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Employment Law Topics and How the Government impacts employment relationships!

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TOPIC AGENDA

- Independent Contractors
- Non-Compete Provisions
- Non-Solicitation Provisions
- Q&A

Employee vs. Independent Contractor

- The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work, not *what* will be done and *how* it will be done.

Employee vs. Independent Contractor

1. Control the manner and means of accomplishing a desired result;
2. Is the person engaged in a separately established occupation or business;
3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal without supervision;

Employee vs. Independent Contractor

4. What skill is required;
5. Does the principal or the person providing the services supply the instrumentalities, tools, and place of work for the person doing the work;
6. Length of time of the assignment (i.e. isolated or continuous);
7. Method of payment (time, piece, job);

Employee vs. Independent Contractor

8. Is the work part of the regular business of the Principal;
9. What do the parties believe;
10. Extent of actual control by Principal over manner and means of performing services; and
11. Whether the Principal is or is not engaged in a business enterprise.

Employee vs. Independent Contractor

What's the government got to say?

The DOL's new rule is an economic reality – or totality-of-the-circumstances – test. It uses multiple factors to see if an employment relationship exists under the FLSA. The DOL says the "goal of the test is to decide if the worker is economically dependent on the employer for work or is instead in business for themself. All factors should be considered. No single factor determines a worker's status, and no one factor or combination of factors are more important than the other factors. Instead, the totality of the circumstances of the working relationship should be considered."

Employee vs. Independent Contractor

Is there one sure fire test? No.

The test takes into consideration: (1) the worker's opportunity for profit or loss; (2) investments by the parties; (3) the degree of permanence in the workplace relationship; (4) the nature and degree of control over the work; (5) whether the work is an integral part of the employer's business; and (6) the worker's skill and initiative.

Employee vs. Independent Contractor

The worker's opportunity for profit or loss:

This factor primarily looks at whether a worker can earn profits or suffer losses through their own independent effort and decision making. Relevant facts include whether the worker negotiates their pay, decides to accept or decline work, hires their own workers, purchases material and equipment, or engages in other efforts to expand a business or secure more work, such as marketing or advertising.

Employee vs. Independent Contractor

Investments by the parties:

This factor primarily looks at whether the worker makes investments that are capital or entrepreneurial in nature. Investments by a worker that support the growth of a business, including by increasing the number of clients, reducing costs, extending market reach, or increasing sales, weigh in favor of independent contractor status. A lack of such capital or entrepreneurial investments weighs in favor of employee status.

Employee vs. Independent Contractor

The degree of permanence in the workplace relationship:

This factor primarily looks at the nature and length of the work relationship. Work that is sporadic or project-based with a fixed ending date (or regularly occurring fixed periods of work), where the worker may make a business decision to take on multiple different jobs indicates independent contractor status. Work that is continuous, does not have a fixed ending date, or may be the worker's only work relationship indicates employee status.

Employee vs. Independent Contractor

The nature and degree of control over the work:

This factor primarily looks at the level of control the potential employer has over the performance of the work and the economic aspects of the working relationship. Relevant facts include whether the potential employer: controls hiring, firing, scheduling, prices, or pay rates; supervises the performance of the work (including via technological means); has the right to supervise or discipline workers; and takes actions that limit the worker's ability to work for others.

Employee vs. Independent Contractor

The worker's skill and initiative:

This factor primarily looks at whether the worker uses their own specialized skills together with business planning and effort to perform the work and support or grow a business. The fact that a worker does not use specialized skills (for example, the worker relies on the employer to provide training for the job) indicates that the worker is an employee.

Employee vs. Independent Contractor

Whether the work is an integral part of the employer's business:

This factor primarily looks at whether the work is critical, necessary, or central to the potential employer's principal business, which indicates employee status. Where the work performed by the worker is not critical, necessary, or central to the potential employer's principal business, this indicates independent contractor status. This factor does not depend on whether any individual worker in particular is an integral part of the business, but rather whether the work they perform is an integral part of the business.

Are You An Employee Or An Independent Contractor?

