



Navigating Rough Seas: Non-Compete Law in 2023



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National Developments



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FTC Enforcement

For Release

FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers

Agency action eliminates noncompetes covering thousands of workers, promoting greater economic opportunity and competition

January 4, 2023 | [f](#) [t](#) [in](#)

FTC Enforcement

- Non-competes involving
 - large numbers of workers who are paid low wages,
 - hold low-skill positions or
 - lack access to significant confidential information/customer relationships
- Also interested in highly specialized workers in highly concentrated industries

FTC Non-Compete Rulemaking

For Release

FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition

Agency estimates new rule could increase workers' earnings by nearly \$300 billion per year

January 5, 2023 | [f](#) [t](#) [in](#)

FTC Non-Compete Rulemaking

Proposed rule would:

- ban all worker non-competes as “unfair methods of competition”
- extend to de facto non-competes
- be prospective and retrospective (requiring rescission of existing non-competes)

*Limited exception for sale-of-business non-competes

FTC Non-Compete Rulemaking

- Timing of final rule
 - 26,813 comments submitted
 - Per Bloomberg Law article, no vote on final rule expected until April 2024 (vague/unsourced)
- As drafted, proposed rule would go into effect 180 days after publication of final rule

FTC Non-Compete Rulemaking

- Potential challenges
 - Court challenges
 - Statutory authority
 - Reasonableness
 - Will the rule be enjoined?
 - How much judicial review and on what schedule?
 - Political challenges
 - Congressional disapproval
 - Change in administration (before/after final rule)

FTC Enforcement Continues

For Release

FTC Takes Action Against Another Company That Imposed Harmful Noncompete Restrictions on Its Workers

Agency action puts an end to noncompete restrictions that Anchor Glass Container Corp. imposed on its employees

March 15, 2023 |   

FTC Enforcement Continues

- Non-compete involving
 - large number of workers (300) across a variety of positions, including salaried employees
 - one-year restriction on
 - working with another employer with same/substantially similar services and
 - selling products to customers or prospective customers with whom employee interacted
- Recent comments from the FTC Chair suggest that such enforcement actions will continue

NLRB General Counsel's Memo

- On May 30, 2023, NLRB GC opines that non-competes generally constitute an “unfair labor practice”
- Argument is that non-competes prevent employees from leaving employment or threatening to leave, either individually or collectively, infringing on their NLRA rights
- Applies to employees with unionized and non-unionized workforces
- Does not apply to employees in supervisory roles (assign/reward/discipline)

NLRB General Counsel's Memo

- Low-wage and medium-wage employees
- May extend to other agreements that limit employee mobility/concerted action
- Suggests that the NLRB intends to pursue enforcement actions and is looking to its regional offices to identify potential violations

NLRB Enforcement

- NLRB complaint filed on September 1, 2023 against an Ohio medical clinic and spa operator offering non-surgical aesthetic services
- Alleges that its use of non-competes, non-solicits, training repayment agreements, and other restrictive provisions violated the NLRA
- Alleges a variety of conduct by the employer—some very standard non-compete/non-solicit/confidentiality language and some fairly oppressive provisions and draconian conduct
- Seeks rescission of the challenged provisions and compensatory damages

FTC & DOL Partnership

For Release

FTC, Department of Labor Partner to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices

New agreement establishes formal collaboration between agencies on issues affecting workers

September 21, 2023 |   

Continuing State Fragmentation



State Legislation

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- CA, ND, and OK have banned non-competes since the 1800s
- Minnesota non-compete ban, effective July 1, 2023
 - Prospective only
 - Still permits non-solicits, confidentiality agreements/NDAs, and non-competes in sale-of-business context

State Legislation - New York

- Potential New York non-compete ban passed by New York legislature on June 20, 2023
 - If signed, it would go into effect 30 days later
 - Prospective only
 - Would permit confidentiality agreements and likely permit non-solicits

State Legislation - California

- Two new California laws go into effect on January 1, 2024
- These laws will
 - void contracts with post-employment restrictive covenants “regardless of where and when the contract was signed,”
 - make it a civil violation for an employer to enter or attempt to enforce such a contract,
 - expand an employee’s ability to obtain attorney’s fees for a successful challenge, and
 - require companies to notify employees subject to such covenants that their restrictions are void and unenforceable

State Legislation

- Several states have enacted restrictions on non-competes
- 11 states and DC have varying wage thresholds for non-competes
- A number of states have complicated statutory schemes governing non-competes

Practical Advice



What's an employer to do?

