Webinar 8 – May 14, 2025

Updates on Restrictive Covenants and other Employment Agreements

WEBINAR OUTLINE

INTRO/SETTING THE STAGE: DEFINING RESTRICTIVE COVENANTS

LEGAL TRENDS AND UPDATES

- The Debate Over Non-Competes: Fairness and Enforceability
- FTC Ruling
- New York Renewed Non-compete Ban Proposal
- States Continue to Target Restrictive Covenants

CONSIDERATIONS WHEN DRAFTING RESTRICTIVE COVENANTS

HRtelligence TIPS

I. INTRO/SETTING THE STAGE: DEFINING RESTRICTIVE COVENANTS

Restrictive covenants have been the subject of much discussion and scrutiny across the country.

Restrictive covenant agreements are contracts that limit what an employee can do after leaving their job. They typically encompass three key components:

1. **Non-Compete Agreements:** These clauses prevent employees from working for competitors or starting a competing business for a specified period after leaving a company.
2. **Non-Solicitation of Customers:** This prevents departing employees from taking their former employer's clients or "book of business" with them.
3. **Non-Solicitation of Employees:** This clause stops former employees from recruiting their old colleagues to join a new employer, effectively protecting the company's talent pool.

Although New York disfavors restrictive covenants based on public policy, which respects the right of people to earn their own living, these provisions are enforced if:
(1) there is a legitimate business interest in enforcement, and
(2) the scope of the restriction is narrowly drawn.

Legitimate interests include protecting trade secrets, confidential information, customer relationships and information, and unique and extraordinary services. The scope of the restriction must be narrow in terms of the geographic scope, the duration of the restriction, and the business activity affected.

An employer must demonstrate:

- the restriction is no greater than what is required to protect the employer's legitimate interest;
- the restriction does not create an undue hardship for the employee; and
- the restriction does not harm the public.

Reasonable Temporal Restrictions and Geographic Scope for Non-Compete Agreements

- New York law requires that a non-compete be reasonable as to its temporal restriction. Whether a time restriction is considered reasonable is based on the facts and circumstances of each case.
- New York law requires that a non-compete be reasonable as to its geographic scope. Like temporal limitations, whether a court considers a geographic limitation reasonable is based on the facts and circumstances of each case.

Courts will determine the reasonableness of a geographic limitation based on the facts and circumstances of each case. Some of the important factors that New York courts may consider in this analysis are:

- The nature of the employer's business
- The competitiveness of the industry
- The location of clients or customers
- The locations of the employer's offices and other facilities –and–
- The type of interests or information being protected by the non-compete

Enforceability of Restrictive Covenants

Courts must weigh the need to protect the employer's legitimate business interests against the employee's concern regarding the possible loss of livelihood, a result strongly disfavored by public policy in New York.

A non-compete agreement that is reasonable in time and geographic scope will be enforced only to the extent necessary:

- to prevent an employee's solicitation or disclosure of trade secrets,
- to prevent an employee's release of confidential information regarding the employer's customers, or
- in those cases where the employee's services to the employer are deemed special or unique.

New York courts are most likely to enforce a non-compete on the following personnel who may have broad access to trade secrets or key customer relationships:

- Executives or upper management
- Employees with key relationships with customers
- Personnel with highly technical skills, such as engineers, software developers or scientific professionals

Be sure that the non-compete is intended to protect genuine trade secrets or confidential information rather than ordinary business techniques. The types of information that may be protected as trade secrets depending on the facts and circumstances include information about the employer's business strategies, recruiting plans, quality control measures, manufacturing processes and confidential client information, among many others.

New York courts consider the following factors to be relevant in determining what constitutes a trade secret: "

1. the extent to which the information is known outside of [the] business;
2. the extent to which it is known by employees and others involved in the business;
3. the extent of measures taken by the business to guard the secrecy of the information;

4. the value of the information to the business and its competitors;
5. the amount of effort or money expended by the business in developing the information;
6. the ease or difficulty with which the information could be properly acquired or duplicated by others."

