

Tips For Employers To Enforce Restrictive Covenants In An Age Of Increasing Scrutiny

Restrictive covenants are governed by the states, and in recent years, we have seen a growing trend to limit the use of non-compete agreements. In 2019, Maine, Maryland, New Hampshire, and Rhode Island passed legislation aimed at curtailing the use of non-compete agreements to “low-wage” workers. Last year, Virginia followed suit. Washington D.C. took it a step further, and on March 16, 2021, it banned non-compete agreements. This is not a new concept. In 2019, Congress introduced the Workforce Mobility Act, which sought to impose a federal ban on the use of non-compete agreements. The bill ultimately did not become law. This year, Congress reintroduced the Workforce Mobility Act, which could result in the extinction of non-compete agreements. Notably, none of the aforementioned legislation limits or bans the use of non-disclosure and non-solicitation agreements.

With state and national attention on non-compete agreements, employers are revisiting and modifying their employee agreements to ensure enforceability. Here are practical tips for employers to increase the likelihood of enforcing restrictive covenants:

- While the precise requirements for the enforceability of restrictive covenants vary from state to state, most courts require non-competes to be reasonable in both geographic scope and duration. Avoid overbroad terms.
- Geographic restrictions should be imposed where necessary to protect an employer’s interests, and if imposed, reasonably limited to areas where the employer provides services.
- Expressly address social media use, including post-termination use, in restrictive covenants.
- Include a favorable choice-of-law provision if the employer is located in a more restrictive state.
- Include a severability clause such that any covenant found unenforceable does not impact the enforceability of the remaining covenants.
- With the increase of a remote workforce, ensure restrictive covenants are executed prior to, or at the time of, hire or risk a court finding the restrictive covenant lacks sufficient consideration to be enforceable.
- If using electronic signatures, ensure security measures to validate the employee’s acknowledgement and assent to the restrictive covenants.

Please join us for a one-hour employment law update on trends in restrictive covenants, presented as a CE and CLE approved webinar on June 22, 2021. Additional details can be found on our website by clicking [here](#) or you can register [here](#).

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