Noncompete Laws: 2021 Year in Review

January 13, 2022

Key Points

- President Biden's July 9, 2021 executive order encouraged the FTC to exercise its statutory rulemaking authority to curtail the unfair use of noncompete agreements.
- Effective March 1, 2022, a person who violates Colorado's noncompete statute commits a class 2 misdemeanor.
- Sweeping changes to the Illinois Freedom to Work Act took effect on January 1, 2022, and, among other things, prohibit noncompete covenants with employees earning $75,000 or less per year and nonsolicitation covenants with employees earning $45,000 or less per year.
- Effective October 1, 2021, Nevada's amended noncompete statute bans noncompete agreements with hourly wage employees and requires employers to pay an employee's reasonable attorney's fees if a noncompete agreement violates certain statutory restrictions.
- Noncompete agreements entered into in Oregon on or after January 1, 2022 cannot exceed 12 months in duration and cannot be enforced against an employee whose gross salary and commissions at termination do not exceed $100,533, adjusted annually for inflation, unless the employer agrees in writing to compensate the employee during the post-employment restricted period in accordance with the statute.
- Unless amended, Washington, D.C.'s new Ban on Non-Compete Agreements Amendment Act of 2020 will invalidate most noncompete provisions entered into with D.C. employees on or after April 1, 2022.

Federal and state efforts to limit the use of employee noncompete agreements have gained significant momentum in recent years, and 2021 was no exception. Colorado, Illinois, Nevada, Oregon and Washington, D.C. passed or enacted new laws restricting noncompete agreements in 2021, and several other states considered noncompete legislation. Common trends in legislation proposed over the last year include: (1) prohibiting noncompete agreements altogether or with certain employees, such as low-wage workers or medical professionals; (2) requiring employers to provide employees advance notice of any noncompete agreements; (3) voiding noncompete agreements for employees who are terminated in certain circumstances; and (4)

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requiring employers to pay monetary damages, statutory penalties and/or attorney's fees for entering into or attempting to enforce unlawful noncompete agreements.

The primary developments during 2021 at the federal level and the key changes to the noncompete laws in Colorado, Illinois, Nevada, Oregon and Washington, D.C. are summarized herein.

Federal Initiatives

The federal government has shown increasing interest in limiting or even outright banning noncompete agreements, and in 2021, noncompete agreements drew scrutiny from the Biden-Harris administration, the Federal Trade Commission (FTC) and Congress. Although no federal laws have passed or are on the brink of passing, employers should continue to monitor the federal initiatives outlined below, as promoting worker mobility in the labor markets will likely continue to be a focus of the Biden-Harris administration for the remainder of President Biden's term.

Executive Order; Federal Trade Commission. On July 9, 2021, President Biden issued an executive order on "Promoting Competition in the American Economy" that, among many other things, encouraged the chair of the FTC to "consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility" (see prior alerts here and here). Significantly, the executive order has no immediate effect on employers. If the FTC does pursue rulemaking, it remains to be seen whether the FTC will target all employee noncompete agreements or take a narrower approach, such as focusing on low-wage employees or on procedural requirements like requiring employers to provide employees advance notice of noncompete agreements. Moreover, any potential rule will likely be subject to extensive litigation challenging the FTC's authority to enact such rule.

On November 11, 2021, the FTC released its draft Strategic Plan for Fiscal Years 2022-2026 for public comment. The plan identified three strategic goals: (1) "[p]rotect the public from unfair or deceptive acts or practices in the marketplace"; (2) "[p]romote an open and competitive marketplace for the benefit of the public"; and (3) "[a]dvance the FTC's effectiveness and performance." In furtherance of these goals, the FTC identified the following strategies, among others:

- "**Investigate**: Investigate potentially anticompetitive mergers and business conduct efficiently using rigorous, economically sound, and fact-based analyses that enhance enforcement outcomes for the benefit of consumers, workers, and honest businesses."
- "**Improve compliance**: . . . Increase use of provisions to improve worker mobility including restricting the use of non-compete provisions."
- "**Focus on workers**: Study and investigate the impact on worker wages and benefits from merger and nonmerger conduct, as well as non-compete and other potentially unfair contractual terms resulting from power asymmetries between workers and employers."
- "**Further research**: Conduct research and merger retrospectives to study the impact of anticompetitive conduct and transactions on consumers, workers, and small businesses in underserved and marginalized communities."

