THE FUTURE OF NON-COMPETES AND NON-SOLICITATION AGREEMENTS

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OVERVIEW OF NON-COMPETES IN 2023

- **Non-compete/non-solicitation clauses are contractual terms between an employer and an employee that forbid:**
  - Employees from working for competing employers or starting a rival companies or businesses for a set time within a geographical area after employment ends and/or
  - Employees from “poaching” other employees or customers from their former employer.
- FTC defines a non-compete clause as "a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker’s employment with the employer."

OVERVIEW OF NON-COMPETES IN 2023

- **Benefits to employers of non-competes:**
  - Protecting their intellectual property (IP), confidential resources, and proprietary information will not be made available to or used by a competitor.
  - Can be addressed through confidentiality and non-disclosure agreements but not as thoroughly as prohibiting former employees from working for competitors.
  - Use them to also protect their investments in training workers.

OVERVIEW OF NON-COMPETES IN 2023

In 2023, the future of non-competes in employment is uncertain.

The Federal Trade Commission, the National Labor Relations Board, and numerous states have or are taking steps to ban or restrict non-compete and non-solicitation agreements in employment.

FTC RULE TO BAN NON-COMPETES

On January 5, 2023, the Federal Trade Commission (FTC) announced a proposed rule to ban all non-competes for workers post termination. FTC concluded that non-competes constitute an unfair method of competition and therefore violate Section 5 of the Federal Trade Commission Act, suppress wages, stifle innovation, and make it harder for entrepreneurs to start new businesses.

- The term "worker" is broadly defined to include not only employees but also independent contractors, sole proprietors, volunteers, interns, and any other individuals who work, whether paid or unpaid, for an employer.
- To address concern that non-compete agreements inappropriately limit worker mobility (particularly for lower wage earners) and suppresses the labor market and wages.

FTC RULE TO BAN NON-COMPETES

- **Specifically, the FTC Rule states that it would be an "unfair method of competition" for an employer to:**
  - Enter into or attempt to enter into a non-compete clause with a worker;
  - Maintain with a worker a non-compete clause; or
  - Represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe the worker is subject to an enforceable non-compete clause.

FTC RULE TO BAN NON-COMPETES

- **Under 16 CFR Part 910, the proposed ban would prevent future non-competes from being issued and void all existing contracts.**
- **The FTC will vote on the proposed rule change in April of 2024.**
- **Supersedes any state law contrary to the non-compete ban, but not any law providing greater protections for workers**

(NPRM, 88 Fed. Reg. 3482, 3536, to be codified at 16 C.F.R. § 910.4).

FTC RULE TO BAN NON-COMPETES

- **It would also be retroactive, requiring employers to rescind existing non-compete agreements and inform employees that they are now void.**
- **If and when enacted, the ban requires employers to:**
  - rescind *all existing* non-competes within 180 days of publication of the final rule;
  - within 45 days of the rescission, employers would need to provide individual notices to all current and former workers stating that they are no longer subject to the post-termination non-compete clause. Cannot be a mass communication.

The Proposed Rule provides a model notice form for this purpose.

FTC RULE TO BAN NON-COMPETES

A new rule enforced by the Federal Trade Commission makes it unlawful for us to maintain a non-compete clause in your employment contract.

As of [DATE 180 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE], the non-compete clause in your contract is no longer in effect. This means that once you stop working for [EMPLOYER NAME]:

You may seek or accept a job with any company or any person—even if they compete with [EMPLOYER NAME].

You may run your own business—even if it competes with [EMPLOYER NAME].

You may compete with [EMPLOYER NAME] at any time following your employment with [EMPLOYER NAME].

The FTC's new rule does not affect any other terms of your employment contract.

For more information about the rule, visit [*link to final rule landing page*].

FTC's Sample Notice

bfvlaw.com

FTC RULE TO BAN NON-COMPETES

- **De Facto Ban- the ban would extend to "de facto" non-compete clauses without clearly defining what thy are.**
- **"Functional Test" a clause is a "de facto" non-compete clause if it has "the effect of prohibiting the worker from seeking or obtaining other employment or operating a business, regardless of what the term is.**
- **The non-compete ban is limited to traditional "pure" non-competes. It does not *per se* prohibit other restrictive covenants, such as customer or employee non-solicits, unless they are so broad that they function as a "de facto non-compete."**

FTC RULE TO BAN NON-COMPETES

Examples of such "*de facto* non-compete clauses":

- **A non-disclosure agreement between an employer and a worker that is written so broadly that it effectively precludes the worker from working in the same field.**

But reasonable non-disclosure clauses, customer non-solicits, and employee non-solicits are not prohibited.

