

# Navigating Uncertainty Surrounding the Current Non-Compete Landscape

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# Agenda



## 1. Recent Federal and State Noncompete Law Updates

- State law changes
- FTC Noncompete Rule and legal challenges to the same

## 2. Why do These Actual and Potential Changes Matter?

## 3. Practical Considerations for Employers

- Can (and should) my company still use noncompetes?
- What other contractual options are available for protecting my company's business interests?
- Other than contractual restrictions, what else can my company do to protect its legitimate business interests?
- What steps should my company take now considering all these changes?

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# Recent State and Federal Noncompete Law Updates

# State Legislative Updates

***In total, 12 noncompete laws were enacted in 10 states in 2023***

- 15 bills (in 10 states) proposed a complete ban of noncompetes
  - One enacted (**Minnesota**)
  - Several passed but vetoed (**New York, Vermont,** and **Rhode Island**)
- 10 bills (in 10 states) proposed compensation thresholds
  - One passed (Maryland – increased threshold))
- 32 bills (in 21 states) proposed changes to noncompetes in the healthcare industry
  - Seven passed (Connecticut, Indiana (x2), Iowa, Kentucky, South Dakota, Tennessee, Rhode Island)
- Two bills in **California** that expanded and exported its existing ban

***2024: 72 noncompete bills introduced in 32 states so far***

***2023: 98 noncompete bills introduced in 35 states***

<https://www.ebglaw.com/50-State-Noncompete-Survey>

# The FTC Noncompete Rule – Overview

FTC voted 3-2 on party lines to issue the final rule on April 23, 2024

Would BAN virtually all post-employment noncompetes nationwide

- Only exception is *existing* noncompetes with “senior executives”
- Requires written notice to all affected employees on or before the effective date

Does not cover:

- Noncompetes entered into with sellers in connection with *bona fide* sale of a business
- Causes of action accrued prior to the effective date
- Non-solicits, NDAs, training cost repayment requirements, garden leave provisions
  - *\*But . . . it could cover these things if they are too broad*
- Certain industries the FTC does not have authority over: nonprofits, banks, etc.
  - *\*But . . . the FTC may challenge nonprofit status*
- Good faith (but failed) attempts to comply are not unfair business practices

# The Rule's Timing and Notice Requirements

- ***If not enjoined, the rule will go into effect 120 days following formal publication in the Federal Register***
  - Published in the Federal Register on May 7, 2024
  - Earliest effective date of September 4, 2024
- **On or before the effective date, “clear and conspicuous notice” must be provided to any affected worker that his/her non-compete clause will not be, and cannot legally be, enforced against him/her**
  - Paper delivered by hand or by mail to worker’s last known address or by email to current work email address or last known personal email address or by text message to a mobile phone number belonging to the worker.
  - Exception where employer has no record of street address, email address, or mobile phone number.
  - Model language is provided.
  - Safe harbor for employers that comply with notice requirement.
  - Translations into Spanish, Chinese, Arabic, Vietnamese, Tagalog, and Korean available on FTC



# The FTC Noncompete Rule



## Who is a “senior executive”?

A worker who is “in a policy-making position”

- i.e., “a business entity’s president, chief executive officer or the equivalent, any other officer of a business entity who has **policy-making authority**, or any other natural person who has **policy-making authority** for the business entity similar to an officer with policy-making authority”); and
- earns at least \$151,164 in annual compensation (which excludes discretionary bonus, board, lodging, payments for health benefits, retirement contributions, and other “fringe benefits”)

## What is “policy-making authority”?

**Final authority** to make policy decisions that control significant aspects of a *business entity or common enterprise* and does not include authority limited to advising or exerting influence over such policy decisions or having final authority to make policy decisions for only a subsidiary of or affiliate of a **common enterprise**.

## What is a “common enterprise”?

A common enterprise has “integrated business entities,” looking to factors like sharing directors and workers, sharing a common office space, operating under common control, comingling funds, sharing advertising and marketing, etc.





# Pending Legal Challenges to the Rule

## *Ryan, LLC v. FTC*

N.D. Tex. No. 3:24-cv-986

- Filed on April 23, 2024
- Motion for Stay of Effective Date and Preliminary Injunction filed on May 1, 2024
- Over 65 amici have filed amicus briefs

## *U.S. Chamber of Com. v. FTC*

E.D. Tex. No. 6:24-cv-00148

- Filed on April 24, 2024
- Motion for Stay of Effective Date and Preliminary Injunction filed the same day
- Case dismissed without prejudice after Chamber successfully intervened in the *Ryan* case

## *ATS Tree Servs., LLC v. FTC*

E.D. Pa. No. 2:24-cv-1743

- Filed April 25, 2024
- Motion for Stay of Effective Date and Preliminary Injunction filed on May 14, 2024
- Order to be issued on or before July 23, 2024

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# Why Do These Actual and Potential Changes Matter?

