Westlaw Today
powered by Reuters

The year in unfair competition and trade secrets: 2023 developments and what is on the horizon for 2024

By Melissa McDonagh, Esq., James Witz, Esq., and Tyler Sims, Esq., Littler Mendelson PC*

JANUARY 23, 2024

- Federal agencies are ramping up efforts to regulate and restrict the use of restrictive covenant agreements in employment.
- Three states passed laws in 2023 that ban or severely curtail the use of such agreements.
- Several jurisdictions will be increasing their minimum compensation floor for certain types of restrictive covenant agreements in 2024.

2023 was an active year in the world of unfair competition and trade secrets law, with employers' use of restrictive covenant agreements coming under assault at the Federal Trade Commission and National Labor Relations Board, as well as in multiple state legislatures. This article recaps key regulatory and legislative developments in 2023 and previews what employers need to be ready for in 2024.

Federal regulatory activity

In 2023, business leaders across the country frequently asked some variation of the same fundamental question — may we continue to use restrictive covenant agreements to protect our confidential information and business relationships? Employers' use of non-competes, and potentially other restrictive covenant agreements, has clearly been targeted by the Biden administration and restricted by recent federal regulatory and enforcement activity. As described below, however, rumors of the demise of all non-compete agreements as a result of FTC and NLRB actions are at this point greatly exaggerated.

FTC proposes rule to ban non-competes nationwide

On January 5, 2023, the Federal Trade Commission published a proposed rule[1] that, if it becomes final, would ban all non-compete agreements nationwide with limited exceptions. The proposed rule defines a "non-compete clause" as "a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer."

Notably, the FTC advises that while non-disclosure agreements and customer non-solicit agreements generally do not prevent a worker from seeking or accepting employment, if they are too broad they *would* be covered within its definition of a non-compete clause — prescribing what it calls a "functional test for whether a contractual term is a non-compete clause." In terms of scope, the proposed rule would cover agreements with any worker, including both employees and independent contractors.

Importantly, the FTC's proposed rule would have retroactive effect to invalidate existing non-compete agreements. Within 180 days after publication of the final rule, employers would be required to provide formal written notice of rescission to both existing employees bound by a non-compete clause and former employees (except those whose contact information is not "readily available") bound by non-compete clauses.

Rumors of the demise of all non-compete agreements as a result of FTC and NLRB actions are at this point greatly exaggerated.

After publication of the proposed rule, the FTC extended the public comment period through April 19, 2023, and Bloomberg Law reported that the agency received approximately 27,000 comments.[2] Critics argued that the FTC lacks legal authority to promulgate such a rule, and that the proposed rule is unlawfully broad, relies upon research with significant shortcomings and violates the Administrative Procedure Act.

Commenters also claimed the proposal is unworkable as a practical matter because of its failure to distinguish among different categories of workers and non-compete agreements and the vague and overly broad functional test it would apply to confidentiality, non-solicit, and other agreements.

Currently there is no clear indication of when the FTC may issue its final rule. It would take effect 60 days after publication of the final rule in the *Federal Register*, with the "compliance deadline" coming 180 days after that. Whether the final rule mirrors the proposed rule or contains changes such as implementation of a compensation threshold, expect it to face strong legal challenge on a number of fronts.

Thus, while the specter of a nationwide non-compete ban has understandably prompted significant commentary, at present the FTC has not yet issued its final rule, no one knows exactly what the final rule will look like, and there will almost certainly be protracted court battles challenging it.

NLRB regional office issues complaint following general counsel's memorandum stating that non-compete agreements violate NLRA

On May 30, 2023, National Labor Relations Board General Counsel Jennifer A. Abruzzo issued Memorandum, 23-08, titled *Non-Compete Agreements that Violate the National Labor Relations Act*.[3] In the Memorandum, Abruzzo set forth her view that the proffer, maintenance, and enforcement of non-compete agreements by employers violate Section 8(a)(1) of the National Labor Relations Act by interfering with or restraining employees' rights under Section 7 of the Act.

State legislatures were also active in 2023, with three states passing bills that ban or severely curtail the use of restrictive covenant agreements.

Abruzzo's view is that, with very limited exceptions, non-competes tend to "chill" employees in the exercise of Section 7 rights such as the right to threaten concertedly to resign to demand better working conditions or the right to solicit co-workers to join a competitor as part of a broader course of protected concerted activity. Ms. Abruzzo did not address the tension between her position and the laws of numerous states recognizing an employer's right to protect proprietary information and customer goodwill through appropriately tailored non-competes.

