

States Continue to Restrict Use of Non-Compete Agreements

September 7, 2021



By John Vering, Brenda Hamilton, and Mark Opara

Recent Developments on the Federal Level

On July 15, 2021, we alerted you to the fact that President Biden had issued an Executive Order targeting non-compete agreements. Click [here](#) for a link to that Client Alert. Since that time, there has been no substantive action on the federal level to limit non-compete agreements. However, as explained below, states have continued their efforts to restrict non-compete agreements.

New State Non-Compete Restrictions

On January 1, 2022, a new law rendering a major overhaul of Illinois restrictive covenant law will become effective. This new law will substantially limit an employer's ability to require its employees to sign non-compete and non-solicitation agreements (defined to include non-solicitation provisions applicable to employees and existing or prospective customers, vendors and suppliers). For example, the new law prohibits employers from imposing non-compete agreements on employees earning \$75,000 or less (with the minimum to increase over time), bans non-solicitation agreements for employees earning \$45,000 or less (with the minimum to increase over time), requires employers to give employees specific advance written notice and the opportunity to review any proposed non-compete and non-solicitation agreements prior to signing it, requires the employer to advise the employee in writing to consult a lawyer before signing, and requires adequate consideration (defined in the new law) to support the non-compete or non-solicitation agreements, and allows an employee who successfully defends against an employer's civil action seeking to enforce a non-compete or non-solicitation agreement to recover costs and reasonable attorneys' fees. Illinois' new ban on the use of certain non-solicitation agreements is particularly significant because some other states that have enacted restrictive covenant legislation in recent years have not prohibited the use of non-solicit agreements but have only restricted non-compete agreements. Employers having employees working in Illinois should re-evaluate their needs and

consider revising their non-compete and non-solicitation agreements to fit within these new legal requirements.

Like Illinois, many other states around the country impose restrictions on the use of non-compete and non-solicitation agreements or they are engaged in legislative efforts to impose new restrictions. For example, California, North Dakota, Montana, Oklahoma, and Washington D.C. generally prohibit non-compete agreements in most situations. Many other states, including but not limited to Massachusetts, Colorado and Oregon, impose various restrictions on non-compete and non-solicitation agreements, including limitations on whom the agreements may be enforced against and/or procedural prerequisites, such as requiring the employer to give the employee the agreement to review a specified number of days before employment begins and/or advising the employee to consult a lawyer before signing the agreement.

Although Missouri and Kansas are more employer-friendly with regard to non-compete and non-solicitation agreements, employers with workers in these two states still must ensure that their non-compete and non-solicitation agreements are reasonable in scope in relation to protecting the employer's business interests and that they otherwise comply with the applicable restrictive covenant laws. Failure to do so may lead to a court refusing to enforce any part of the non-compete or non-solicitation agreement if it is overbroad.

Given all the variations and the constant changes in state laws, as well as the frequent issuance of new court decisions, regarding the enforceability of non-compete and non-solicitation agreements, employers operating in multiple states should not assume they can use the same form agreement in every state or that agreements drafted years ago will still be fully enforceable today. Thus, we recommend that employers periodically review their non-compete, non-solicitation and non-disclosure agreements to ensure they comply with the current applicable law. We also suggest that employers consider whether a carefully drafted, state-specific non-solicitation and non-disclosure agreement will meet their needs better than a broad non-compete agreement that may not be enforceable. And remember, when it comes to such agreements, one size/form does not fit all.

This article is general in nature and does not constitute legal advice. Readers with legal questions about non-compete, non-solicitation and non-disclosure agreements should consult the authors, John Vering (jvering@sb-kc.com), Brenda Hamilton (bhamilton@sb-kc.com) and Mark Opara (mopara@sb-kc.com), or other shareholders in Seigfreid Bingham's Employment Law Group, including: Shannon Johnson, John Neyens, Julie Parisi, or Christopher Tillery, or your regular contact at Seigfreid Bingham at 816-421-4460.