- **A requirement that the worker must repay training costs where the required payment is not reasonably related to the costs the employer incurred for training the worker.**

- **Disproportionately high liquidated damages provisions for violation of other restrictive covenants, or forfeiture of benefits provisions.**

FTC RULE TO BAN NON-COMPETES

Exceptions:

Under Section 5 of the FTC (used to promulgate Theban) does not apply to:

- **Certain Banks;**
- **Savings and loan institutions;**
- **Common carriers;**
- **Air carriers; and**
- **Non-profit organizations.**

FTC RULE TO BAN NON-COMPETES

Exceptions:

Express carve-out for non-competes in connection with a person:

- selling a business entity;
- otherwise disposing of all of the person's ownership interest in the business entity; or
- selling all or substantially all of a business entity's operating assets.

However, to be covered by this exception, the person must own at least 25% of the equity in the company at the time of entering into the non-compete.

FTC RULE TO BAN NON-COMPETES

Legal Challenges to Proposed Rule:

- FTC's **Statutory Authority** to Regulate Non-compete agreements;
- **Major Questions Doctrine** (See *West Virginia v. Environmental Protection Agency*, 597 U.S. (2022). S. Ct. determined that an EPA proposed clean air power plan was outside the scope of its authority under because of its impact across industries and the authorities of multiple federal agencies**.)**
- **Non-Delegation Doctrine** (FTC was not delegated the authority it claims to have under Section 5 of the Act to engage in this kind of rulemaking).
- Modified Rule, like state legislation, that does not ban all non-competes but limits them to those earning a certain compensation, employees holding managerial and executive positions, allowing factors of duration, geographic scope and/or activity restrictions.

NEW MEXICO LAW REGARDING NON-COMPETES

- **Generally speaking, New Mexico law permits non-compete clauses.**
  - Consideration - in exchange for agreeing to the covenant not to compete;
  - The agreement is reasonable in time;
  - The agreement is reasonable in geographic scope.

  See, e.g., *Kidskare, P.C. v. Mann*, 2015-NMCA-064, ¶10.

NEW MEXICO LAW REGARDING NON-COMPETES

New Mexico courts enforce non-solicitation agreements if the terms are:

- Reasonable.
- Necessary to protect an employer's legitimate business interest.

See Nichols v. Anderson, 92 P.2d 781, 783 (N.M. 1939); *Campbell v. Millennium Ventures*, LLC, 55 P.3d 429, 434 (N.M. Ct. App. 2002).)

In construing the scope of non-solicitation agreements, courts examine the language of the agreement on a case-by-case basis.

NEW MEXICO LAW REGARDING NON-COMPETES

- **Exceptions: post-employment non-compete agreements involving healthcare practitioners are generally unenforceable.**
- **Per N.M. Stat. Ann. § 24-1i-2 to 24-1i-5,** a non-compete provision in an agreement executed after July 1, 2015, restricting a health care practitioner's right to provide clinical health care services is unenforceable upon the termination of:

  The agreement; the renewal or extension of the agreement; or a health care practitioner's employment with a party seeking to enforce the agreement.

NEW MEXICO LAW REGARDING NON-COMPETES

N.M. Stat. Ann. § 24-1i-2 to 24-1i-5,

Health care practitioners include:

Dentists, Osteopathic physicians, Physicians, Podiatrists, Certified registered nurse anesthetists, Certified nurse practitioners, Certified nurse-midwives.

For agreements executed on or after April 4, 2023, practitioners also include:

- Psychologists.
- Physician assistants.
- Pharmacists.

(NMSA 1978, § 24-1i-1.)

NEW MEXICO LAW REGARDING NON-COMPETES

N.M. Stat. Ann. § 24-1i-2 to 24-1i-5

For agreements entered into on or after April 6, 2017, a provision in an agreement for clinical health care services in New Mexico is void, unenforceable, and against public policy if it either requires:

- Application of the laws of another state.
- Litigation arising out of the agreement to be conducted in another state.

(NMSA 1978, § 24-1i-2.)

NEW MEXICO LAW REGARDING NON-COMPETES

N.M. Stat. Ann. § 24-1i-2 to 24-1i-5

The law does not limit the enforceability of:

• A provision in an agreement requiring a health care practitioner working for an employer for less than three years to repay all or a portion of:

• a loan; relocation expenses; a signing bonus or other remuneration to induce the health care practitioner to relocate or establish a health care practice in a specified geographic area; or recruiting, education, and training expenses.

• A nondisclosure provision relating to confidential information and trade secrets.

A non-solicit regarding patients and employees for one year or less after the last date of employment.

• Any other provision of an agreement that is not in violation of law, including a provision for liquidated damages.

(NMSA 1978, § 24-1i-3.)