Subsequently, on December 6-7, 2021, the FTC and the Department of Justice (DOJ) jointly hosted a virtual public workshop titled "Making Competition Work: Promoting Competition in Labor Markets." The workshop brought together agency representatives, lawyers, economists, academics, policy experts, labor groups and workers to discuss efforts to promote competitive labor markets and worker mobility. The workshop addressed various competition issues affecting labor markets and the welfare of workers, including the increased use of noncompete and nondisclosure agreements. Following the workshop, the FTC and DOJ invited public comments and received 39 submissions, 27 of which are publicly available here. No consensus has been reached regarding what action, if any, the FTC should take to limit noncompete agreements or other restrictive covenants, and employers should stay tuned for further developments.

Workforce Mobility Act of 2021. The bipartisan Workforce Mobility Act of 2021, which essentially would ban all employee noncompete agreements, was introduced in the Senate as S. 483 and in the House of Representatives as H.R. 1367 on February 25, 2021. In particular, the proposed legislation would: (1) limit the use of noncompete agreements to situations involving the sale of a business or the dissolution of a partnership; (2) empower the FTC and the Department of Labor to enforce the act; (3) create a private cause of action for aggrieved individuals; and (4) require employers to post notice of the prohibition on noncompete agreements. The proposed legislation remains under committee and subcommittee review. If passed, the ramifications would be extensive, as employers would have no legal remedy to prevent employees from working for a competitor. However, employers can take some comfort in the fact that similar bills in recent years have failed to pass.

Freedom to Compete Act. On July 15, 2021, Sen. Marco Rubio (R-FL) and Sen. Maggie Hassan (D-NH) introduced the Freedom to Compete Act, S. 2375, which would amend the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq.*, to ban noncompete agreements with certain nonexempt employees. In its current form, the bill would apply retroactively to preexisting noncompete agreements (and thus will likely be subject to constitutional challenges if passed). The bill was read twice and referred to the Committee on Health, Education, Labor and Pensions. Sen. Rubio previously introduced identical legislation in January 2019, which died.

Employment Freedom for All Act. On November 3, 2021, Rep. Claudia Tenney (R-NY-22) and eight cosponsors introduced the Employment Freedom for All Act, H.R. 5851, which would void existing noncompete agreements for any employee who is fired for not complying with an employer's COVID-19 vaccine mandate. The bill has been referred to the Committee on Education and Labor and to the Committee on Energy and Commerce for further consideration.[1]

Colorado

On July 6, 2021, Gov. Jared Polis signed Senate Bill 21-271 on misdemeanor reform into law, which takes effect on March 1, 2022. Buried on page 26 of this 304-page bill is an amendment to Colorado's noncompete statute, Colorado Revised Statute section 8-2-113, under which a person who violates the statute commits a class 2 misdemeanor. Under the bill, class 2 misdemeanors committed on or after March 1, 2022 are punishable by up to 120 days in jail, a fine of up to $750, or both.

Section 8-2-113, dubbed “Unlawful to intimidate worker--agreement not to compete,” voids any noncompete agreement that “restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer,” with certain statutory exceptions for the sale of a business, the protection of trade secrets, the recovery of expenses for educating and training employees in certain conditions, and executive and management personnel and their professional staff. Colorado courts have held that an agreement not to solicit customers is a form of a noncompete agreement.[2] The statute also provides that it “shall be unlawful to use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation at any place he sees fit.”[3]

Although there is limited guidance on what conduct would constitute improper force, threats or intimidation under the statute, Colorado employers and managers should be mindful of this broad language in light of potential criminal liability. Colorado employers should also ensure that their noncompete and customer nonsolicitation agreements are presented to and enforced against only those employees falling under the statute’s permitted exceptions.

Illinois

On August 13, 2021, Illinois Gov. J.B. Pritzker signed Senate Bill 0672 into law, which amends the Illinois Freedom to Work Act and significantly alters the landscape of noncompete and nonsolicitation agreements in Illinois. The amended act, which took effect on January 1, 2022, imposes several additional limitations on Illinois employers entering into noncompete and nonsolicitation agreements after the effective date.

Salary Threshold. Previously, the Illinois Freedom to Work Act prohibited noncompete covenants with “low-wage employees” earning less than $13 per hour or the hourly minimum wage, whichever was greater. The amended act removes the definition of “low-wage employees” and instead prohibits noncompete covenants with any employee earning $75,000 or less per year and also prohibits nonsolicitation covenants (of both clients and other employees) with any employee earning $45,000 or less per year. These thresholds will increase every five years by $5,000 for noncompete covenants and by $2,500 for nonsolicitation covenants.

