Key Trends, Risks, and Best Practices for Business Protection Agreements: Non-Competes, Non-Solicits, and NDAs

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Lancaster SHRM
September 26, 2025

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Important Proviso

- The law in this area is rapidly changing, with a number of states considering legislation impacting the enforceability of non-compete and non-solicit agreements; the federal government targeting "unfair" non-compete agreements; and courts issuing precedential opinions on a routine basis.
- This Overview has been prepared for informational purposes only and is not offered, nor should it be construed, as legal advice.
- Please consult legal counsel with any specific questions.

CONFIDENTIALITY & NON-DISCLOSURE COVENANTS

– Generally, "reasonableness" requirements do not apply

– Some states require reasonable temporal limits

– Useful to establish that the company took "reasonable measures" to protect information

CONFIDENTIALITY & NON-DISCLOSURE COVENANTS

Scope:

- Protect against use or disclosure of employer's confidential, proprietary, and/or trade secret information information
- Ensure return of company property and confidential, proprietary, and/or trade secret information:
  - immediately upon termination or at any other time upon request; and
  - in any format (tangible or electronic), wherever located.

CONFIDENTIALITY & NON-DISCLOSURE COVENANTS

Define which information is confidential:

- Should be *tailored* to business
- Consider categories of information that provide the company with a competitive advantage or that are not readily known in the industry
- Safety "catchall" language
- Exclude information in the public domain through no breach by employee

Common Types of Post-Employment Restrictive Covenants

- **Non-compete:** prohibits employee from competing with former employer for a period of time following employment, in a given geographic area and/or with respect to certain clients
- **Customer non-solicit:** prohibits employee from soliciting former employer's customers for a period of time following employment; often includes "no interference" and/or "no acceptance of business" covenants
- **Employee non-solicit:** prohibits employee from soliciting former employer's employees for a period of time following employment

LIMITATIONS ON NON-COMPETE COVENANTS

→ Consideration

Must be supported by "adequate" consideration (highly state specific)

- Commencement of employment
- Promotion or beneficial change in benefits or compensation
- Stock options / long term incentive plan
- Separation benefits

Pennsylvania Practice Note:

- Continued employment is *not* sufficient consideration
- "Intent to be legally bound" is not enough

LIMITATIONS ON NON-COMPETE COVENANTS

→ Must be No Broader than Necessary to Protect Legitimate Business Interests

- protecting confidential information and/or trade secrets
- protecting customer relationships / goodwill
- specialized training

LIMITATIONS ON NON-COMPETE COVENANTS

→ Must be Reasonable in Scope of Activities

- Is the employee responsible for all or only some of the company's lines of business?
- How broad are the employee's responsibilities for the company?
- What is the scope of the employee's access to confidential information?
- What is the scope of the employee's access to the company's customer relationships and goodwill?

LIMITATIONS ON NON-COMPETE COVENANTS

→ Must be Reasonable in Geographic Scope

– Where does the company operate?
– For what area(s) is the employee responsible?
– Is the employee's responsibility limited to certain customers?

LIMITATIONS ON NON-COMPETE COVENANTS

→ Must be Reasonable in Temporal Scope

– How long will the information to which the employee will have access remain confidential or valuable?
– How long will it take to hire and train a replacement and stabilize customer relationships?
– How long are the contracts for which the employee will be responsible?
– Will the employer pay the employee to "sit out"?