Memorandum 23-08 reflects Ms. Abruzzo's view only and has *not* yet been adopted as the position of the NLRB. Nevertheless, it carries significance because of her authority as general counsel to control the issuance of complaints by NLRB regional offices.

This has already been demonstrated by the NLRB's Region 9 office in Cincinnati filing a complaint in September 2023 alleging that a medical clinic and spa violated the Act by, among other things, requiring its employees to execute agreements containing non-compete and customer and employee non-solicitation provisions. This complaint is noteworthy not only because it implements Ms. Abruzzo's theories, but also because it takes the position that non-solicitation clauses also violate the Act, which was not expressly discussed in the GC's Memorandum.

The respondent clinic filed a partial motion to dismiss the complaint on October 27, arguing that non-compete agreements do not implicate the NLRA and that Ms. Abruzzo's position contradicts established state law.

On November 20, counsel for the GC filed an opposition, stating that Ms. Abruzzo "intends to use this case to urge the Board to find that maintaining overbroad non-compete provisions is unlawful absent special circumstances," that "it is well within the purview of the General Counsel to exercise her prosecutorial discretion to argue that the interpretation and application of the Act should change with the changing realities of the modern workplace," and that "to the extent state law is to the contrary, it should be preempted by the Act." To date, no decision has been issued on the respondent's motion.

Employers can reasonably expect to see additional complaints filed by the NLRB based on unfair labor practice charges in which non-supervisory or non-management employees or unions claim a particular employer's non-compete violates the NLRA. Even if the Board ultimately adopts Ms. Abruzzo's position, however, its decision will certainly be challenged on appeal to the courts. It will likely be some time before the courts clarify the law in this area.

State law updates

State legislatures were also active in 2023, with three states passing bills that ban or severely curtail the use of restrictive covenant agreements. Also, the Georgia Court of Appeals provided new clarification regarding a geographic requirement for employee non-solicitation provisions.

California strengthens its aggressive policies against non-competes

Governor Newsom signed into law two new bills, Senate Bill 699[4] and Assembly Bill 1076,[5] that expand the scope and consequences of California's longstanding policies against restrictive covenants. The laws amend California Business and Professions Code Section 16600 by creating two new statutes within the same chapter (Sections 16600.1 and 16600.5) that significantly increase the stakes for employers with restrictive covenants in their contracts.

Senate Bill 699 creates new Section 16600.5, providing that any contract that is void under Section 16600 is unenforceable "regardless of where and when the contract was signed." Under the plain terms of the law, an otherwise enforceable non-compete agreement signed by a company and employee who worked in a state outside California would be rendered unenforceable should that employee seek to join a competitor in California.

Section 16600.5 further provides that any company that enters or attempts to enforce a contract that is void under Section 16600 "commits a civil violation" subjecting the company to a private right of action by employees whose agreements include restrictive covenants, providing for remedies of injunctive relief, damages, and attorney's fees. We fully expect to see litigation in 2024 involving choice-of-law disputes and potential constitutional challenges to California's reach beyond its own borders.

Assembly Bill 1076 creates new Section 16600.1, which declares it *unlawful* to include a non-compete clause in an employment contract and requires that employers whose contracts included a non-compete clause must issue an individualized notice to each current employee and former employee employed after January 1, 2022, that the non-compete clauses in their contracts are void. Companies must issue this notice by February 14, 2024. We advise employers to consult with experienced counsel regarding the details of the notice.

Finally, Assembly Bill 1076 also amends Section 16600 to provide that any noncompete clause is void unless it satisfies a statutory exception. The amendment also provides that Section 16600 "shall not be limited to contracts where the person being restrained from engaging in a lawful profession, trade, or business is a party to the contract."

How this new clause will be interpreted is not yet clear, but it may be targeting business-to-business agreements in response to a recent California Supreme Court ruling that such agreements be analyzed under a rule of reason test rather than declared void *per se* under Section 16600.

Minnesota bans non-competes

Effective July 1, 2023, Minnesota became the fourth state, joining California, North Dakota, and Oklahoma, to statutorily prohibit all non-compete agreements.[6] While *not* retroactive, Minnesota's ban is expansive, applying to both employees and independent contractors working for an employer.

Notably, this non-compete ban also applies to foreign employers that employ remote employees in Minnesota, so long as the remote employee "primarily resides and works in Minnesota." The statute expressly allows a court to award attorneys' fees to an employee who is required to enforce rights under the law. Minnesota's prohibition is subject to only two limited exceptions involving the sale of a business or anticipation of the dissolution of a business.

