independent contractor or consultant agreement.

In general, the Minnesota law prohibits agreements between an employer and employee or independent contractors that restrict them from, upon termination, performing (a) work for another employer for a specified period of time; (b) working in a specified geographical area; or (c) providing similar services for another employer. The only specified exceptions to the general ban are: (a) the sale of a business where the seller agrees to refrain from carrying on a similar business within a reasonable geographic area for a reasonable duration; and (b) the dissolution of a business that prohibits the applicable parties from carrying on a similar business within a reasonable geographic area surrounding where the dissolving business was involved.

The law also prohibits employers from requiring an employee who primarily resides and works in Minnesota to agree to a provision that would require any claim or controversy arising in Minnesota to be adjudicated elsewhere or that otherwise deprives the employee of the new law's protections. Thus, parties cannot contract around the law's application through choice of law or venue selection provisions.

California

In California, two new laws were recently passed to expand the consequences for violating California's well-known policy against non-compete agreements. The first law (AB 1076) makes non-compete provisions illegal. Previously, state law merely rendered them void and unenforceable. The law now also requires any employer whose contracts included a non-compete clause to issue a notice to all current employees and former employers who were employed after January 1, 2022, that the non-compete clauses in their contracts are void. The required notice was due by February 14, 2024. The second new law in California (SB 699) permits current and former employees (employed after January 1, 2022) or prospective employees to bring a lawsuit to enforce the prohibition on non-compete provisions. The new law allows the employee to seek injunctive relief, actual damages, and reasonable attorneys' fees and costs.

Georgia

In 2023, the Georgia Court of Appeals issued an opinion impacting the enforceability of employee non-solicitation provisions under Georgia's Restrictive Covenants Act. In *North American Senior Benefits v. Wimmer*, the court held that employee non-solicitation provisions must include an express geographic limitation. 368 Ga. App. 124, 889 S.E.2d 361 (2023). Importantly, the court confirmed that while the Georgia law permits a court to

“blue pencil” a covenant, this is limited to removing overbroad language and does not permit a court to equitably reform a covenant by redrafting or adding a restriction. The Georgia Supreme Court granted certiorari in December 2023.

Income Threshold Laws

Over the course of the past few years, numerous other states have passed laws narrowing the scope of employees who may be subject to a non-compete. Most states have done so by prohibiting the use of non-competes against employees earning below a certain threshold. As of January 1, 2024, eleven states and the District of Columbia have passed such restrictions. Most of the restrictions call for annual updates to the income threshold, which further limit the group of workers that may be subject to non-competes. The jurisdictions with income threshold requirements and their current income thresholds are as follows:

Jurisdiction	Current Income Threshold
Colorado	**Non-Solicit**: $74,500 per year **Non-Compete**: $123,750 per year
District of Columbia	**Non-Compete**: $154,650 per year ($257,750 for medical specialists)
Illinois	**Non-Solicit**: $45,000 per year **Non-Compete**: $75,000 per year
Maine	**Non-Compete**: $60,240 per year
Maryland	**Non-Compete**: $22.50 per hour or $46,800 per year
Massachusetts	**Non-Compete**: $684 per week
Nevada	**Non-Compete**: Employee must be paid on a salary-basis
New Hampshire	**Non-Compete**: $14.50 per hour or $30,160 per year
Oregon	**Non-Compete**: $113,250 per year
Rhode Island	**Non-Compete**: $37,650 per year
Virginia	**Non-Compete**: $1,410 per week or $73,320 per year
Washington	**Non-Compete**: $120,559.99 per year

Key Takeaways

Employers using non-compete agreements should take steps to ensure the enforceability and legality of their agreements given the clear trend disfavoring the use of non-competes. In doing so, employers should:

- **Identify the business interest you are trying to protect.** Does protecting the business interest—such as trade secrets or commercially-sensitive information, company goodwill, or client relationships—require the use of a non-compete? Or can the interest be protected through another type of agreement? If so, consider bolstering confidentiality agreements to fill any voids created by restrictions on non-competes or

using a customer non-solicitation provision in lieu of a non-compete. In many cases, the business interest in question is adequately protected through other types of agreements, which are less likely to be deemed unlawful by federal agencies such as the NLRB or state law.

- **Consider which employees really need to sign restrictive covenant agreements.** Non-compete agreements should generally only be used with employees whose departure would post a risk to the identified legitimate business interests. As a result, employers should generally avoid using non-competes with low wage workers except in extraordinary circumstances. Courts and governmental agencies are increasingly more likely to target employers requiring low-level employees to sign non-compete agreements. In fact, the FTC has announced memorandums of understanding with both the U.S. Department of Labor and the NLRB to, among other things, investigate the use of non-compete and training repayment agreements against low wage workers.
- **Conduct an annual review of state non-compete law to address any applicable updates.** As more jurisdictions introduce new laws aimed at banning or otherwise limiting the use of non-competes, it is important for employers to stay abreast of any updates potentially effecting the enforceability of their noncompete agreements. Kilpatrick's labor and employment attorneys routinely handle 50 state noncompete drafting projects for their clients and are happy to help ensure the agreements you are utilizing are enforceable in the jurisdictions where your employees are located.

If you have any questions about this Alert, please contact one of the authors or the attorney(s) in our firm with whom you are regularly in contact.

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