

THE NATIONAL LAW REVIEW

New Year's Resolution Series - Ringing Your Post-Employment Covenants into the New Year

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Many state legislatures spent 2017 tinkering with post-employment covenants. Given the growing trend to legislate locally and the employee mobility issues that seem to nag every employer, we thought the New Year would be a perfect time to review and revisit your post-employment covenants. So for our multi-jurisdictional employers (which seems to be everyone these days), how do your post-employment covenants legally measure up?

Even California got into the act this year. Everyone (well, almost everyone) knows of the long-time California legislative non-compete ban (except in the context of a sale of business or equity). But did you know that as of 2017 California now regulates choice of law provisions in employment contracts? This new [Labor Code provision](#) was passed in an effort to stamp out the practice of some out-of-state employers who were using choice of law/venue provisions in the hope of applying some other state's law to their California-based employees, thereby (they hoped) avoiding California's non-compete ban. A review of that provision is in order for any employer hiring individuals in California.

Other states have gotten into the act by banning or regulating non-competes. Nevada, not known for its active employee mobility legislation, passed [legislation this year](#) governing non-competes, joining [Colorado](#), [Florida](#), [Georgia](#), Illinois, and [Texas](#), to name a few. New Jersey is also actively considering [similar legislation](#).

And while Massachusetts tried but failed to pass statewide legislation, don't overlook specific Massachusetts provisions addressing non-competes [for Physicians](#), [nurses](#), [psychologists](#), [social workers](#), and those in the [broadcasting industry](#).

But don't stop at a state law review. Remember: many states (and many state statutes) require an assessment of the reasonableness of post-employment covenants. The very best evidence of reasonableness is employer mindfulness regarding what agreements are truly necessary to protect some legitimate interest of the employer – and, most importantly, a deep dive into *why* they are necessary.

So here are a few action items to consider for your post-employment covenants resolution for 2018:

- Where are your employees performing services for you? Do your post-employment covenants comply with the legislative mandates applicable in the various jurisdictions in which you have employees?
- What impact, if any, do promotions have on your employees? Do they now have access to sensitive information, in addition to expanded job duties? If so, should they have new or different post-employment covenants?
- How if at all has your business changed? Are you doing business in new locations or have you abandoned business in other locations?
- Are post-employment covenants truly necessary – or will a solid proprietary rights agreement (and the



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applicable trade secrets law) provide the legal protection you really need?

- Are you just as eager to recruit individuals bound by these agreements as you are to enforce your own? Have you considered the possible cognitive dissonance of such an approach?

We hope you have enjoyed our [New Year's Resolution](#) Series and we look forward to a prosperous, productive and compliant 2018!

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