NON-SOLICITATION COVENANTS

- Less intrusive than non-competition covenants, but can still provide significant protection for customer or employee relations
- Typically prohibit:
  - Solicitation of/interference with customers or prospective customers or a subset of customers
  - Solicitation/hiring of employees/agents
- Sometimes prohibit the solicitation of suppliers
- Subject to reasonableness requirements
- Customer restrictions may replace geographic limits
- Laws vary by state

RECENT STATE LAW DEVELOPMENTS

Pro-Employee

Minnesota

- **Bans non-competes** signed on or after July 1, 2023
- Does *not* ban:
  - a nondisclosure agreement
  - an agreement designed to protect trade secrets or confidential information
  - a nonsolicitation agreement
  - an agreement restricting the ability to use client or contact lists or solicit customers of the employer
  - non-competes entered into in connection with the sale or dissolution of a business

Pro-Employee

Virginia

- Since July 1, 2020, Virginia has prohibited employers from entering into or enforcing a "covenant not to compete" with "**low-wage employees**"
  - approx. $76,000 per year in 2025
  - interns, apprentices, and independent contractors
- For agreements signed on or after July 1, 2025, new law expands the definition of "low-wage employee" to also include **non-exempt** employees
- Language *suggests* that the law permits non-solicit where employee is the one initiating contact with or otherwise soliciting customer
- Stiff penalties for violation

Pro-Employee

Wyoming

- Prohibits non-competes eff. July 1, 2025, unless exception applies
  1. Noncompetes to the extent they protect "trade secrets"
  2. Noncompetes for "[e]xecutive and management personnel and officers and employees who constitute professional staff to executive and management personnel"
  3. Repayment of expense provisions, in certain circumstances
  4. Noncompetes "contained in a contract for the purchase and sale of a business or the assets of a business"
- Silent on whether customer nonsolicitation provisions are excluded or covered.

Pro Employee

Delaware

– The court will now likely strike entirely, and not reform, a covenant that the court determines is too broad.

Washington State

– Tricky got trickier with June 2024 statute changes
– When a non-compete/non-acceptance of business/non-conduct of business clause is unenforceable:
  - **below earnings thresholds** (adjusted annually): $124,559.99 employees / $301,399.98 independent contractors
  - > **18 months** absent clear and convincing evidence that a longer period is necessary
  - **employee laid off**, unless agreement provides for compensation equal to employee's **full base salary** from the time of termination through the end of enforcement period, less any compensation earned through other employment
– Strict advance notice requirement
– Strict penalties and attorneys' fees for violation
– Washington Supreme Court: "[B]arring employees from providing any kind of assistance to competitors exceeds a narrow construction of the duty of loyalty"

Florida…Bucking the Trend

Existing Florida pro-employer restrictive covenant law

Fla. Stat. sect. 542.335:

- In employee context, the court must presume reasonable in time ≤6 months and presume unreasonable in time ≥ 2 years.
- Court *must narrow* overly broad covenant to enforce it
- Attorneys' fees and costs to prevailing party

Florida…Bucking the Trend

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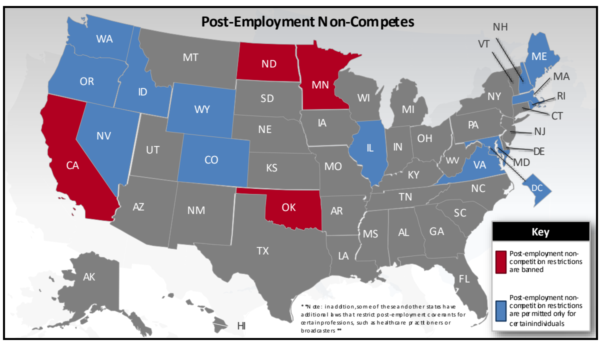
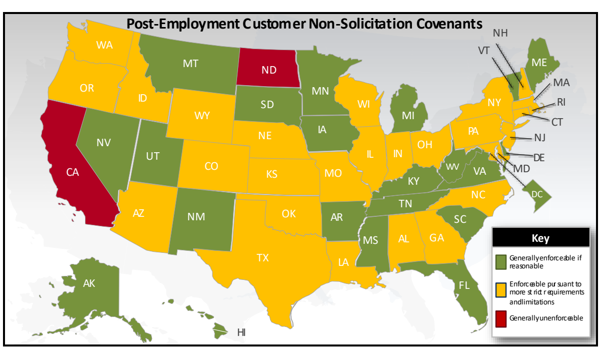
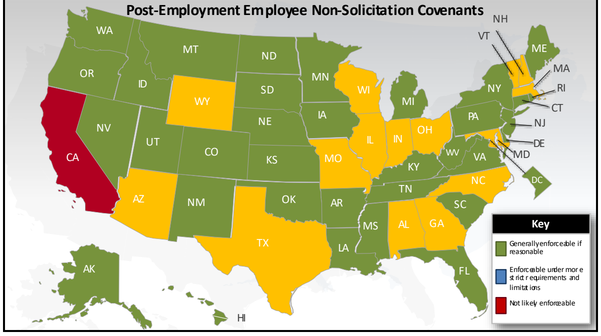
CHOICE Act (agreements signed on or after July 1, 2025)

