



# The Latest On State-Level Noncompete Reform

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Earlier this year, Vermont legislators introduced House Bill 556, an outright ban on noncompetes and any other restrictive covenant that restrains an individual's livelihood. This legislative overhaul of Vermont restrictive covenant law is one of several state-level reform efforts proposed in the wake of the White House's 2016 "call to action" for state restrictive covenant reform. Indeed, since the call to action, over a dozen state legislatures from across the country have proposed and enacted legislation reforming employers' use of restrictive covenants. As more and more states answer the "call" and alter an already inconsistent legal landscape, employers who use restrictive covenants should review their agreements to ensure compliance with the states' laws in which they operate.

## Federal Reform Efforts and the White House Call to Action

Federal restrictive covenant reform efforts began in 2015 with the introduction of the Mobility and Opportunity for Vulnerable Employees, or MOVE, Act. If enacted, the MOVE Act would have prohibited noncompete agreements between employers and low-wage earners.

Ultimately, the MOVE Act was not passed into law, but it did hasten the call for restrictive covenant reform, particularly by the Obama administration. [The White House](#) and the U.S. Department of Treasury analyzed the use of restrictive covenants across the country, and issued two reports on their "overuse." In October 2016, these reports resulted in the White House's call to action.

The call to action provided state legislatures with specific "best-practice policy objectives" aimed at curbing the misuse and overuse of restrictive covenants. The policy objectives suggested three potential areas of reform:

1. Banning noncompetes for certain categories of workers (such as workers in public health and safety, low-wage earners and workers laid off or terminated for cause);
2. Improving the transparency and fairness of noncompetes (through notice or consideration provisions or regulating the timing of execution); and
3. Encouraging employers to draft enforceable agreements through the adoption of the "red pencil doctrine."

Thereafter, state legislatures proposed restrictive covenant reform aimed at addressing these "best practices "

## State-Level Legislative Activity Since the Call to Action

Since the call to action was issued, eight states have enacted some type of restrictive covenant reform:

- California enacted Labor Code Section 925, which prohibits employers from entering into choice of forum or choice of law agreements with California workers. The law does not apply to contracts entered into before Jan. 1, 2017, or to any employees represented by counsel when negotiating the agreement.
- Colorado amended its noncompete statute, C.R.S. § 8-2-113(2), as it applies to physicians, and it now prohibits the recovery of damages against physicians who treat patients with “rare disorders.”
- Idaho repealed, I.C. §§ 44-2701, et seq., thereby eliminating a rebuttable presumption of irreparable harm for departures of “key employees.” Under the amended law, employers must establish irreparable harm for all former employees subject to a noncompete agreement to obtain injunctive relief.
- Illinois enacted the Illinois Freedom to Work Act (820 ILCS 90, et seq.) which prohibits employers from entering into noncompetes with “low-wage workers,” defined in the act as employees making the greater of \$13 per hour or the federal minimum wage.
- With NRS § 613.200, Nevada enacted sweeping reform to its noncompete laws. Interestingly, Nevada law now requires employers to offer “valuable consideration,” an undefined term, in return for an enforceable noncompete. This amendment also rejected the “red pencil doctrine,” the doctrine by which courts could invalidate an entire noncompete where some portion of the covenant was unenforceable, and provided additional protections for laid-off employees and employees whose former customers choose to follow that employee to his or her new employer (in situations where the former employee did not solicit that customer).
- New Mexico expanded the protection of its noncompete prohibition (N.M.S.A. § 24 1i-1) against medical professionals to include certified nurse practitioners and midwives. Perhaps more importantly, the amendment also prohibited the use of choice of forum and choice of law agreements with those workers to prevent circumvention of the prohibition.
- Oregon expanded its noncompete protections, prohibiting noncompetes, no-raid agreements and customer nonsolicitation agreements for home care workers.
- Utah expanded its noncompete protections to workers in the broadcasting industry implementing a salary threshold, and only allowing noncompetes that meet the threshold to apply to a term of employment less than four years, and against employees terminated for cause or who breach their contract.

This wave of activity is likely only the tip of the iceberg, as there is an abundance of proposed

This wave of activity is likely only the tip of the iceberg, as there is an abundance of proposed legislation working its way through state legislatures.

## Potential State-Level Legislative Activity on the Horizon

Five states have proposed legislation that would have a significant impact on the use of restrictive covenants in their borders:

- **Massachusetts:** House Bill 4419, the latest of a number of reform efforts over the years, is an amalgam of eight pending bills. If enacted, the bill would expand protections by: (1) with limited exceptions, capping noncompetes at 12 months; (2) requiring employers to sign noncompetes and to advise employees of the right to counsel; (3) requiring employers to disclose noncompetes at the earlier of a formal offer and/or 10 business days before employment; and (4) increasing consideration requirements.
- **New Hampshire:** Senate Bill 423 would prohibit noncompetes with low-wage workers defined as the greater of \$15 per hour or the minimum wage.
- **New Jersey:** Senate Bill 3518 would require employers to: (1) disclose the terms of the noncompete in writing at the earlier of a formal offer or 30 business days before employment; (2) limit noncompetes to 12 months; (3) limit the geographic reach of noncompetes to areas where the employee provided services or had a material presence in the final two years of employment; (4) limit the scope of activities to the specific services the employee provided in the final two years of employment; and (5) prohibit employers from restricting employees from accepting customers who choose to follow the employee without solicitation. The bill also prohibits enforcement against certain types of employees, including low-wage employees; requires employers to pay employees 100 percent of their pay and benefits during enforcement if they pursue an action; and requires employers to provide notice of enforcement to employees within 10 days of termination or else the noncompete is void.
- **Pennsylvania:** The Pennsylvania Freedom to Work Act, House Bill 1938, would ban the use of noncompetes, and would also void forum selection and choice of law agreements. It would not apply retroactively.
- **Vermont:** House Bill 566 would ban noncompetes and any restrictive covenants that restrain an individuals' livelihood defined as "agreement[s] not to compete or any other agreement that restrains an individual from engaging in the lawful profession, trade, or business."

It is almost certain that more states will follow the White House's call to action.

## Conclusion

Unless a federal solution ultimately prevails, which appears unlikely, employers will have to continue to wade through these differing state-by-state reforms. To do so successfully, employers first and foremost have to know the law in the jurisdictions where they operate and stay current on

first and foremost have to know the law in the jurisdictions where they operate and stay current on the ever-evolving legal landscape. Second, once up to speed, they need to review their existing agreements for compliance with the law.

For instance, if a noncompete runs contrary to existing law, employers should consider alternate protections in their state, such as nonsolicit provisions, confidentiality agreements or trade secret protections, to safeguard their legitimate business interests.

Finally, employers have to consider substantive differences in restrictive covenant law from state-to-state in crafting their employment agreements. For employers operating in multiple states, this may result in using two or more different agreements to ensure compliance with the laws of the various jurisdictions in which their employees work. Ultimately, state-by-state restrictive covenant law compliance is a constant challenge, and one that unfortunately does not appear to be going away any time soon as more and more states answer the White House's call to action.

This article was originally featured on [Law360](#) on June 11, 2018. For more information on this topic, you can refer to these three articles by the authors:

[State Legislatures Heed the Obama White House's "Call to Action": Part 1 of a 3-Part Series Examining State-Level Restrictive Covenant Activity](#)

[Part II: State Legislatures' Initial Response to the Call to Action](#)

[Part III: State Legislatures' Initial Response to the Call to Action - Proposed Legislation](#)