II. LEGAL TRENDS AND UPDATES

A. The Debate Over Non-Competes: Fairness and Enforceability

Non-compete agreements have long been controversial, and there are several reasons why they may be seen as problematic:

- **Geographical and Time Restrictions:** Many non-competes have a broad geographical scope (often covering the entire U.S.) and long time frames (sometimes lasting up to two years). Critics argue that such restrictions are excessive, particularly when they hinder an employee's ability to earn a living.
- **Consideration and the Two-Year Rule:** In states like Illinois, courts have emphasized that a restrictive covenant is essentially a separate contract that must meet the traditional elements of offer, acceptance, and consideration. Simply including a non-compete clause as part of an employment agreement—where the salary is the only consideration—may not be enough. Illinois law has codified that proper consideration typically only exists after an employee has worked for at least two years, unless additional compensation is provided at the time of signing.
- **Economic Impact on Employees:** For many lower-wage workers, signing a non-compete can have dire financial consequences, effectively locking them out of entire industries or fields.

B. FTC Ruling

The FTC ruling was, in part, a response to these inequities, aiming to make it easier for workers to transition to new opportunities without undue restrictions.

The Federal Trade Commission (FTC) issued a ruling aimed at banning non-compete agreements for employees earning below a certain salary threshold. Although the ruling was set to go into effect in September 2024, a federal judge in Texas has placed a hold on it, questioning whether the FTC has the jurisdiction to enforce such a ban. The FTC appealed.

On March 7, 2025, the FTC moved to stay its appeals to challenges against the Non-Compete Rule for 120 days, which the circuit courts granted. The FTC's motion cited the change in presidential administrations as well as FTC Chair Andrew Ferguson's public comments stating that the FTC may reconsider its defense of the Rule: "My view is that the Commission . . . basically needs to decide whether it's a good idea and it's in the public interest to continue defending this rule."

C. New York Renewed Non-compete Ban Proposal

In June 2023, the New York State Legislature passed a bill that would have prohibited almost all new non-competes in New York and created a private right of action enabling workers to void their non-competes and recover up to $10,000 in liquidated damages, in addition to lost compensation, damages, and reasonable attorneys' fees and costs. Though the legislature passed the 2023 bill, Governor Kathy Hochul vetoed it, calling for a carveout to the ban for higher-wage workers. The bill's sponsor, State Senator Sean Ryan committed to proposing similar legislation in the future and made good on that promise when he introduced Senate Bill 4641 on February 10, 2025 which includes the carveout Governor Hochul called for.

What are the key features of New York's 2025 bill?

- The bill adds a new section to New York State Labor Law that would prohibit any employer from seeking, requiring, demanding, or accepting a non-compete agreement from any covered individual. Section 191-d(2).

- Covered individuals include "any person other than a highly compensated individual who, whether or not employed under a contract of employment, performs or has performed work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person." Section 191-d(1)(b). Accordingly, the law not only applies to formal employees but also may extend to independent contractors and others working under informal arrangements.

- If enacted into law, employers must conspicuously post a notice informing employees of the law's non-compete protections. New York's Department of Labor will develop and provide this notice for employers to distribute to their workforces. Section 191-d(9),

- The bill expressly exempts agreements that (1) establish "a fixed term of service," (2) prohibit disclosure of "trade secrets" and "confidential and proprietary client information," and (3) prohibit "solicitation of clients of the employer that the covered individual learned about during employment," provided that such agreement does not otherwise restrict competition. Section 191-d(4).

How does the Highly Compensated Individual exception work?

- Non-competes imposed on workers who are "compensated an average annualized rate of cash compensation determined by the income listed on the individual's three most recent W-2 statements and, where applicable, K-1

statements" equal to or greater than $500,000 are not banned under the law, so long as those workers are not health care professionals or non-management broadcast industry employees. Section 191-d(1)(c); see also Sections 191-d(1)(d), 191-d(2) (defining health care professionals separately from covered individuals and prohibiting non-competes against both); Section 191-d(5) (retaining restrictions on non-competes imposed against non-management broadcast industry employees).