NEW MEXICO LAW REGARDING NON-COMPETES

N.M. Stat. Ann. § 24-1i-2 to 24-1i-5

The law does not limit the enforceability of:

NM recently killed a bill to ban non-solicitation agreements for healthcare practitioners.

Proposed in 2023:

nonsolicitation provision in an agreement, which provision restricts the right of a health care practitioner to solicit patients or employees of the party seeking to enforce the agreement, shall be unenforceable upon the termination of:

the agreement;

a renewal or extension of the agreement;

or

a health care practitioner's employment

with a party seeking to enforce the agreement

Did not pass.

NEW MEXICO LAW REGARDING NON-COMPETES

N.M. Stat. Ann. § 24-1i-2 to 24-1i-5

An agreement may provide for liquidated damages in an amount that is reasonable at the time the agreement is signed and given the anticipated harm and difficulty of proving the amount of loss resulting from breach of the agreement by any party. However, a provision in an agreement fixing unreasonably large liquidated damages is void as a penalty. (NMSA 1978, § 24-1i-4.)

These requirements and restrictions do not apply to agreements between health care practitioners who are shareholders, owners, partners, or directors of a health care practice

(NMSA 1978, § 24-1i-5(A).)

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NLRB CHALLENGE OF NON-COMPETES

- The National Labor Relations Board (NLRB) is also attacking non-competes.
- NLRB General Counsel Jennifer Abruzzo said non-competes violate labor law "unless the provision is narrowly tailored to special circumstances justifying the infringement on employee rights."

NLRB CHALLENGE OF NON-COMPETES

In a memo released May 30, 2023, Jennifer Abruzzo announced that noncompete agreements violate the National Labor Relations Act (NLRA).

May result in unfair labor practice charges for any non-managerial employer that uses non-competes. The NLRA applies only to nonmanagerial, nonsupervisory staff.

NLRB CHALLENGE OF NON-COMPETES

Per the memo, non-compete agreements violate Section 7 of the NLRA, which protects employees' rights to take collective action to improve their working conditions.

Specifically, Abruzzo said, these agreements interfere with employees' ability to:

Concertedly threaten to resign to secure better working conditions.

Carry out concerted threats to resign or otherwise concertedly resign to secure improved working conditions.

Concertedly seek or accept employment with a local competitor to obtain better working conditions.

Solicit their co-workers to go work for a local competitor as part of a broader course of protected concerted activity.

Seek employment, at least in part, to specifically engage in protected activity, including union organizing, with other workers at an employer's workplace.

NLRB CHALLENGE OF NON-COMPETES

“U.S. law generally protects employee mobility, and employers may protect training investments by less restrictive means, for example, by offering a longevity bonus," Abruzzo said. "I note that employers' legitimate business interest in protecting proprietary or trade secret information can be addressed by narrowly tailored workplace agreements that protect those interests.“

Memo added that overbroad noncompete provisions imposed on low-wage or middle-wage workers who lack access to trade secrets are unlikely to be justified.

Not yet law, but regional charges may be made to get a decision from the NLRB.

STATE LAW RESTRICTIONS OF NON-COMPETES

- State Law Restrictions
- Ban non-compete agreements with few exceptions: California, North Dakota, Oklahoma, & Washington, D.C.
- Prohibit non-compete agreements unless workers earn above a certain threshold: Colorado, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, Oregon, Rhode Island, Virginia & Washington
- This is to protect lower income earners

OVERVIEW OF NON-COMPETES IN 2023

- **State Law Restrictions**
- **Most of these state restrictions enacted during COVID-19 pandemic, to assist the labor market.**
- **Colorado, new law enacted August 10, 2022, regarding non-compete and non-solicitation clauses, is very strict.**
- **Such agreements are not enforceable unless they are:**
  - Noncompete agreements accompanying a sale of business.
  - Noncompete agreements signed by highly compensated employees who earn more than $101,250 per year.
  - Non-solicitation agreements signed by workers earning more than $60,750 per year.
- **Colorado employers must notify job applicants about any noncompete agreements and ask them to review the agreements before they accept the job.**

ADVICE FOR EMPLOYERS

- Continue to evaluate non-compete and non-solicitation agreements;
- Review on a state-by-state basis if national employer;
- Avoid overly broad agreements;
- Reconsider blanket use of non-competes;
- Reconsider using non-competes with low-wage workers;

ADVICE FOR EMPLOYERS

- Consider how non-solicitation, nondisclosure and confidentiality agreements can protect proprietary company information, and employee and client relationships without preventing an employee from working in the same industry.

- Be aware that even if FTC rule in the middle of legal challenges, FTC can still bring enforcement actions and NLRB can also entertain challenges.

QUESTIONS?

Call us with questions

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