Indicators of an Employee	-OR-	Indicators of an Independent Contractor
Working for someone else's business		In business for themself
Generally, can only earn more by working additional hours		Can increase profit through business decisions
Typically uses the employer's materials, tools and equipment		Typically provides their own materials, tools and equipment and uses them to extend market reach
Typically works for one employer or may be prohibited from working for others		Often works with multiple clients
Continuing or indefinite relationship with the employer		Temporary relationship until project completed
Employer decides how and when the work will be performed		Decides how and when they will perform the work
Employer assigns the work to be performed		Decides what work or projects they will take on

These are general concepts. All relevant facts about the work relationship should be considered as a whole, and the existence or absence of any particular fact does not require a particular outcome.

dol.gov

Employee vs. Independent Contractor

The M Word: Misclassification

Job misclassification happens when a company incorrectly says that you are an independent contractor instead of an employee. This affects your pay, benefits, and protection.

Employee vs. Independent Contractor

Misclassification of workers occurs when an employer improperly classifies their employees as independent contractors so that they do not have to pay payroll taxes, minimum wage or overtime, or comply with other wage and hour law requirements such as providing meal periods and rest breaks. Misclassification, or labeling a worker as an independent contractor when they should be an employee, undermines businesses who play by the rules and basic worker protections like minimum wage, paid sick days, and the safety of workplaces. Additionally, the misclassified worker has no workers' compensation coverage if injured on the job, no right to family leave, no unemployment insurance, no legal right to organize or join a union, and no protection against employer retaliation. This is a form of fraud.

Employee vs. Independent Contractor

You can be an employee even if a company:

Sends you a 1099 tax form

Makes you sign a contractor agreement

Verbally states that you are an independent contractor

Pays you in cash or off the books

Claims that being a contractor is standard practice

Requires you to work offsite

Employee vs. Independent Contractor

Consequences of Misclassification:

For Workers: Misclassified workers miss out on essential employee benefits and protections, such as health insurance, retirement plans, overtime pay, and other legal rights. They also become responsible for paying both the employer's and employee's share of Social Security and Medicare taxes, which can result in financial burdens.

Employee vs. Independent Contractor

Consequences of Misclassification:

For Employers: Employers who practice worker misclassification can face significant legal and financial penalties. Worker misclassification penalties can include paying back wages, fines, back taxes, interest, and potentially legal fees. Misclassification of employment status also exposes companies to the risk of lawsuits from misclassified workers.

Employee vs. Independent Contractor

The dreaded AUDIT: How do they start

The 1099 Independent Contractor (IC) files an unemployment claim. This creates suspicion because they are not eligible for unemployment.

The 1099 IC files a workers' compensation or disability claim against the company. If someone is truly an IC, they should carry workers' comp and disability insurance on themselves because they are not eligible through an employer.

Employee vs. Independent Contractor

The dreaded AUDIT: How do they start

A worker receives a W-2 and a 1099 Form from the same employer in one year. This happens when they are converted from a 1099 IC to a direct-hire of the company. But if they performed the same work as a 1099 IC and a W-2 employee, the IRS may wonder why they were not classified as an employee all along.

The worker files a complaint with the Department of Labor's Wage and Hour Division. With all the information out there about misclassification, workers are more savvy than businesses may think and can blow the whistle if they believe they have been misclassified.

Employee vs. Independent Contractor

The dreaded AUDIT: How do they start

The worker feels they are being improperly treated as a 1099 IC and files a Form SS-8 with the IRS for their own classification determination or files a Form 8919, Uncollected Social Security Tax and Medicare Tax on Wages, with their personal income tax return.

The IRS is anonymously alerted about the worker or the employer not paying payroll taxes.

Employee vs. Independent Contractor

The dreaded AUDIT: What do they look at

check registers, bank statements, general ledgers/journals, annual financial statements, ownership verification, tax returns, 1099 forms, payroll records, employment tax records, handbooks, training materials, and expense receipts

Employee vs. Independent Contractor

If an AUDIT isn't bad enough!

Montaque v. S-Trip

Employment Law Class Action

This proposed class action is brought against four related companies – Handa Travel Student Trip Ltd. o/a I Love Travel, Campus Vacations Holdings Inc., 2504027 Ontario Inc. o/a Breakaway Tours, and 2417988 Ontario Inc. o/a S-Trip! (together "S-Trip").