- Highly Compensated Individuals subject to non-competes are entitled to salary payments for the period of the non-compete, which cannot apply for longer than a year. Section 191-d(7)(b). Additionally, these non-competes still must (1) be reasonable in time, geography, and scope, (2) not pose undue burden on the employee or harm to the public, and (3) be no more restrictive than necessary to protect an employer's legitimate business interests. Section 191-d(7)(a).

- The compensation level governing the exception under the bill will be adjusted on an annual basis beginning in 2027, based on any increase in the Consumer Price Index for all urban consumers for New York State. Section 191-d(1)(c).

Are there any other exceptions proposed under the bill?

- The bill also includes a sale-of-business exception such that non-competes entered in the sale of a business's goodwill or a majority ownership interest remain enforceable so long as (1) the seller owns at least 15% of the business, or (2) the seller is a partner of a partnership or a member of a LLC who owns at least 15% of that partnership or LLC. Section 191-d(6).

If enacted, what happens when you violate the law?

- The bill creates a private right of action such that a worker subject to a prohibited non-compete can sue to void its terms and receive payment for liquidated damages, lost compensation, damages, and reasonable attorneys' fees and costs. Section 191-d(3)(a). Additionally, the bill provides that courts "shall award liquidated damages" of not more than $10,000 "to every covered individual affected under this Section, in addition to any other remedies permitted by this Section." Section 191-d(3)(b).

- Such actions can be brought "within two years of the later of: (1) when the prohibited non-compete agreement was signed; (2) when the covered individual learns of the prohibited non-compete; (3) when the employment or contractual relationship is terminated; or (4) when the employer takes any step to enforce the non-compete agreement." Section 191-d(4)(a).

When would the law become effective?

- The law would become effective 30 days after being signed into law by Governor Kathy Hochul and will be applicable contracts entered into or modified on or after that date.

D. States Continue to Target Restrictive Covenants

Restrictive Covenant Legislation at the State Level Continues to Increase

Salary Thresholds

States have continued to adopt salary-level thresholds for the use of non-competes.

Colorado limits non-compete agreements to employees making in excess of $123,750. Some other states' current salary requirements are as follows:

- Washington, D.C. – $154,200
- Illinois – $75,000
- Maryland – $46,800
- Maine – $60,240
- New Hampshire – $30,160
- Oregon – $113,241
- Rhode Island – $37,650
- Virginia – $73,320
- Washington – $120,559

California

California strengthens its non-compete ban. California's new non-compete laws went into effect on January 1, 2024, bolstering the state's existing protections against non-competes. Though most non-compete clauses have been void in California since 1872, California's newly enacted AB-1076 and SB-699 create additional bars to enforcing non-competes in the state.

SB-699, signed into law in September 2023, expands the reach of California's non-compete ban to contracts signed outside the state and creates a new private right of action for workers to sue employers who enter into or attempt to enforce a non-compete.

AB-1076, enacted just a month later, codifies California Supreme Court precedent which made including a non-compete clause in an employment contract or requiring an employee to enter a non-compete unlawful unless an exception applied. AB-1076 also requires that California employers notify employees who are subject to unlawful non-competes that their non-competes are void by February 14, 2024.

Arkansas

- On March 4, 2025, Arkansas amended its non-compete law to prohibit and void non-compete agreements that restrict the right of a physician to practice within their field. The law takes effect 90 days after the legislative session ends (May 5, 2025). (S.B. 139 [arkleg.state.ar.us]; Eff. est. 8/3/25)

Colorado

Colorado updated the highly compensated employee threshold: non-competes may only be entered into with employees earning $127,091 or more and covenants not to solicit customers may only be entered into with an employee earning approx. $76,254.60. (7 CCR 1103-14 [cdle.colorado.gov]; Eff. 1/1/25)