- Live in the world that exists
 - Changing landscape
 - State fragmentation
 - Regulatory pressure
- Prepare for the world that may come
 - Augment/backstop non-competes

Don't Panic

- Most state non-compete law is unchanged
- What about the FTC/NLRB enforcement risk?
 - Most cautious: Rescind and notify
 - More reasonable: Proceed with caution

Do Assess

- How are you using non-competes?
- Warning flags: non-competes for
 - Low-wage employees
 - Low-skill positions
 - Employees with little access to customer relationships or confidential information
 - Large groups of employees

Do Assess

- Where are you using non-competes?
 - Consider business locations (including remote employees)
 - Be aware of states with non-compete bans, wage thresholds, or complex statutory requirements
 - Know that choice of law may not help

Do Assess

- What non-compete forms are you using?
 - Beware zombie non-compete forms
 - A bad non-compete often means no non-compete
 - Potential penalties or fee-shifting in certain states

Non-Competes (Tailored Version)

- What about entering into new non-competes?
- FTC and NLRB have relatively limited enforcement resources
- Non-competes should be conservative, limited, and tailored
- Now is not the time to go big and bold on who/how broad

A Non-Compete by Any Other Name

- What alternatives could augment or backstop non-competes?
- Legitimate purposes for non-competes:
 - Protecting customer relationships
 - Protecting confidential information and trade secrets

Protecting Customer Relationships

- Assess who has the customer relationships
- Customer non-solicits are still permitted in most states
 - FTC non-compete ban would not ban non-solicits
 - NLRB has not questioned the legality of reasonable non-solicits

Protecting Customer Relationships

- Again, Tailored Version
 - Customers the employee had business contact with during the last 1–2 years of employment
 - Not all of the employer’s customers at any time
 - Not customers of distinct affiliated businesses

Protecting Confidential Information

- Confidentiality agreements
 - Wide agreement that employers should be able to protect their confidential information
 - Easier to enforce than non-competes and non-solicits
 - Key element of trade secret protection

Protecting Confidential Information

- Channel Oprah
- Confidentiality agreements with
 - Employees
 - Vendors (where appropriate)
 - Customers (where appropriate)
- A confidentiality policy in an employment handbook is not a substitute

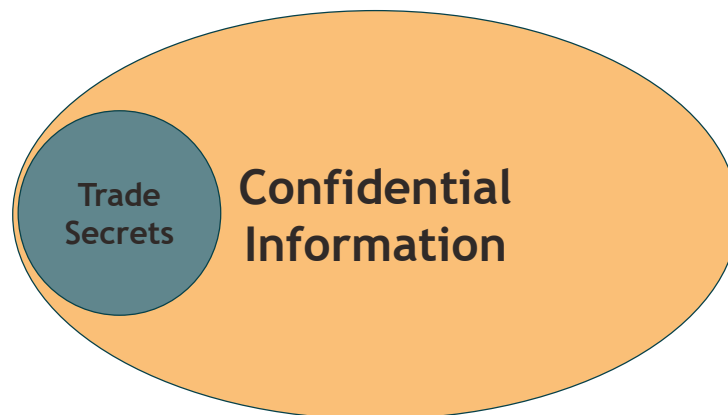
Protecting Confidential Information

- Take confidentiality agreements seriously
 - Onboarding/orientation
 - Training for current employees
 - Offboarding
 - Continuing obligations letter

Protecting Confidential Information

- A confidentiality agreement should include a carveout allowing an employee to engage in protected activity
- To preserve the opportunity to recover exemplary damages and attorneys' fees under the Defend Trade Secrets Act, a company must provide specific notice to the employee or contractor about their right to disclose trade secret information (see sample language in Appendix)

Protecting Trade Secrets



Protecting Trade Secrets

- One weird trick to make your trade secret not a trade secret
 - Fail to take “reasonable” efforts to maintain its secrecy
- What are “reasonable” efforts?

Reasonable Efforts

- Reasonable Efforts
 - Confidentiality agreements
 - Essential for trade secret protection
 - Don't forget vendors and customers
 - Need-to-know principle
 - Assess who needs access to trade secrets

Reasonable Efforts

- Physical Controls
 - External security
 - Access controls
 - Who can enter
 - Who can go where
 - Locks

Reasonable Efforts

- Electronic Controls
 - Access controls
 - Firewall
 - Anti-virus/anti-phishing
 - IT policies
 - IT monitoring

Reasonable Efforts

- Other Policies
 - Confidentiality
 - Use of company property/technology
 - BYOD / personal devices
 - Code of conduct
- Onboarding, training, and offboarding

Summary

- The non-compete seas are rough
- Don't panic, but do assess
- Don't overreach
- Augment and backstop non-competes with
 - non-solicits
 - confidentiality agreements
 - trade secret protections

Appendix: DTSA Carveout for Protected Activity

Sample DTSA notice: Notwithstanding any other provision of this Agreement, [Employee/Contractor] will not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made (i) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney and (ii) solely for the purpose of reporting or investigating a suspected violation of law, or that is made in a complaint or other document that is filed under seal in a lawsuit or other proceeding; and in the event that [Employee/Contractor] files a lawsuit for retaliation by the Company for reporting a suspected violation of law, [Employee/Contractor] may disclose the Company's trade secrets to [Employee's/Contractor's] attorney and use the trade secret information in the court proceeding if [Employee/Contractor] files each document containing the trade secret under seal and does not disclose the trade secret, except pursuant to court order.



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