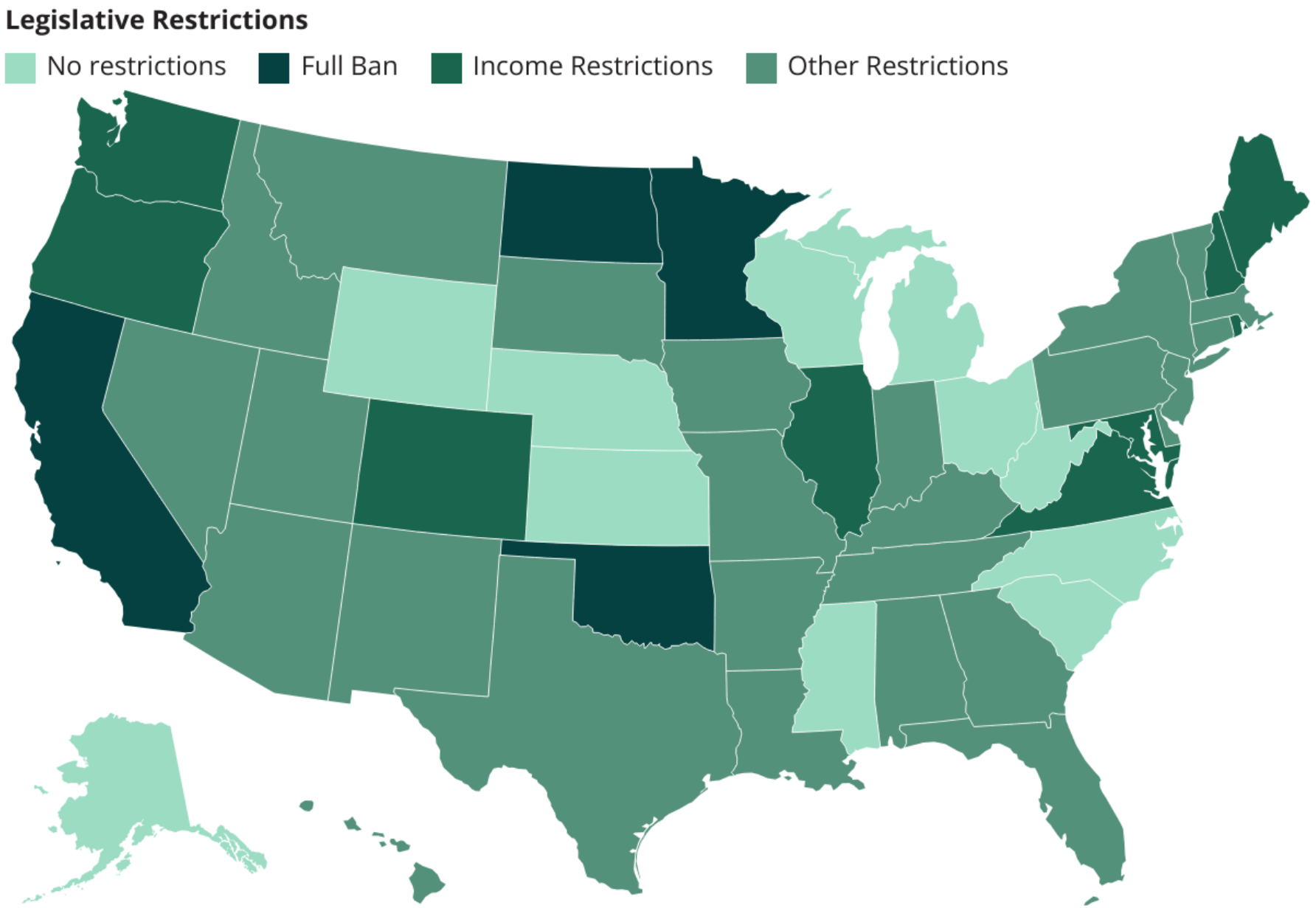
Employee vs. Independent Contractor

The statement of claim alleges, among other things, that S-Trip violated the Employment Standards Act, 2000 (the "ESA") and its contracts of employment with Trip Leaders by misclassifying Trip Leaders as "volunteers" and failing to pay them wages, overtime, vacation pay and public holiday pay in accordance with the ESA. The claim seeks various damages, including for unpaid wages, overtime, and Canada Pension Plan and Employment Insurance Act premiums.

What About Non-Compete Agreements?

- Movement away from Non-Compete clauses.
  - Federal Trade Commission proposal to prohibit Non-Compete Agreements – More to come on this!
  - California AB1076 & Edwards v. Arthur Andersen LLP
  - National Labor Relations Board Memorandum
- State law will dictate enforceability and limitations
- Some Non-Competes **ARE** enforceable. Be careful when you are subject to a non-compete as an employee or as an IC (if applicable under state law).