- **Supplements existing pro-employer Florida law**
- **Creates a presumption of enforceability** for agreements with employees/independent contractors earning (or reasonably expected to earn) >2x annual mean wage in Florida county where employer has its principal place of business or, if not applicable, the county in which employee resides.
- **Covered noncompetes are fully enforceable if:**
  - Employee is given **seven days** to consider whether to sign
  - Employee is notified of **right to seek counsel**
  - Employee has **acknowledged** in writing that employee will receive confidential information or customer relationship access
  - Temporal scope is **4 years or less** and reduced by any garden leave
  - Limits employee from taking on new employment in which employee would provide services in a role: (1) **similar to services provided to employer** during the three years preceding noncompete; **or** (2) in which it is **likely that employee would use confidential information or customer relationships** of employer
- **Garden leave arrangements fully enforceable for up to 4 years if:**
  - Employee is given **seven days** to consider whether to sign
  - Employee is notified of **right to seek counsel**
  - Employee has **acknowledged** in writing that employee will receive confidential information or customer relationship access
  - Employee's **base salary and benefits paid during garden leave.**
  - Employee **not required to provide services to employer after 90 days** and advised that they may work for another business with employer's consent
  - Employer may only reduce garden leave period with 30 days' notice





Post-Employment Employee Non-Solicitation Covenants



CHOICE OF LAW & FORUM

- Requires careful analysis of potentially applicable state laws
- Chosen law should have a connection to the parties
- Be mindful of state statutes prohibiting other state's choice of law and/or forum (ex: California)

HEALTHCARE PRACTIONERS

Pennsylvania Healthcare Practioners

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How Does the Act Limit Noncompetes with Healthcare Practitioners?

- Any noncompete covenant with a health care practitioner signed after January 1, 2025, is void unless:
  - The covenant lasts no longer than **one year**; and
  - The health care practitioner was **not dismissed** by the employer.

What Types of Agreements Are Covered by the Act?

- A "noncompete covenant" under the Act is an agreement with a covered healthcare practitioner that "has the effect of impeding the ability of the health care practitioner to continue treating patients or accepting new patients, either practicing independently or in the employment of a competing employer after the term of employment."
- Covered healthcare practitioners include: Medical doctors; Doctors of osteopathy; Certified registered nurse practitioners; Certified nurse anesthetists; and Physician assistants.
- Certain sale of business covenants allowed.

What Notice Must Employers Provide to Patients of a Healthcare Practitioner's Departure?

- Within 90 days of a healthcare practitioner's departure, the employer must notify patients seen within the last year and with whom the practitioner had an "ongoing outpatient relationship" of two years or more of the practitioner's departure, that the patient may be seen in the practice if it chooses, and how the patient may transfer records.

