



# Do You Need to Give Notice to Employees About Signing a Non-Compete or Other Restrictive Covenant?

Insights

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Even companies that diligently prepare non-competes and other restrictive covenants for their employees to sign often miss some of the essential steps necessary to ensure those agreements will later be enforceable. One rule that has taken hold in a number of states is giving advance notice to prospective and current employees about the requirement to sign a restrictive covenant in connection with their employment. Failing to provide such notice can have significant consequences: for example, a court may refuse to enforce the restriction against the employee when they leave the company. Therefore, it is essential to keep the following key points in mind as you review and potentially update your practices.

## Review State Law Nuances

Notice rules can take different forms but generally require you to tell a prospective employee in advance of being hired that they will be required to sign a restrictive covenant. The goal is to help them make an informed decision as to whether to accept the job with such conditions. For example, in **Colorado**, employers must provide the terms of a non-compete to a prospective employee before they accept the offer and to a current employee at least 14 days before the earlier of either the agreement's effective date or the effective date of any additional compensation or change in the terms or conditions of employment that provides consideration for the covenant. The notice must be in clear and conspicuous terms, signed by the employee, and presented in a separate document from the actual non-compete agreement.

Likewise, in **Illinois**, an employer must provide a copy of both non-competition and non-solicitation covenants at least 14 days before the employee's start date or at least 14 calendar days before requiring current employees to sign the agreement. The **District of Columbia** is similar in that it also requires an employer to provide a non-compete agreement to employees who can be subject to such agreements at least 14 days before their start date or before being required to sign the agreement. Notably, the District of Columbia has additional obligations relating to those notices, such as including specific language and providing notice about other provisions, like those dealing with moonlighting, non-disclosure policies protecting confidential information, and restrictions in long-term incentive agreements.

Employers should also review and be mindful of applicable notice requirements in other states, including the following:

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- **Maine** – New hires must be notified before an offer of employment that they will be required to sign a non-compete. New hires and current employees must be provided with a copy of a non-compete agreement not less than three business days before it must be signed.
- **Massachusetts** - An employer must provide a new hire with a contract with a non-compete by the earlier of either a formal offer of employment or 10 business days before the employee's start date. As to current employees, notice of the agreement must be provided at least 10 business days before the agreement is to be effective.
- **New Hampshire** - Employers must provide potential employees with a copy of a non-compete agreement before the individual accepts an offer of employment.
- **Oregon** - Prospective employees must be informed, in writing, at least two weeks before their first day of work that a non-compete is an employment requirement.
- **Washington** - Non-competes, or other restrictive covenants considered to trigger the applicable statutory requirements, must be disclosed in writing to the prospective employee no later than the time the job offer is accepted. If the agreement becomes enforceable only at a later date due to changes in the employee's compensation, such as an increase in compensation above the statutory minimum threshold, then the employer must specifically disclose that the agreement may be enforceable in the future.

## Be Aware of Additional Requirements

In most states it is not necessary to advise a new hire or current employee of their right to consult with counsel when provided with an agreement that contains restrictive covenants, but that is not true in all states. For example, in **Illinois**, for both non-competition and non-solicitation covenants, the company must advise the employee in writing to consult with an attorney before entering into the covenant. Similarly, in **Massachusetts** for both new hires and current employees, the company must advise the recruit or employee in writing of the right to consult with counsel before signing a non-competition agreement.

## Develop Best Practices

The current state law trend is to provide more transparency and equity around restrictive covenants, which can include notifying employees that they will be required to sign an agreement. Even if a state's law does not specifically require it, companies would benefit by providing restrictive covenants to employees and potential employees in advance, as it is a good practice that may be viewed favorably by a court considering the restriction.

As the minefields multiply regarding the enforcement of restrictive covenants, employers are advised to do their homework and consult with counsel to ensure that such agreements are implemented consistent with the requirements of the states that will govern their enforcement. Otherwise, the work that goes into drafting these agreements may be wasted.

## Conclusion

For further information, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our [Employee Defection and Trade Secrets Practice Group](#). We will continue to monitor developments impacting employers, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information direct to your inbox.

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