"Upset at you for breaching the non-compete? Of course not."



Map: Economic Innovation Group

ECONOMIC INNOVATION GROUP

Am I subject to a Non-Compete Agreement?

- **Very** State Specific
  - Reasonable Time
  - Reasonable Area
  - Related to a Legitimate Business Interest
- A non-compete is not enforceable in a number of states.

Total Ban States

California, Minnesota, North Dakota and Oklahoma are total ban states while 33 states plus DC restrict their use and impose such penalties.

How about Florida?

Noncompete agreements should be no broader than "reasonably necessary" to protect a legitimate business interest. Time restraints of six months or less are presumed reasonable, and time restraints of greater than two years are presumed unreasonable.

How about New York?

No statute governing noncompetes generally. Whether a noncompete agreement is “reasonable” and therefore enforceable is left up to the courts.

How about Virginia?

Noncompetes are banned for workers whose earnings are below $73,320.

How about Montana?

Montana allows "reasonable" noncompete agreements that protect a legitimate business interest and do not fully restrain former employees from exercising their professions.

How about California?

Strengthened existing ban on noncompetes by banning the signature of void noncompetes, voiding out-of-state noncompetes within the state, and allowing affected workers to pursue civil action against employers (Effective 1/1/2024, retroactive)

Examples of Penalties

- California: In California, non-compete agreements are prohibited by law (Cal. Bus. & Prof. Code § 16600), and employers cannot require employees or applicants to agree in writing to any term or condition known to be prohibited by law (Cal. Lab. Code § 432.5). California employers who violate the ban may be found guilty of a misdemeanor and either fined up to $1,000, imprisoned up to six months, or both (Cal. Lab. Code § 23 and Cal. Lab. Code § 433).
- Colorado: Entering into, presenting to an employee or prospective employee as a term of employment, or attempting to enforce an unenforceable non-compete agreement is a violation of Colorado law (C.R.S. § 8-2-113). An employer that uses force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation wherever the person chooses to work may be found guilty of a Class 2 misdemeanor. An employer may also be liable for actual damages and a $5,000 penalty per harmed employee or prospective employee.
- Illinois: Illinois law establishes various non-compete restrictions including an income threshold (820 Ill. Comp. Stat. 90/). For violations of the non-compete restrictions, the Illinois Attorney General may request — and a court may impose — a civil penalty not to exceed $5,000 for each violation and $10,000 for each repeat violation within a five-year period.