On April 21, 2025, the Colorado legislature passed a bill that excludes certain doctors, dentists, and nurses from the highly compensated workers exemption to the state's non-compete and customer non-solicitation laws. Covered healthcare providers may not be prohibited from disclosing their new professional contact information to their patients. Also, the bill allows a non-compete agreement to include the recovery of certain recruiting expenses (e.g., relocation expenses, signing bonuses), so long as the employer's recovery decreases proportionally over the course of not more than 3 years. Colorado's Governor has not signed the bill, but if enacted, it will take effect 90 days after adjournment of the legislative session on August 6, 2025. (S.B. 83)

District of Columbia

- In early February 2025, the Consumer Price Index for the Washington D.C. Metro area dropped from 2.8% to 2.7%. Consequently, restrictions on non-compete clauses now apply to employees who earn $158,364 or less and medical specialists earning $263,939 or less. (Index [bls.gov]; Update [does.dc.gov]; Eff. 1/1/25)

Florida

- On April 24, 2025, the Florida legislature passed a bill governing non-compete agreements between employers and "covered employees," defined as individuals, other than health care practitioners, earning a salary greater than twice the annual mean wage for their respective county. "Covered non-competes agreements" between covered employees and their employers will be required to be in writing, last no longer than 4 years, and the agreement must define the geographic area in which the employee agrees not to provide services similar to those provided to the employer during the preceding 3 years or in a role in which it is reasonably likely that the employee would use confidential information or customer relationships of the employer. If the bill is signed into law, it will take effect on July 1, 2025. (H.B. 1219 [flsenate.gov])

Illinois

- Non-compete and non-solicitation provisions entered into after January 1, 2025 are unenforceable if the provision is likely to result in an increase in cost or difficulty for any veteran or first responder seeking mental health services from a mental health professional licensed in Illinois. Effective February 7, 2025, Illinois enacted a law that revises the definition of "first responder" to include persons formerly employed as emergency medical services personnel, firefighters, and law enforcement officers. (S.B. 2737 [ilga.gov]; H.B. 2840 [ilga.gov]; Eff. 1/1/25 and 2/7/25)
- Non-competes and non-solicitation agreements with a person employed in construction are void and illegal, regardless of whether the employee is covered by a collective bargaining agreement. (S.B. 2770 [ilga.gov]; Eff. 1/1/25)

Kansas

- On April 8, 2025, Kansas enacted a law amending its restraint of trade statute. The amended law (1) directs the judiciary to modify contracts that are overbroad or otherwise not reasonably necessary to protect a business's business interest, and grant only the relief reasonably necessary to protect such interests; (2) creates a presumption of enforceability for written non-solicitation agreements between a business owner and a business entity, including employee and material contact customer non-solicitation agreements, that does not last more than four years following the end of the owner's business relationship with the business entity; and (3) creates a presumption of enforceability for written non-solicitation agreements with employees that lasts no more than 2 years following employment, if the agreements prohibit either (a) solicitation of employees, if it seeks to protect trade secrets or customer or supplier relationships, goodwill, or loyalty or (b) solicitation of material contact customers. (S.B. 241 [kslegislature.gov]; Eff. 7/1/25)

Louisiana

- Louisiana added restrictions to non-compete agreements with physicians that limit their ability to practice medicine, excluding certain physicians in rural hospitals or under certain federal contracts in rural parishes. Non-competes with primary care physicians may not exceed 3 years, or 5 years for all other physicians, beginning from the effective date of the initial contract. Agreements must include qualified parish-specific geographic limitations, and subsequent agreements between the employer and physician executed after the initial restricted period may not contain a non-compete provision. (S.B. 165 [legis.la.gov]; Eff. 1/1/25)

Maine

- The non-compete threshold was updated: employers may not enter into a non-compete agreement with an employee earning at or below $62,600 per year, which is based on the 2025 Poverty Guidelines published on January 15, 2025. (HHS Poverty Guidelines [aspe.hhs.gov]; Eff. 1/1/25)