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## Most trade secrets are misappropriated by insiders, usually employees!

- Intentionally or otherwise – does not matter

## Trade secret laws vs. noncompetes

- Noncompetes are a key proactive measure to protect trade secrets
  - Trade secret laws can be very reactive
- Trade secret litigation is typically more costly and time consuming

## Increased mobility = increased opportunities for mischief

- More difficult to monitor/react quickly
- Offboarding is more complicated

## Decreased protection = decreased information sharing and collaboration

- Less likely to share sensitive information and client relationships if they can be taken to a competitor



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# Practical Considerations for Employers

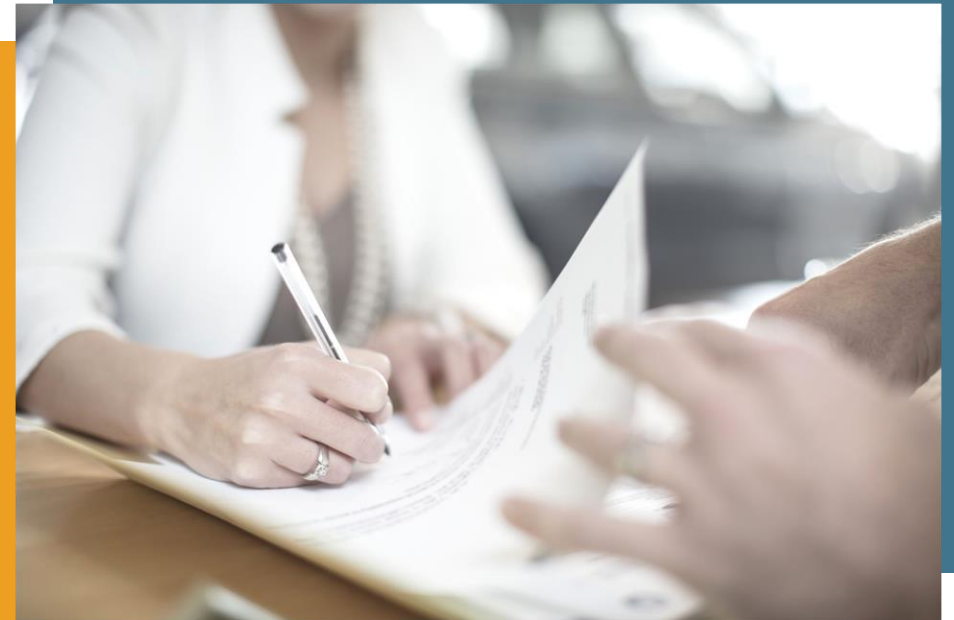
# Can (and should) my company still use noncompetes?

## ■ Can you use noncompetes?

- The FTC Rule has not yet gone into effect, and may never do so
- 46 states permit noncompetes; only 4 ban them (CA, OK, ND, MN)
- Several states have compensation thresholds and notice requirements, but generally permit noncompetes (IL)
- Drafting multi-state (including 50-state) agreements is more difficult now, but certainly not impossible.

## ■ Should you use noncompetes?

- Company culture
- Competitive landscape
- What are you trying to protect?
- With whom are you utilizing them?
- Are they necessary to protect your legitimate business interests?
- Will other, narrower, restrictions suffice?



# Illinois Freedom to Work Act

820 ILCS § 90/1 *et seq.*

- Governs noncompetes and nonsolicits entered into on or after January 1, 2022
- **Requirements:**
  - (1) adequate consideration;
  - (2) ancillary to a valid employment agreement;
  - (3) no greater than required to protect a legitimate business interest;
  - (4) no undue hardship on employee; AND
  - (5) not injurious to the public.
- “**Adequate consideration**,” means either (1) post-execution work for at least 2 years or (2) “the employer otherwise provided consideration adequate to support an agreement not to compete or to not solicit”
- Salary thresholds for noncompetes and nonsolicits:
  - Current **noncompete** threshold: **\$75,000/year** (increases to \$85,000 in 2032 and to \$90,000 in 2037).
  - Current **nonsolicit** threshold: **\$47,500/year** (increases to \$50,000 in 2032 and to \$52,500 in 2037).