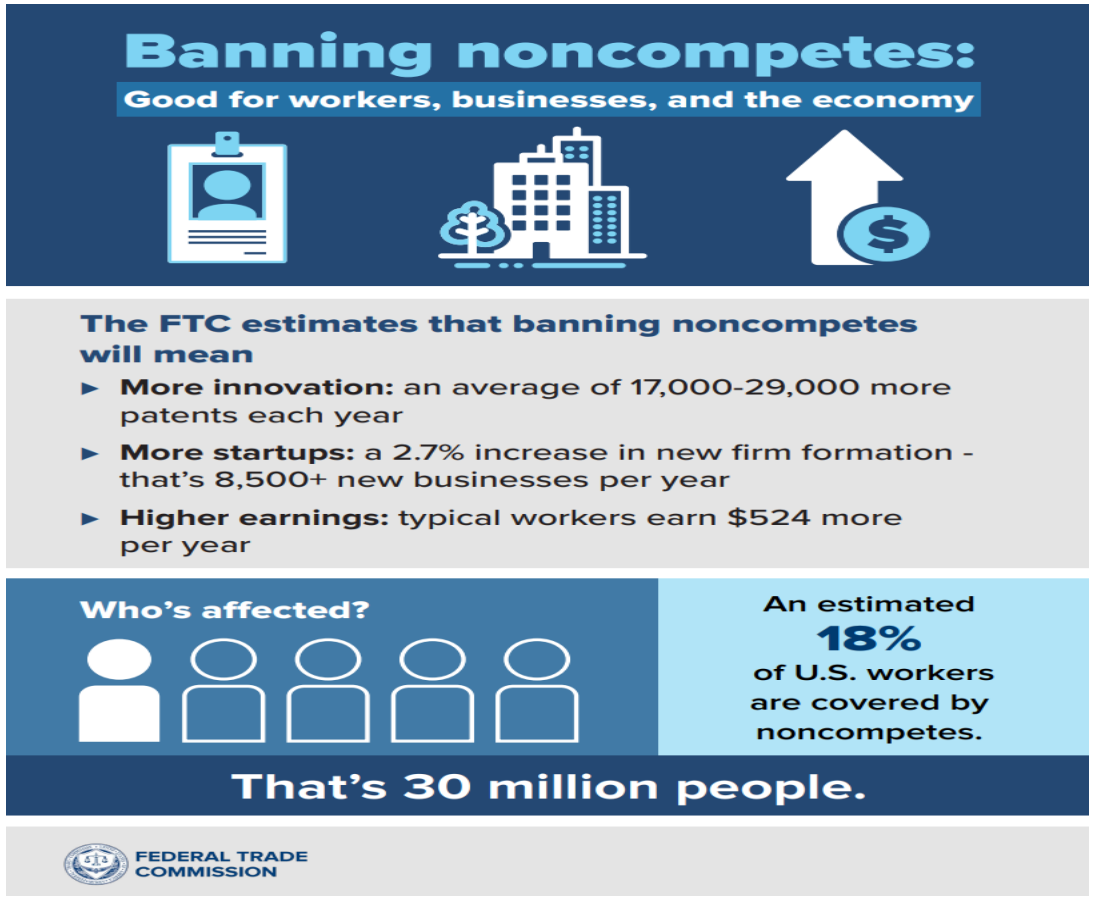
Examples of Penalties

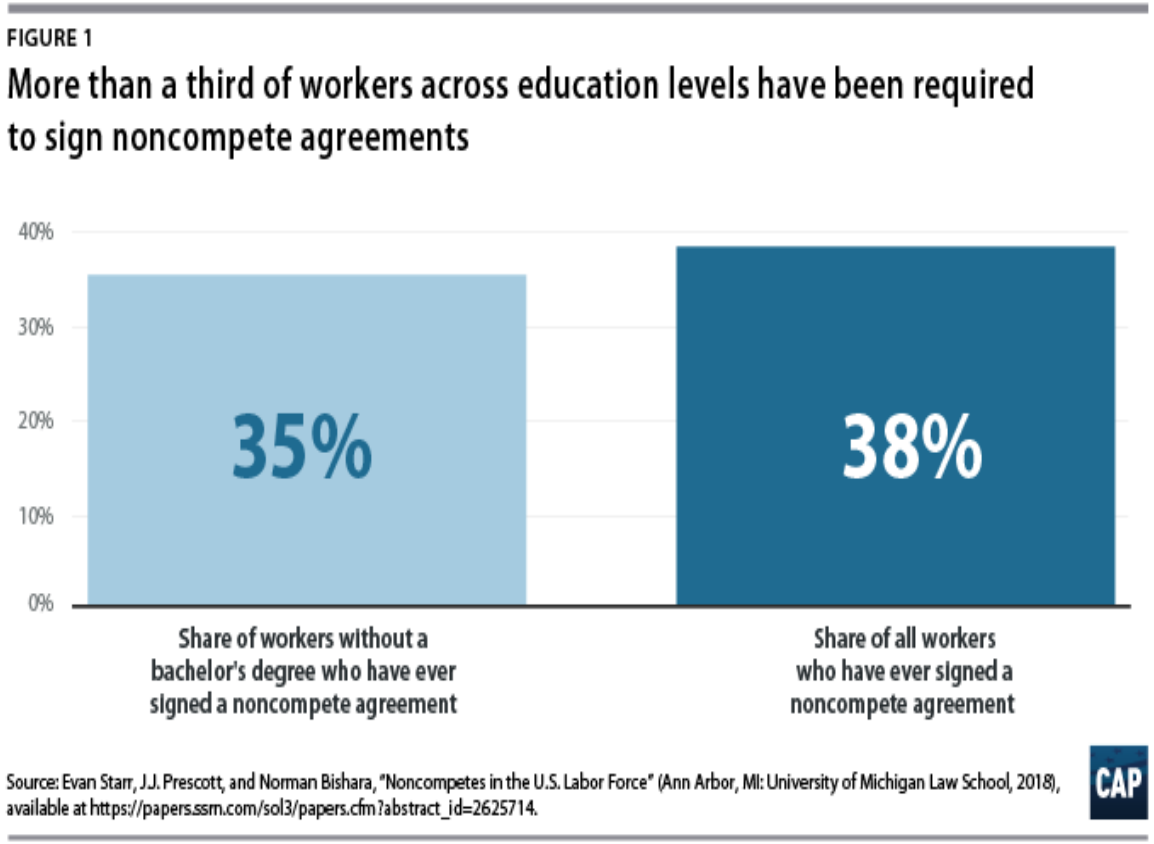
- Virginia: An employer violates Virginia's non-compete law (Va. Code Ann. § 40.1-28.7:8) by entering into, enforcing, or threatening to enforce an invalid non-compete agreement with a low-wage employee. Employers who violate these restrictions may be subject to a $10,000 civil penalty for each violation. Virginia law also creates posting requirements. An employer who fails to post the non-compete law in the workplace will be issued a written warning for the first offense, a civil penalty not to exceed $250 for the second offense, and a civil penalty not to exceed $1,000 for each subsequent offense.
- Washington: If a court or arbitrator finds that a non-compete agreement violates Washington's non-compete law, the violator may be required to pay the aggrieved party actual damages or a statutory penalty of $5,000 — whichever is greater — along with reasonable attorney's fees, expenses, and costs (Wash. Rev. Code. § 49.62.080). An employer seeking to enforce a non-compete agreement may be subject to this penalty, even if a court or arbitrator reforms, rewrites, modifies, or partly enforces the agreement.