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Other States with Specific Healthcare Practitioner Rules

- Arkansas
- Colorado
- Indiana
- Louisiana
- Maryland
- Oregon
- Texas
- Utah
- More to come

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Federal Government Regulation of Non-Competes

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FTC Abandons its Rule

- In April 2024, the FTC promulgated a rule that:
  - Banned post-employment non-competes nationwide with virtually all workers
  - Invalidated existing noncompetes with all workers except senior executives
  - Required employers to send a clear and conspicuous notice to all affected workers that their noncompete clause will not and cannot be legally enforced
- Courts promptly struck down the rule, and the FTC appealed.
- In March 2025, the FTC asked the courts to stay the appeals while it reconsidered its defense of the rule.
- On September 5, 2025, the **FTC voted to dismiss the appeals and accede to vacatur of the rule → NO RULE**

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But… Restrictive Covenants Remain an FTC Priority in 2025

- FTC creates a **Joint Labor Task Force** in February 2025 to coordinate enforcement strategies focused on non-compete, no-poach, non-solicit, and no-hire agreements.
- FTC launches **public inquiry** in September 2025 to assess the scope, prevalence, and impact of employer non-compete agreements in the U.S. labor market
  - **Comment period**: Interested parties have 60 days—until November 3, 2025—to submit comments via regulations.gov.
  - **Confidential submissions**: Parties seeking to submit confidential, nonpublic comments should follow the alternative submission guidelines outlined in the FTC's request for information.
- Following review of public comments, the FTC may consider policy guidance, enforcement actions, or new rulemaking initiatives targeting noncompete restrictions.

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Recent FTC Enforcement Action

- **Policy at Issue:**
  - Gateway Services, Inc., a pet cremation services company, had a policy, since 2019, of requiring **all newly hired employees** (other than in California), to sign 12-month post-employment noncompete agreements.
  - Nearly 1,800 of Gateway's 1,900 employees were subject to post-employment noncompetes, **including hourly workers, regardless of skill level or job duties**.
- **FTC's September 4, 2025, Enforcement Action:**
  - The FTC charged Gateway Services of violating Section 5 of the FTC Act, arguing that the policy is an unfair method of competition.
  - Under a *proposed* FTC consent order, Gateway must:
    1. **Cease enforcing** existing noncompetes and refrain from entering into new ones, subject to narrow exceptions:
       - directors, officers, or senior employees in connection with the grant of equity or equity-based compensation
       - noncompete agreements against equity holders in connection with the bona fide sale of a business in which person holds an equity interest
    2. **Notify affected employees** that they are no longer bound by noncompetes; and
    3. **Limit nonsolicitation restrictions** to customers with whom the employee had **direct contact** in the prior 12 months.

BEST PRACTICES

EMPLOYER BEST PRACTICES FOR DRAFTING

- Condition oral & written offer of employment/promotion on signing agreement
- Attach copy of agreement to offer letter
- Provide advanced notice:
  - 14 days' notice = best practice
  - More stringent rules may apply
- Get documents signed at time of hire, promotion, potentially at equity grant
- Custom tailor agreements to position
- Be careful about "affiliates"
- Be careful about low-wage employees
- Carefully consider choice of law and forum and consult counsel to include critical state-specific modifications
- Include consent to assignment by employer clause
- Tailor confidential information clause

EMPLOYER BEST PRACTICES FOR PROTECTING INFORMATION

- Limit access to confidential information
- Track access to confidential information
- Supplement agreements with training and policies that are enforced
- Conduct an exit interview and obtain a certification of compliance
- Take inventories upon termination
- Preserve devices, accounts, & access logs upon termination
- Instruct resigning employees not to reset or wipe devices
- Forensic examination

BEST PRACTICES WHEN HIRING

- Review agreement with company's legal counsel
  - Do not take candidate's word for it
  - Do not give the candidate legal advice about agreement
  - No non-privileged communications about enforceability
- Require candidate to represent, as a condition of employment, that there are no undisclosed agreements containing post-employment restrictive covenants
- Require candidate to represent, as a condition of employment, that he/she has returned all prior employer property or confidential information
- Require employee to affirm intention to comply with agreement
- Build in conditions to offer/position
- Consider declaratory relief if there are strong defenses to enforcement

Additional Resources

- Contact shsutherland@duanemorris.com to be added to our mailing list for Alerts on key developments
- Visit our website for prior Alerts: https://www.duanemorris.com/practices/trade_secrets_and_noncompete.html