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# Competing Views on Non-Compete Agreements: Changes May be Coming Across the Nation to Employers' and Business Purchasers' Ability to Limit Competition

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Employers often place limitations on their employees' ability to compete following the termination of the employment relationship. The justification for restraints on trade is that employers have a protectable interest in their customer and vendor relationships, the goodwill associated with their brand, and their confidential information and trade secrets.

Purchasers of businesses likewise often place limitations on sellers' ability to compete in the same industry after an acquisition. These limitations can be critical to ensure the purchasers' investment is not devalued by a seller's use of prior relationships and knowhow to compete in the same market.

Though common, non-competition provisions in employment agreements and, to a lesser extent, in business purchase agreements, have long been the target of state regulation. The rationale for regulation is that restraints on trade remove employees from the job market, and, in the acquisition context, may remove property from commerce.

Louisiana, for example, has long placed strict form requirements and substantive requirements on non-competition provisions in employment agreements. They must be limited to two years in duration, must specifically list parishes or municipalities where competitive activity is restricted, and must limit competition only in places where the former employer actually does business. Other states, most recently Washington, Maryland, and Massachusetts, have begun to follow Louisiana's more employee-friendly approach to non-competition agreements by limiting situations in which an employer may legally restrain the trade of a former employee.

Under Washington's new rules, non-competition agreements are enforceable only against employees who earn more than $100,000 a year and independent contractors who earn more than $250,000 a year. Washington employers must also compensate employees who are laid off but are still subject to non-competition agreements, and such agreements must not last longer than eighteen months. Maryland has similarly created an income floor below which non-competition agreements are unenforceable–employers are forbidden from requiring employees who make less than $15.00 per hour or $31,200 per year from signing non-competition agreements. Massachusetts's new law provides, among other things, that non-competition agreements entered into during employment must now be supported by independent consideration beyond continued employment. Finally, the

Supreme Court of California will decide whether that state's near ban on non-competition restrictions also applies to agreements between two businesses exiting a joint venture.

State laws that apply strict requirements to non-competition agreements are designed in part to slow their expanding use in fields that do not require particular technical expertise and skills, *i.e.* fields where such agreements were once uncommon. The discrete differences that have resulted between laws in each state make it difficult for employers with regional or national reach to implement uniform non-competition policies. These state law differences can frequently lead to complicated conflict-of-law issues, especially when employees move between states or work in different states for the same employer. This often leads to the courts of one state applying the law of another and can sometimes bring about unpredictable results. For example, a Delaware Chancery Court recently declined to enforce a Delaware choice-of-law provision in a non-competition agreement that involved a California manufacturer because of California's strong public policy against restraints on trade.

A uniform approach, however, may be found in the not-too-distant future. While differing state regulation in the field of non-competition agreements is by no means a new phenomenon, there is now reason to believe the federal government may begin to legislate in this area in an attempt to promote uniformity. According to its website, on January 9, 2020, the Federal Trade Commission held a public workshop to examine whether there is a sufficient legal basis and empirical economic support to promulgate a Commission Rule that would restrict the use of non-competition clauses in employer-employee employment contracts and apply to employers throughout the United States. At this time though, it is unclear how the federal government could harmonize different state approaches on the permissible scope of restraints on trade under one national and comprehensive rule and whether such a rule would withstand judicial scrutiny.



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