Despite this sweeping ban, Minnesota employers may still rely on nondisclosure, confidentiality, trade secret, and non-solicitation agreements, as these are explicitly excluded from the ban on non-compete agreements.

New York legislature limits invention assignment agreements, but governor vetoes its attempted ban on non-competes

The New York legislature passed two bills amending the state's Labor Law, but only one was signed by the governor.

First, the legislature passed, and Governor Hochul signed into law,[7] a new section of the Labor Law imposing limits on the use and enforceability of invention assignment agreements. The law provides that invention assignment clauses "shall not apply to an invention that the employee developed entirely on his or her own time without using the employer's equipment, supplies, facilities, or trade secret information," unless the inventions: (a) relate to the employer's business or "reasonably anticipated" research or development; or (b) result from work performed by the employee for the employer.

Second, the legislature made its third attempt to ban non-competes in the state, Senate Bill SB3100.[8] The bill was among the nation's most sweeping attacks on post-employment restrictions, having no compensation threshold and no exceptions or carveouts for independent contractors, business sales, or other common non-employment situations.

It applied to any clause or agreement that "prohibits or restricts" covered individuals "from obtaining employment, after the conclusion of employment with the employer included as a party to the agreement." The definition of "covered individual" was sufficiently broad to include independent contractors as well as employees.

The bill also provided employees and contractors with a private right of action, with a two-year statute of limitations from (i) the date the prohibited non-compete was signed; (ii) the date the employee or contractor learns of the prohibited non-compete agreement; (iii) the date employment or the contractual relationship is terminated; or (iv) the date the employer takes any step to enforce a non-compete agreement and remedies including that a court may void the non-compete agreement and order injunctive relief, and further award the plaintiff lost compensation, damages, attorney's fees and costs, and liquidated damages up to $10,000.

On December 22, Governor Hochul vetoed the legislation, after negotiations with lawmakers regarding amending the legislation with a compensation threshold failed. The governor sought to protect low and middle-income, while still protecting the ability of companies to use non-competes with respect to high earners. In issuing the veto, she stated:

"My top priority was to protect middle-class and low-wage earners, while allowing New York's businesses to retain highly compensated talent. New York has a highly competitive economic climate and is home to many different industries. These companies have legitimate interests that cannot be met with the Legislation's one-size-fits-all approach."

It is anticipated that a new compromise bill may emerge in 2024.

Georgia appellate court holds that employee non-solicits require geographic limitation, Georgia Supreme Court to review

Georgia's Restrictive Covenants Act requires that restrictive covenants be "reasonable in time, geographic area and scope of prohibited activities." In *North American Senior Benefits, LLC v. Wimmer*,[9] the Georgia Court of Appeals provided new and important clarification of that Act,[10] holding that, like a non-compete, an employee non-solicitation provision must contain an express geographic limitation to be enforceable. While the geographic component is to be "read forgivingly," the court noted, it must be present.

The court further held that while courts have some discretion to "blue pencil" (narrow or sever) restrictive covenants to bring them into compliance, a court may not add a geographical limitation to a provision lacking that material term. Without any geographic restriction, an employee non-solicitation provision is altogether void and unenforceable under Georgia law.

Stay tuned for further developments in 2024, however, because on December 19, 2023, the Georgia Supreme Court agreed to review this matter, instructing the parties to submit briefs solely on the following issue: "Does OCGA § 13-8-53(a) in the Georgia Restrictive Covenants Act require a non-solicitation-of-employees restrictive covenant to have an explicit geographic limitation to be reasonable?"

Oral argument is set for April 2024.

2024 minimum compensation threshold updates

Amid the hustle and bustle of the holidays, please don't lose sight of the fact that several jurisdictions will be increasing their minimum compensation floor for certain types of restrictive covenant agreements in 2024:

Notes

[1] https://bit.ly/3S4l9sL

[2] Littler's Workplace Policy Institute (WPI), the government affairs and advocacy arm of Littler, filed extensive commentary on the proposed rule.

[3] https://bit.ly/3U4KXYp

[4] https://bit.ly/3TXIf7c

[5] https://bit.ly/3OuGiM7

[6] https://bit.ly/3vFqPSR

[7] https://bit.ly/4b0P8dN

[8] https://bit.ly/4b3XOAu

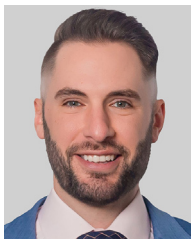
[9] 368 Ga. App. 124 (Ga Ct. App. June 12, 2023).