Maryland

- Effective June 1, 2024, Maryland expanded its non-compete statute to prohibit non-compete agreements with healthcare providers who provide direct care to patients and earn $350,000 or less in annual compensation, as well as veterinary practitioners and technicians. Noncompete and conflict of interest provision for those covered under the exemption may not exceed one year and a ten mile radius. The prohibition applies to agreements executed on or after July 1, 2025. (H.B. 1388 [mgaleg.maryland.gov])

Montana

- On April 16, 2025, Montana amended its non-compete law, expanding its prohibition on non-competes to include naturopathic physicians, registered nurses, advance practiced nurses, and physician assistants. (H.B. 198 [bills.legmt.gov]; Eff. 4/16/25)

Oregon

- In late January 2025, Oregon increased the salary threshold for non-compete agreements from $113,241 to $116,427. (Announcement [oregon.gov]; Eff. 1/1/25)

Pennsylvania

- Pennsylvania prohibits non-competes with health care practitioners entered into after January 1, 2025. Non-compete covenants are defined as agreements between employers and health care practitioners that have the effect of impeding the health care practitioners' ability to continue treating patients or accepting new patients, either independently or with a competing employer. Patients with an ongoing relationship with the practitioner of 2 or more years must be notified of their practitioner's departure within 30 days. (H.B. 1633 [legis.state.pa.us]; Eff. 1/1/25)

Rhode Island

- The non-compete threshold for low-wage employees is increased to $39,125, which is based on the 2025 Poverty Guidelines published on January 15, 2025. (Poverty Guidelines [aspe.hhs.gov]; Eff. 1/1/25)

Virginia

- Virginia updated its average weekly wage for 2025 to $1,463.10. Employers are prohibited from entering into non-compete agreements with "low wage employees" (including independent contractors) earning less than $1,463.10 per week. (Announcement [doli.virginia.gov]; Eff. 1/1/25)
- On March 24, 2025, Virginia enacted a law that expands the definition of "low wage worker" under its non-compete law to include any person, regardless of weekly earnings, who is entitled to overtime under federal law for working in excess of 40 hours per week. The bill does not apply to agreements entered into or renewed prior to July 1, 2025. (S.B. 1218 [lis.virginia.gov]; Eff. 7/1/25)

Washington

- The 2025 non-compete threshold increased to $123,394.17 for employees and $308,485.43 for independent contractors. (Announcement [lni.wa.gov]; Eff. 1/1/25; Seyfarth Post)

Wyoming

- On March 19, 2025, Wyoming enacted a law that voids non-compete agreements entered into on or after July 1, 2025, unless it relates to (1) executive and management personnel, their professional staff, and officers; (2) rights of a physician to practice medicine upon termination; (3) recovering qualified expenses related to relocating, education, and training; (4) the sale of a business/asset; and (5) trade secret protections. Physicians may share their new contact information to existing patients with a rare disorder. (S.F. 107 [wyoleg.gov]; Eff. 7/1/25)

III. CONSIDERATIONS FOR DRAFTING RESTRICTIVE COVENANTS

Employers should consider taking the following steps when it comes to restrictive covenants:

- Review the terms for compliance with state laws where the employee is working, including salary threshold requirements.
- Realize non-competes are not a one-size-fits-all provision and narrowly tailor the non-compete to the employee's actual job duties, including the geographic areas where the employee truly works or has contact with customers.
- Confirm the non-compete agreement is supported by sufficient – not nominal – consideration given at the time of signing.
- Give new employees non-competes for review before the start of employment and have the employee sign at the start of employment. For current employees, some courts have ruled that continued employment is sufficient consideration.
- Consider if non-solicitation provisions (provisions that allow the former employee to work in the same industry but restrict solicitation of former or current customers or employees) are sufficient safeguards for certain employees.
- Strengthen confidentiality provisions.
- Consider offboarding procedures that remind departing employees about their post-employment obligations, including providing a copy of the non-compete/non-solicitation agreement.
- Promptly issue cease and desist letters and pursue court action if necessary, when a former employee breaches their non-compete obligations.

