

Noncompete Agreements are Slowly Going Extinct in the U.S.

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by Aaron Goldstein

Companies utilizing noncompete agreements in the U.S. in the employment context should reevaluate their practices in light of recent changes to law and a rapidly changing legal landscape that is growing increasingly hostile to noncompete agreements.

Early this year, the Federal Trade Commission (“FTC”) proposed a rule that would ban noncompete clauses nation-wide in the U.S. However, there is a long road ahead for the FTC’s proposed noncompete ban, and the proposed ban may very well be struck down by U.S. courts even if it is ultimately adopted. The FTC will not vote on the proposed ban until next April, and while 18 states’ attorneys general submitted a joint public comment letter in favor of the ban, numerous small business groups and the U.S. Chamber of Commerce submitted letters in opposition. Even if adopted, the rule would not go into effect until 180 days after its publication and it is likely that there would then be numerous challenges to the rule, which may ultimately need to be decided by the U.S. Supreme Court.

While the future of the FTC’s noncompete ban is uncertain, states are, in the meantime, making noncompete agreements harder and harder to enforce across the country, and in many cases, banning noncompete agreements altogether.

California, for example, has long outlawed noncompete agreements and has more recently passed laws declaring noncompetes void in California, even if they were entered into outside of California and the employee performed services for the enforcing employer entirely outside California. In addition to California, Minnesota, North Dakota, and Oklahoma have banned noncompete agreements entirely. New York’s legislature recently passed a bill that would outlaw noncompetes, which is now awaiting New York’s governor’s decision on whether to sign it.

Colorado recently passed a law limiting noncompete agreements to employees deemed “highly compensated” and now requires that employers provide notice to candidates for employment before they accept a job offer and to current employees at least 14 days

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before the effective date of any additional consideration for the noncompete provision. The District of Columbia recently passed law creating a similar pay threshold that noncompetes must meet and Washington State has had such income requirements in place for over three years.

Even in states that have not passed laws restricting noncompete agreements, courts have grown increasingly skeptical of employers' need for such protections. The general rule in states without noncompete legislation is that noncompete agreements are only enforceable if the employer can show a compelling need for them. Such need usually involves a need to protect sensitive confidential information and trade secrets, or a need to protect customer goodwill in situations where employees develop close relationships with customers. U.S. courts are, on average, becoming more skeptical of employers' arguments that they need such protections except in cases where employees have access to truly sensitive information, or could do real damage by going to a competitor and taking substantial business with them.

Many of the states that have restricted the use of noncompete agreements, but still allow them under certain circumstances, have created penalties for employers who unsuccessfully attempt to enforce noncompete agreements. Washington, for example, has passed law requiring the employer to pay the employee's attorney fees if the noncompete agreement is deemed partially or entirely invalid by the court. Other states have even passed laws creating criminal sanctions for employers who try to enforce unenforceable noncompete agreements.

Companies with employees in the U.S. must be sure to stay up to date on the rapidly changing legal landscape governing noncompete agreements. Not only is noncompete litigation extremely expensive, but there is a growing additional risk to employers in the use of noncompete agreements in circumstances where no compelling need can be established. Accordingly, employers should reevaluate their employment practices and considering limiting such agreements to employees that have access to truly sensitive confidential and trade secret information, and/or employees with responsibility for key client relationships that could easily be transferred to a competitor.