[10] https://bit.ly/47DG8J0

Jurisdiction	2024 Compensation Threshold	Effective Date
Colorado	Colorado prohibits non-compete agreements with employees who earn less than a "highly compensated" threshold amount and prohibits non-solicitation agreements with employees who earn less than 60% of that same threshold. The 2024 proposed PAY CALC order raises the "highly compensated" employee threshold to $123,750 for non-compete agreements, which would result in a cut-off of $74,250 for non-solicitation agreements. **Note that this proposed PAY CALC order has not yet been adopted.*	January 1, 2024.
D.C.	Washington, D.C. bans non-compete agreements with workers who are not "highly compensated employees," earning at least the specified minimum qualifying annual compensation. In 2023, the minimum qualifying annual compensation threshold was $150,000. Starting on January 1, 2024, the minimum qualifying annual compensation threshold increases in proportion to the annual average increase, if any, in the Consumer Price Index for All Urban Consumers in the Washington Metropolitan Statistical Area published by the Bureau of Labor Statistics of the United States Department of Labor for the previous calendar year. **Note that this data is not expected to be released until early 2024.*	Potentially retroactive to January 1, 2024.
Maine	Maine prohibits non-compete agreements with employees who earn wages less than 400% of the current federal poverty level. Updated federal poverty level data will likely be released by the U.S. Department of Health & Human Services in early 2024.	Not specified, but likely upon release of the latest federal poverty level data in the *Federal Register* in early 2024.
Maryland	Maryland law sets a compensation floor for non-compete agreements of 150% of the current minimum wage. For 2024, Maryland's minimum wage is $15.00 per hour, so the compensation threshold for non-compete agreements is $22.50 per hour.	January 1, 2024.
Oregon	A non-compete agreement (without a garden leave provision) is void under Oregon law unless, among other criteria, the employee meets the criteria for a salaried exempt employee whose annual income at termination exceeds a minimum amount that is adjusted each year for inflation. For 2024, the previous year's $108,581 threshold will increase based on the Consumer Price Index for All Urban Consumers, West Region (All Items), as published by the Bureau of Labor Statistics of the United States Department of Labor. **Note that this data is not expected to be released until early 2024.*	Potentially retroactive to January 1, 2024.
Rhode Island	Among Rhode Island's non-compete prohibitions is a ban on agreements with employees who earn wages less than 250% of the current federal poverty level. Updated federal poverty level data will likely be released by the U.S. Department of Health & Human Services in early 2024.	Not specified, but likely upon release of the latest federal poverty level data in the *Federal Register* in early 2024.
Virginia	Virginia prohibits non-compete agreements with "low-wage employees," defined as (1) employees whose average weekly earnings fall below Virginia's average weekly wage and (2) independent contractors whose average hourly rate falls below Virginia's median hourly wage for all occupations. It does not include any employee whose earnings are derived, in whole or in predominant part, from sales commissions, incentives, or bonuses. **Note that Virginia is expected to release average weekly wage information and median hourly wage figures in early 2024.*	Potentially retroactive to January 1, 2024.
Washington	Washington prohibits non-compete agreements with employees and independent contractors whose earnings fall below the statutory threshold, which is adjusted each year for inflation. The 2024 thresholds are expected to increase to $120,559.99 for employees and $301,399.98 for independent contractors.	January 1, 2024.

About the authors





Melissa McDonagh (L) is a shareholder at **Littler Mendelson PC** in Boston and co-chair of the firm's unfair competition and trade secret practice group. She has extensive experience litigating on behalf of employers in single plaintiff and class and collective actions involving business competition, wage and hour law, whistleblower retaliation, failure to accommodate and wrongful termination. She can be reached at mmcdonagh@littler.com. **James Witz** (C) is a shareholder in the firm's Chicago office and co-chair of the firm's unfair competition and trade secret practice group. He is a trial lawyer who has experience with a wide range of employment issues. Witz is recognized for his knowledge in noncompetition and trade secret disputes and cases involving emergency and injunctive relief. He can be reached at jwitz@littler.com. **Tyler Sims** (R) is a shareholder in the firm's Newark, New Jersey, office. He focuses his multijurisdictional practice in two specialized areas: (1) post-employment restrictive covenants, unfair competition and trade secrets and (2) traditional labor law. Sims routinely handles emergency temporary restraining orders and preliminary injunction matters, including notable restrictive covenant and trade secret cases in Delaware, Florida, New Jersey, and New York state and federal courts. He can be reached at tsims@littler.com.
The authors would like to thank associates Lauren Clements and Anton Stewart for their contribution to this article, which was originally published Dec. 20, 2023, on the firm's website. Republished with permission.

This article was published on Westlaw Today on January 23, 2024.