Traditionally, non-compete agreements have aimed to safeguard proprietary information, trade secrets, and client relationships. While these important interests remain, their use has expanded across industries and roles, raising concerns about

potential abuse and limitations on employee mobility. Enforceability of non-compete provisions can vary significantly from state-to-state. However, in those states where non-compete agreements are not prohibited, there are some common themes that are generally considered in determining whether a restriction is enforceable. Accordingly, to ensure that non-compete agreements meet legal standards and serve their intended purpose without unduly restraining employees, we recommend that employers consider the following key factors:

1. **Legitimate Business Interests:** Employers should craft non-compete agreements to protect genuine business interests. These may include safeguarding trade secrets, proprietary information, client relationships, or investments in specialized employee training. Employers should delineate these interests to justify the agreement's necessity. Now more than ever, employers should consider whether their legitimate business interests are adequately protected by less onerous covenants, like non-solicitation agreements (for both employees and customers/clients) and non-disclosure and confidentiality provisions. Should employers implement various restrictive covenants in their contracts, they should identify specific or unique interests that their non-compete agreements are essential to protect.
2. **Narrow Tailoring:** Employers should narrowly tailor the scope of non-compete agreements to protect specific business interests without unduly restricting an employee's ability to seek alternative employment. Blanket restrictions covering wide-ranging industries may face heightened scrutiny and be deemed unenforceable.
3. **Geographic and Temporal Limits:** Non-compete agreements should specify reasonable geographic restrictions and timeframes. These limitations should directly tie to the employer's legitimate business interests as well as reflect the industry's competitive landscape and the locations where the employer actually does or is actively planning to do business. Overly expansive restrictions may be deemed unreasonable and unenforceable.
4. **Consideration and Fairness**: Non-compete agreements must be entered into willingly by both parties and be supported by adequate consideration. Employees should receive something of value in exchange for agreeing to the restrictions, such as employment opportunities, specialized training, or access to proprietary information. Employers should keep in mind that non-compete agreements signed by existing employees are not always enforceable, and some states will require the existing employee to receive meaningful new consideration, including material elevations in position or stock awards.
5. **Review and Revision:** Employers should periodically review and update non-compete agreements to ensure they remain relevant and compliant with evolving legal standards. Changes in business practices, industry regulations, or court rulings may necessitate adjustments to the terms of these agreements.
6. **Legal Consultation:** Given the complexity and variability of non-compete laws across jurisdictions, seeking legal counsel is advisable when drafting or enforcing these agreements. Our experienced attorneys can provide valuable guidance on

compliance with state and federal regulations and help mitigate the risk of litigation.

Currently, employers in many states can still use restrictive covenants. However, they are under increasing scrutiny, and employers would be wise to review their agreements and evaluate their enforceability. Courts and governmental agencies routinely decline to enforce non-compete agreements if they find them unreasonably broad.

Employers should consider the following issues:

- **What is the business interest they are trying to protect?** Non-compete agreements, where allowed, must only be used to protect legitimate business interests, like trade secrets or commercially sensitive information, specialized training, company good will or client relationships. Employers should be able to identify and articulate the business interests that require the protection of a non-compete agreement.
- **Which employees really need to sign?** Employers should only use non-compete agreements with employees whose departure would actually pose a risk to the business interests protected. Courts and governmental agencies have invalidated non-compete agreements signed by front-line fast food workers and manufacturing employees, security guards and other similar types of employees because their departure form the company did not really threaten any legitimate business interest.
- **What is the law where you operate?** Restrictions on non-compete agreements vary from state to state. These restrictions generally limit things like the length of time an agreement can last and the types of employees with whom they can be used. Employers who operate in multiple states need to ensure that their non-compete agreements meet the requirements in each relevant state. A "one size fits all" agreement is unlikely to work for multi-state employers.