CLIENT ALERTS & INSIGHTS

A Quick Q&A on Restrictive Covenants as We Start the New Year

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Featured Practices: Trade Secrets, Restrictive Covenants & Unfair Competition

Key Takeaways

- The FTC's noncompete ban is dead; enforceable agreements are still valid under state law.
- Noncompetes aren't extinct, but state restrictions are increasing.
- Review agreements for multi-state compliance; consider state-specific carveouts.

Happy New Year! At the end of 2025, Benesch's Trade Secret, Restrictive Covenants and Unfair Competition Group fielded several common questions regarding the FTC and the state of restrictive covenant law. Below is a short Q&A regarding what is going on and what companies should consider when drafting restrictive covenants.

Q: What is the status of the FTC's proposal to ban noncompete agreements?

A: It is dead.

Q: Are you sure?

A: Yes

Q: Then why do I keep receiving email blasts about the proposed Rule and the FTC challenging noncompetes?

A: The FTC challenging overbroad noncompetes (and no hire agreements) is nothing new. The FTC brought these actions long before its proposed Rule to ban noncompetes and the FTC is simply going back to its practice of "targeting" specific companies (and in some cases industries) that have employees sign overbroad noncompetes. Importantly, neither the FTC, nor any government agency (federal or state) has ever attempted to invalidate a noncompete that would be enforceable under state law.

Q: What about the "workshop" the FTC is hosting on January 27th to discuss noncompete agreements and "anticompetitive activities"?

A: We do not expect the workshop to discuss a complete ban on noncompetes. Rather, we expect the workshop to reiterate that the FTC is going back to what it did before attempting to enact a

complete ban. Specifically, the FTC will continue targeting certain companies and industries (notably healthcare).

Q: So, should I be concerned about the FTC?

A: Not if your agreement complies with the state law(s) that governs the agreement. In other words, if your agreement with Illinois employees is governed by Illinois law and complies with Illinois law, then you should not be concerned about the FTC.

Q: But I keep hearing that noncompetes are becoming extinct? Is this true?

A: No. Although a few states (California, Minnesota, North Dakota and Oklahoma) have a complete ban on noncompetes, only one state (Minnesota) has enacted a complete ban on noncompetes in the last 80 years. What is true, however, is that states continue to place restrictions on the scope of noncompetes.

Q: Ok. So, what are the new restrictions that are typically being placed on noncompetes?

A: Income thresholds, carve outs for "lower-level employees," duration caps, advanced notice requirements, statutory choice of law mandates and civil penalties and fee-shifting provisions for overbroad restrictive covenants.

Q: What should I do about it?

A: Make sure you are up to date on the state of restrictive covenant law with respect to a) the state law that governs the agreement(s), b) the state law where your employees reside, and c) the state law for your principal place of business.

Q: We have employees in multiple states and each employee signs the same agreement. Is there risk with this approach?

A: Yes. Noncompete statutes in California, Washington, Massachusetts, Colorado and Minnesota specifically state that their law applies to a noncompete even if the agreement calls for another state's law to apply. We can expect more states to adopt similar statutes. In addition, several states (including Delaware) have recently chosen to not enforce choice of law provisions in a noncompete agreement where another forum (i.e. the employee's home state) has a stronger interest than the law of the state identified in the agreement.

Q: Is there another option/alternative to a "one size fits all" approach? What do you suggest?

A: The two primary options/alternatives are a) multiple agreements or b) one agreement with an addendum that contains state specific carve outs. Multiple agreements can be unruly, especially over a period of a time, from a maintenance/business perspective. Consequently, we typically recommend one agreement with state specific carve outs. For example, if your company is headquartered in New York with employees located in New York, New Jersey, Florida, Illinois, Colorado and California, the body of the noncompete agreement could contain restrictive covenants designed to be enforceable in New York, New Jersey and Florida, a choice of law provision that requires the application of New York law, and an addendum that contains carve outs for California, Colorado and Illinois employees.

Q:

Who can we talk to about the changes to restrictive covenant laws and updating our agreements?

A: Members of Benesch's Trade Secret, Restrictive Covenants and Unfair Competition Group can assist you and we are currently offering a flat fee review of restrictive covenant agreements to assess whether the agreements comply with the recent changes to restrictive covenant law. If you would like to hear more about these offerings, please contact Scott Humphrey at 312.624.6420 or shumphrey@beneschlaw.com.

Q: Last question. What about Delaware?

A: Stay tuned. We will address Delaware next week.