# What other contractual options are available for protecting my company's business interests?

- **Garden Leave / Mandatory Paid Notice Period**
  - During or post-employment
- **Non-Solicitation Agreements**
  - Customers and/or employees
  - Collaboration agreements
- **Nondisclosure / Confidentiality Agreements**

- **Forfeiture-for-Competition Provisions**
  - Employee choice
- **Term Contracts**
  - Used in California

**\*\*\* Beware of entering into illegal no-poach agreements with competitors! \*\*\***

# Other than contractual restrictions, what else can my company do to protect its legitimate business interests?

- **Create and maintain a culture of compliance**
  - Help employees understand the “why” not just the “what” and “how”
- **Policies and procedures**
  - Onboarding
  - Ongoing
  - Offboarding
- **Training, training, training**
- **Enhanced cybersecurity / physical protections**
- **Use carrots and sticks**
  - Retention bonuses
  - Equity grants/options
  - Happy employees are typically more loyal





# What steps should my company take now in light of all these changes?

## Consider a holistic review of your restrictive covenant strategy and practices.

- Take an inventory of your current restrictions – which roles, agreement/scope variations, state, etc.
- Consider overall use of restrictive covenants – who, what, when, where, and why?
- Are non-solicits and confidentiality provisions sufficient for some groups / levels?
- Are other types of contractual restrictions appropriate?
- Review onboarding and offboarding policies and procedures
- What improvements / changes can be made?

## Focus on trade secret protection and securing customer relationships

- Consider a trade secret audit

# Looking for Some Extra Help?

## TRADE SECRETS AND EMPLOYEE MOBILITY

# 50-State Noncompete Survey

Health Care Supplement

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STATE	Employee Noncompete Permissible?	General Noncompete Statute?	Industry-Specific Statutes or Rules?	Other Excluded Employees?	Continued Employment: Sufficient Consideration?	Notice Requirements	Other Unique Requirements	Customer and Employee Non-Solicits Permissible?	Enforceable Against Terminated Employees?	Judicial Modification Permitted? (Blue Pencil and/or Reformation)	Tolling Permissible?
ALABAMA	Yes	Ala Code § 9-1-100-107 (effective January 1, 2016)	Lawyers (Ala R Prof C 5 B); Mediators (Ala Code of Ethics for Mediators Std 11)	N/A	Yes	N/A	Must be reduced to writing and signed by all parties	Yes	Unresolved	Yes	Yes
ALASKA	Yes	No	Lawyers (AK R. Prof. C. 5.4)	N/A	Unresolved	N/A	N/A	Yes	Unresolved	Yes	Unresolved
ARIZONA	Yes	No	Broadcasting Industry (Labor § 23-104); Lawyers (AZ R. Prof. C. 5.3)	N/A	Yes	N/A	N/A	Yes	Unresolved	Yes	Unresolved
ARKANSAS	Yes	AR Code § 4-75-101	Licensed medical professionals (Arkansas Code Title 17, Subtitle 3); Lawyers (AR R. Prof. C. 5.6)	N/A	Yes	N/A	N/A	Yes	Probably not	Yes	Unresolved
CALIFORNIA	No, with narrow exceptions in the sale of a business, contract or dissolution or disassociation relating to a partnership or LLC	Cal. Bus. & Prof. Code § 16600, et seq.	Entertainment industry (Cal. Labor Code § 2855); Lawyers (Cal. R. Prof. C. 5.6)	N/A	N/A	N/A	N/A	No, with narrow exceptions in the sale of a business, contract or dissolution or disassociation relating to a partnership or LLC	No	N/A	Probably not
COLORADO	Yes	C.R.S. § 9-2-103 (amendments effective August 10, 2022)	Physicians (C.R.S. § 9-2-113(3)); Lawyers (Col. R. Prof. C. 5.4)	Minimum income thresholds for agreements entered into on or after August 10, 2022	Yes	For agreements entered into on or after August 10, 2022, before acceptance of an offer of employment for new prospective workers: at least 90 days before the effective date of restrictions for existing workers. Must provide separate written notice in either case.	Penalties and potential criminal liability for violations of statute; aggrieved workers may seek injunctive relief and attorney's fees; out-of-state choice-of-law and venue provisions are unenforceable.	Yes, subject to minimum income thresholds for agreements entered into on or after August 10, 2022	Unresolved	Yes	No
CONNECTICUT	Yes	No	Security Guards (Conn. Gen. Stat. Ann. § 20-50a); Broadcasters (Conn. Gen. Stat. Ann. § 30-50b); Physicians (Conn. Gen. Stat. Ann. § 20-1ap); Home Health Care, Companion, or Homemaker Service Workers (Conn. Gen. Stat. Ann. § 20-601); Lawyers (Conn. R. Prof. C. 5.4)	N/A	Generally no, but unenforced as to at-will employees	N/A	N/A	Yes	Yes	Yes, but only if agreement states that terms are severable	No
DELAWARE	Yes	No	Physicians (Del. Code Ann. tit. 8, § 2107); Lawyers (Del. R. Prof. C. 5.4)	N/A	Yes	N/A	N/A	Yes	Yes	Yes	Yes

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# Questions?