

10 THINGS EMPLOYERS STILL NEED TO CONSIDER EVEN THOUGH THE FTC'S NON-COMPETE BAN IS DEAD: YOUR REMINDER TO-DO LIST

Insights
Sep 4, 2024

You probably know the federal non-compete ban is on ice for now – but that doesn't mean employers are free to use non-competes indiscriminately. What remains in the wake of the FTC's ban is a highly complex, constantly shifting patchwork of state laws that regulate the administration and substance of non-compete agreements. Here's your reminder to-do list, including the top 10 state law issues you'll still need to tackle, even though the FTC's non-compete ban did not take effect September 4.

First, Catch Up on Breaking News

In case you missed it, a Texas federal judge struck down the Federal Trade Commission's proposed non-compete ban on August 20, blocking the rule from taking effect on September 4 for all employers nationwide. [You can read more about this significant development here.](#)

Then, Review the Top 10 State Law Issues You Still Must Consider

Give Advance Notice When Required

In some states, you can't just give non-competes to hires on the first date of employment or to current employees without advance notice. For example, Illi requires employers to give employees a copy of the compete at least 14 calendar days before their start give them at least 14 calendar days to review it. Oth have varying requirements.

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Confirm Employee Meets Any Minimum Compensation Threshold

You need to be sure that the individual you're asking a non-compete meets the minimum compensation threshold if any, required by their jurisdiction in order for the non-compete to be permissible. This could range from \$15 per hour in Maryland to \$301,399.98 per year in Washington for independent contractors. Amounts in several states are annually based on inflation.

Offer Proper Consideration

Some states require more than initial or continued employment in order to have a valid non-compete. You may need to offer extra financial incentives, new confidential information or trade secrets, or a promotion.

Limit the Time Period

All non-competes need to have a reasonable limitation on how long they last after the period of employment. Be aware that some states set specific caps.

Restrict Geographic Scope

Same thing with the geographic scope. Depending on jurisdiction, you may even need to list the specific counties in which the non-compete restrictions apply.

Look Out for Industry-Specific Rules

Several industries have their own non-compete rules. For example, multiple states enacted new statutes in 2020 regulating non-competes for healthcare professionals.

Notify Employee of Their Right to Counsel

This is usually a good idea anyway, but some states require employers to notify the employee in writing that they have the right to consult with an attorney before signing a non-compete.

Beware of Other State Law Remedies

For example, in addition to civil penalties, some states allow employees to recover attorneys' fees from employers who try to enforce invalid non-competes against them.

Conclusion

Courts and lawmakers around the country are constantly refining the laws on non-competition, non-solicitation, and

non-disclosure agreements, which means employers need to stay up to speed in order to prevent unfair competition and comply with the law. Even the smallest mistakes can lead to significant liability and business risks – but we’ve got you covered. Each month, the Fisher Phillips Employee Defection and Trade Secrets team – powered by [Blue Pencil Box](#) – provides you with a practical checklist of actions you can take to ensure you are best positioned to avoid liability and protect your business interests.

We constantly monitor new cases, legislation, and regulatory developments to keep you at the cutting edge of the law. Make sure you are subscribed to [Fisher Phillips’ Insight System](#) to gather the most up-to-date information directly to your inbox. Check out [Blue Pencil Box](#) for our daily updates on restrictive covenant law. If you have questions, please contact the authors of this Insight, your Fisher Phillips attorney, or any attorney in our [Employee Defection and Trade Secrets Practice Group](#).