

# PUBLICATION

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## The New Landscape for Non-Compete Law in 2019 and Beyond

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**For years, employers have relied on the use of restrictive covenants to protect their companies from unfair competition by former employees and competitors. Historically, the use of restrictive covenants, such as non-compete and anti-poaching provisions, was premised on the idea that when an employee leaves the company, they might begin working for a competitor or start a business, and gain competitive advantage by exploiting customer relationships built through the employer's time, effort and expense, or confidential or sensitive information about their former employer's customers, operations, trade secrets, business practices, upcoming products, and marketing plans. Over the past several years, however, the law has witnessed a variety of changes to the landscape of restrictive covenants at both the state and federal levels. Increasingly, legislatures and courts have been taking an aggressive approach to limiting the type and scope of restrictive covenants that an employer can use in its relationships with employees.**

By the end of 2018, heading into 2019, we have seen laws and regulations proposed, and in some cases enacted, that look to shift the practice of law as it relates to restrictive covenants and fundamentally alter an employer's ability to protect itself from unfair competition. There are three developments – a crackdown on the use of anti-poaching agreements between employers, the enactment of state legislation restricting or banning the use of non-competes, and the proposal of federal legislation to prohibit the use of non-compete provision nationwide – that may have the biggest impact on U.S. companies.

### **Anti-Poaching Agreements Targeted at the State and Federal Level**

In October 2016, the Antitrust Division of the Department of Justice (DOJ) released its "Antitrust Guidance for Human Resource Professionals" and announced its intention to criminally pursue companies that enter into anti-poaching agreements. Following up on that announcement, in January 2018 the division's Attorney General formally announced the criminal antitrust cases relating to these agreements would be filed going forward. In the past, the DOJ had treated no-poaching agreements as civil violations of the antitrust laws. Even when the DOJ brought cases on agreements that they determined to be per se illegal, the agency would not pursue those cases as criminal violations. This new position obviously represents a major policy shift.

Not to be outdone, in mid-2018, the Attorneys General for California, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Washington, D.C. joined the movement when they took on the use of anti-poaching agreements entered into between franchise owners. The state Attorneys General sent a letter to several large national franchisors seeking information and documents about provisions in franchise agreements that restrict franchisees in the same chain from hiring workers away from each other. Per the letter, the state Attorneys General are concerned that the anti-poaching provisions in franchise agreements negatively impact fast-food industry employees in their respective states.

Just days after that letter was issued, the Washington state Attorney General announced that he had reached agreements with seven of the largest franchise operations in the country – including McDonald's – who agreed to immediately end the nationwide practice that restricts mobility and decreases competition for labor by preventing workers from moving among the chains' franchise locations. The State of Washington is reportedly looking at other franchisors, and, if those franchisors do not agree to its demands, the Attorney General has made clear that his office will file lawsuits.

## **States Throughout the Country Now Restrict or Ban Non-Compete Provisions**

California has traditionally led the way on state law against non-compete restrictions, being the first to find all employment agreements containing such provisions to be null and void. Many employers, however, had been successful in contracting around this prohibition by incorporating choice of law provisions applying the law of other states to contract disputes. On January 1, 2017, California closed this loophole when it passed legislation voiding any agreement that requires an employee who "primarily resides and works in California, as a condition of employment" to agree to a foreign venue and choice of law requiring the application of the law of another state.

With 2018, employers in a host of states saw their legislators pass law similarly attacking non-compete provisions:

- **Massachusetts.** In 2018, the Massachusetts legislature passed a law to significantly limit the use and enforcement of non-compete provisions. Effective October 1, Massachusetts employers are prohibited from imposing a non-compete provision on non-exempt employees and may not enforce such provisions against an exempt employee when the employee is laid off or terminated without cause. A non-compete must be presented to an employee at the time employment is offered or at least ten days before employment begins, and cannot extend beyond one year. Finally, a non-compete must be signed by both parties and must make clear that the employee was advised to consult a lawyer before signing.
- **Utah.** Several years ago, Utah enacted a law imposing a one-year time limit on post-employment non-compete provisions. In 2018, Utah modified the law to limit the enforcement of non-compete against employees in the broadcasting industry. Should an employer seek to enforce a non-compete against an employee in the broadcasting industry, the employer must confirm the employee is paid a salary of at least \$913 per week, the non-compete provision was part of a written employment agreement, and the employee must have been terminated for cause or must have breached the employment agreement to result in termination.
- **Idaho.** The state repealed an employer-friendly amendment to its non-compete law. Idaho law allows employers to enter into non-competees with "key employees" and "key independent contractors" providing the non-competees protect a legitimate business interest and are reasonable in duration, geographic scope, and type of employment. Previously, the law allowed the employer a rebuttable presumption of irreparable harm if it sought injunctive relief for a breach; that presumption has been repealed.

Following on the heels of these developments, several states witness the proposal of legislation that would follow suit:

- **Pennsylvania and Vermont.** Both Pennsylvania and Vermont have proposed bills that generally ban non-competees. The Vermont bill would permit them only in the context of sale of a business or dissolution of a partnership or interest in a limited liability company. The Pennsylvania bill would have a similar exception, but would also require (similar to California law) Pennsylvania to be the governing law and venue in any non-compete agreement. In other words, choice of law and venue provisions in non-competees would not be recognized in Pennsylvania.
- **New Jersey.** In May 2018, a bill was introduced that would impose numerous restrictions on the enforceability of non-compete agreements including limiting the term to one-year post-employment, requiring the employer pay all wages due to an employee during the course of employment unless terminated for "misconduct," and requiring the employer to provide notice of the agreement at the time a formal offer of employment is made or at least 30 days prior to the commencement of employment.

- **New York City.** Seeking to follow in the footsteps of Illinois, the city council proposed a bill that would prohibit non-compete agreements for low-wage workers, and further prohibit such agreements unless the employer makes clear at the beginning of the hiring process that such an agreement may be required.

**The Workforce Mobility Act of 2018 Proposed.** In early 2018, Senators Elizabeth Warren, Ronald Wyden, and Christopher Murphy introduced Senate Bill 2782, dubbed the Workforce Mobility Act of 2018. While the Bill seeks to ban any company engaged in interstate commerce from requiring any employee to sign a covenant not to compete, it is careful to define covenants not to compete that would be prohibited as only those provisions that are signed after the effective date of the Act. The Bill expressly provides that the Act would not "preclude an employer from entering into an agreement with an employee to not share any information ... regarding the employer or the employment that is a trade secret" as defined by the federal Defend Trade Secrets Act. The Bill also appears to have been written with an intent to have no impact on other types of restrictive covenants, such as non-solicit agreements.

To enforce the new law, the Bill would (1) require employers to post a notice of employee rights on the subject, (2) task the Department of Labor with the power to investigate and enforce the law, and (3) create a private right of action in federal courts for employees aggrieved by a violation, authorizing compensatory damages, punitive damages, and attorneys' fees. The Bill was referred to the Senate Committee on Health, Education, Labor, and Pensions for consideration. The corresponding House Bill has been referred to both the Judiciary Committee and the Committee on Education and the Workforce for consideration.

With these ever-growing pushes to restrict and prohibit non-compete and anti-poaching agreements, employers need to be aware of how to best tailor their own restrictive covenants.

For assistance with crafting restrictive covenants for your company, contact the author, [Jennifer Curry](#), or any member of Baker Donelson's [Labor & Employment Group](#).

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