What's happening in New York

- New York proposed non-compete ban. For example, on June 20, 2023, the New York State Legislature passed a bill that would have prohibited almost all new non-competes in New York and created a private right of action enabling workers to void their non-competes and recover up to $10,000 in liquidated damages, in addition to lost compensation, damages, and reasonable attorneys' fees and costs. Governor Hochul eventually vetoed the bill, calling for a carveout to the ban for higher-wage workers. The bill's sponsor in the State Senate has said that he will reintroduce the legislation in 2024.

How did the FTC rule come to be!





What is the FTC rule

The Noncompete Rule bans the issuance of new noncompetes for all workers as of the effective date, which is September 4th, 2024. Beginning on that date, it is unlawful for any person covered by the rule to enter into or attempt to enter into a new noncompete with a worker. Additionally, existing noncompetes will become unenforceable on September 4th for the vast majority of workers. Only noncompetes with senior executives, as defined by the rule, will continue to be enforceable after September 4th. Briefly, to be a senior executive that meets this exception for existing agreements, a person must earn more than $151,164 dollars in a year and must be in a policy-making position for the entire business.

What happened to the FTC rule

"The Commission's lack of evidence as to why they chose to impose such a sweeping prohibition ... instead of targeting specific, harmful non-competes, renders the Rule arbitrary and capricious," wrote Ada Brown, an appointee of Republican former President Donald Trump.

What happened to the FTC rule

"The decision has been met with significant criticism from labor advocates, who argue that it perpetuates a system in which businesses can continue to exploit workers without fear of competition. Critics also point to this ruling as evidence of the increasing influence of corporate money in the judiciary, suggesting that Judge Brown's decision aligns more with the interests of the wealthy and powerful than with those of ordinary workers." Oregon Pub. Radio

Non-Solicitation Provisions may be the way to go.

Non-solicitation agreements, also known as non-solicit or non-interference agreements, are legally binding contracts that establish specific restrictions on individuals or entities regarding solicitation activities involving a business's clients, customers, or employees. Such agreements may be drafted as a stand-alone contract, or they may be part of a larger employment contract, partnership agreement, or other agreement that addresses various aspects of a business relationship.

Non-Solicitation Provisions may be the way to go.

Parties to the Agreement

A non-solicitation agreement should clearly identify the parties subject to its terms. This section should include the names and contact information of both the party imposing the restriction (often the company) and the party subject to the restriction.

Definition of Non-Solicitation

The agreement should clearly specify what constitutes solicitation, which may include direct or indirect recruitment, enticement, or any action that aims to persuade the restricted party's clients, customers, employees, or business partners to terminate their relationship.

Non-Solicitation Provisions may be the way to go.

Duration of the Agreement

The agreement should establish a specific timeframe during which the non-solicitation agreement remains in effect. The duration should be reasonable and proportionate to the legitimate business interests it seeks to protect. Common durations range from one to three years, but this can vary based on industry, position, and other factors.

Geographic Scope

A non-solicitation agreement should also define the geographical area or scope where the non-solicitation restrictions apply. This section should be clear and relevant to the company's business operations. Striking a balance between protecting the company's interests and allowing the restricted party to seek employment or clients outside the specified area is crucial.

