

Publication

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More Limits to Restrictive Covenants on the Horizon: What Multi-State Employers Need to Know

Recently enacted and pending state legislation confirms a marked shift toward limiting employers' use of non-competition and non-solicitation covenants. Colorado's new non-compete law, which imposes wide-ranging restrictions on non-competition and non-solicitation covenants in that state, goes into effect on August 10, 2022. Connecticut, New Jersey, New York, and Washington, D.C. are among the states currently debating legislation to limit restrictive covenants.

Colorado's New Non-Compete Law

Below are key takeaways that employers should keep in mind when entering into restrictive covenants with employees based in Colorado. Agreements that are permissible despite the general ban on non-competes and other restrictive covenants include:

- **Non-disclosure agreements and confidentiality provisions:** These are allowed as long as they don't prohibit disclosure of information readily available to the public or from the worker's general knowledge or training.
- **Non-compete agreements for highly-compensated employees:** These are allowed for employees earning \$101,250 or more. This threshold includes

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annualized cash compensation and is determined by the Division of Labor Standards and Statistics.

- **Non-solicitation agreements:** Agreements not to solicit customers are allowed if the employee earns \$60,750 or more. The agreement must be reasonable and cannot be too broad.
- **Agreements for recovery of education and training expenses:** Expense recovery agreements are allowed if the training is distinct from normal on-the-job training. The employer's recovery is limited to the cost of training and decreases proportionally over the course of two years.

Employers must provide timely, sufficient notice and information regarding any permissible restrictive covenant agreements, or they may be deemed as void:

- Written notice of the agreement must be given to new employees before they accept an employment offer. Written notice must be given to current employees at least fourteen (14) days before the effective date of the agreement or the effective date of any change in the conditions of employment (e.g., a promotion);
- Notice must be given in a separate document (e.g., an offer letter), must be signed by the employee, and must use clear language;
- A copy of the agreement must accompany the notice;
- The notice must identify the agreement by name and state that the agreement contains covenants that could restrict the employee's options for future employment; and
- The notice must direct the employee to the specific sections or paragraphs of the agreement that contain the covenants.

Significantly, Colorado's new law calls for steep penalties if violated, including:

- A \$5,000 penalty fee for every worker harmed by the employer's conduct;
- Damages and attorneys' fees.

Although restrictive covenant agreements already in existence will not be invalidated by Colorado's new law, employers should review any existing employment agreement-related templates being used for employees in that state and make any necessary revisions and updates. In doing so, employers may need to consider other issues under the statute. For example, Colorado's new law mandates Colorado's choice of law, even if an employee, under advice of counsel, agrees to dispute resolution in another state.

Non-Compete Developments in Other States

While Colorado's law is imminent, and many other states, including Illinois ([click here to view our June 2021 client alert regarding these changes](#)) and Massachusetts, already have restrictive non-compete statutes, several states are debating impactful legislation:

Connecticut

Connecticut Bill No. 5249, introduced in March 2022, would limit the restricted period for non-solicitation and non-competition covenants to generally no more than one year. On the non-compete front, the period could go up to two years if certain salary conditions are met. Employers would need to provide a copy of the agreement to employees and inform them regarding their rights. Violations would entail similar penalties to Colorado's new non-compete law, including monetary damages, a \$5,000 penalty and attorneys' fees.



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New Jersey

New Jersey Bill No. 3715, introduced in May 2022, would ban restrictive covenant agreements without listing specific exclusions, but non-disclosure agreements appear not to be covered by the ban. In general, client and employee non-solicitation agreements would not be allowed. Employers also could not forbid an employee from providing client services as long as the employee did not solicit them. Agreements would not be enforceable against employees who have not been laid off or terminated for misconduct, or who have been employed for less than one year. A copy of the agreement would need to be provided to the employee. Violation penalties could include lost wages, liquidated damages of up to \$10,000, other damages, and attorneys' fees.

New York

Bill No. A9591A, introduced in March 2022, would broadly prohibit employers from seeking, requiring, demanding or accepting non-competes and voids all contracts restraining covered employees. A covered employee is anyone performing work in the state, including independent contractors. Violation penalties could include liquidated damages capped at \$10,000, lost compensation, and reasonable attorneys' fees.

Washington, D.C.

Although the District of Columbia Bill (D.C. Law 23-209) was meant to go into effect in March 2021, its implementation has now been delayed until October 1, 2022. This is the second time the effective date has been postponed. This bill would ban non-compete agreements, prohibit anti-moonlighting provisions during employment, and does not provide salary threshold exceptions, unlike many other bills. Violation penalties would include fines of up to \$2,500. The postponement



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is due to a proposed amendment that responds to the concerns of the business community. The amendment (Bill 24-256) would clarify what non-compete provisions are allowed, would protect employer proprietary information, and would carve out an exception to the non-compete ban for highly compensated employees.

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If you have any questions regarding employer rights and obligations when it comes to non-competition, non-solicitation or non-disclosure agreements, please contact Sonya Rosenberg , Chad Moeller or your Neal Gerber Eisenberg attorney. A special thanks and note of recognition to NGE summer associate Sylvia Wolak, who assisted with the preparation of this alert!