Non-Solicitation Provisions may be the way to go.

Covered Parties

The agreement should specify which individuals or categories of individuals are protected by the non-solicitation provision. Commonly, this includes all current employees, clients, or business partners. It may also extend to former employees who worked for the company within a specified time frame.

Permissible Exceptions

The agreement may outline specific exceptions to the non-solicitation restrictions. These exceptions could include situations where the restricted party's solicitation is authorized by the company, or when the solicitation results from general job postings or public job advertisements.

Non-Solicitation Provisions may be the way to go.

Remedies and Consequences for Breach

The potential consequences and remedies in the event of a breach should be clearly spelled out in the non-solicitation agreement. Remedies may include injunctive relief, monetary damages, or a combination of both. This section should specify how damages will be calculated in the event of a breach.

Notice Requirement

In some cases, the agreement may include a provision requiring the restricted party to provide notice to the enforcing party before accepting employment or entering into a business relationship with a new organization. The notice period allows the company to assess the potential solicitation risks associated with the new role.

Non-Solicitation Provisions may be the way to go.

Severability Clause

A severability clause is essential to ensure that if any part of the agreement is deemed unenforceable, the remaining provisions remain valid and in effect. This clause helps protect the overall integrity of the agreement.

Governing Law and Venue

The agreement should specify the jurisdiction whose laws will govern the agreement and the appropriate venue for legal disputes, should any arise. This ensures that both parties understand the legal framework governing the agreement.

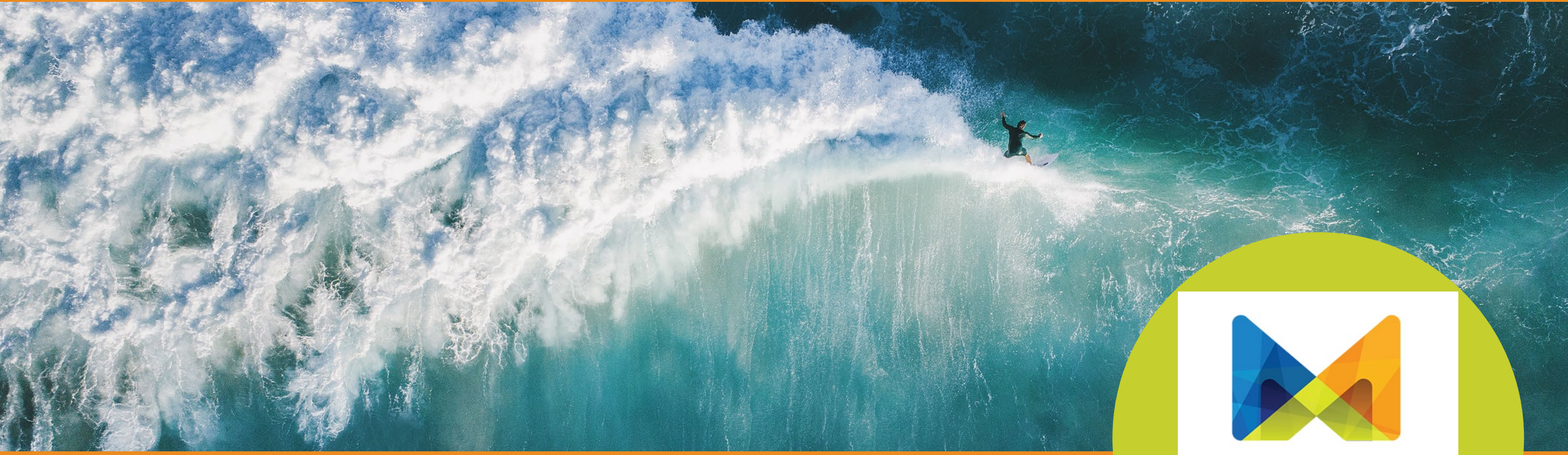
Non-Solicitation Provisions may be the way to go.

Acknowledgment and Acceptance

The agreement should include a section where the restricted party acknowledges their understanding of the agreement and their commitment to abide by its terms. This section often includes space for the restricted party's signature, the date of acceptance, and may require a witness or notary.

Confidentiality and Non-Disclosure

In some cases, a non-solicitation agreement may include clauses related to confidentiality and non-disclosure to protect sensitive information, trade secrets, or intellectual property, especially if the solicitation could involve sharing proprietary information.



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