New Standard for Enforcement. Under the amended act, a noncompete or nonsolicitation covenant is illegal and void unless: (1) the employee receives adequate consideration; (2) the covenant is ancillary to a valid employment relationship; (3) the covenant is no greater than is required for the protection of a legitimate business interest of the employer; (4) the covenant does not impose undue hardship on the employee; and (5) the covenant is not injurious to the public.

Adequate Consideration. The amended act defines “adequate consideration” as: (1) the employee worked for the employer for at least two years after the employee signed an agreement containing a noncompete or nonsolicitation covenant; or (2) the employer otherwise provided consideration adequate to support an agreement to not compete or to not solicit, which consideration can consist of a period of employment plus additional professional or financial benefits, or merely professional or financial benefits adequate by themselves. The amended act does not specify what professional or financial benefits (e.g., a bonus or a promotion) would be sufficient.

Employer’s Legitimate Business Interest. The amended act instructs courts to consider the totality of the facts and circumstances in determining the legitimate

business interest of the employer. Factors to be considered include, but are not limited to: (1) the employee's exposure to the employer's customer relationships or other employees; (2) the near-permanence of customer relationships; (3) the employee's acquisition, use or knowledge of confidential information through the employee's employment; (4) the time restrictions; (5) the place restrictions; and (6) the scope of the activity restrictions. No single factor is determinative.

Notice Requirements. Under the amended act, noncompete and nonsolicitation covenants are void unless the employer complies with specific notice requirements. Specifically, employers must: (1) advise the employee in writing to consult with an attorney before entering into the covenant; and (2) provide the employee with a copy of the covenant at least 14 calendar days before the commencement of employment or provide the employee with at least 14 calendar days to review the covenant before signing. The employee may voluntarily sign the covenant before the 14-day period expires.

COVID-19 Layoffs. The amended act prohibits noncompete and nonsolicitation covenants with any employee who an employer terminates, furloughs or lays off as the result of business circumstances or governmental orders related to the COVID-19 pandemic or similar circumstances, unless enforcement of the covenant "includes compensation equivalent to the employee's base salary at the time of termination for the period of enforcement minus compensation earned through subsequent employment during the period of enforcement."

Additional Prohibitions. The amended act voids noncompete covenants with individuals covered by a collective bargaining agreement under the Illinois Public Labor Relations Act or the Illinois Educational Labor Relations Act and with certain individuals employed in construction.

Reformation. The amended act warns that extensive judicial reformation of a noncompete or nonsolicitation covenant may be against the public policy of the state but provides courts discretion to choose to reform or sever provisions of a covenant rather than hold such covenant unenforceable. Factors courts may consider when deciding whether reformation is appropriate include: (1) the fairness of the restraints as originally written; (2) whether the original restriction reflects a good-faith effort to protect a legitimate business interest of the employer; (3) the extent of such reformation; and (4) whether the parties included a clause authorizing such modifications in their agreement.

Attorney's Fees. The amended act allows an employee to recover all costs and reasonable attorney's fees, and possibly other "appropriate relief," if the employee prevails on a claim filed by an **employer** (including a complaint or counterclaim) seeking to enforce a noncompete or nonsolicitation covenant.

Attorney General Enforcement; Penalties. The amended act also permits the Illinois Attorney General to bring an action against any person or entity it reasonably believes has engaged in a pattern and practice prohibited by the amended act, which can result in monetary damages, restitution, equitable relief and other appropriate relief, as well as a civil penalty up to $5,000 per violation or $10,000 for each repeat violation within a five-year period.

Nevada

Nevada's amendment to the Nevada Unfair Trade Practice Act took effect on October 1, 2021, and made the following noteworthy changes to the state's noncompete law.

Hourly Wage Employees. Significantly, the amended statute prohibits noncompete covenants with employees who are "paid solely on an hourly wage basis, exclusive of any tips or gratuities."

Service to Former Customers. The amended statute also prohibits employers from bringing an action to restrict a former employee from providing service to a former customer or client if: (1) "[t]he former employee did not solicit the former customer or client"; (2) "[t]he customer or client voluntarily chose to leave and seek services from the former employee"; and (3) "the former employee is otherwise complying with the limitations in the covenant as to time, geographical area and scope of activity to be restrained, other than any limitation on providing services to a former customer or client who seeks the services of the former employee without any contact instigated by the former employee." Of note, the former version of the statute provided that noncompete covenants could not restrict former employees in these circumstances; only the prohibition on employers from bringing an action is new.

Reformation. The amended statute updated the reformation provision in two key ways. First, when a noncompete covenant is supported by valuable consideration but is overly broad as to time, geographical area or scope of activity to be restrained, the court must revise the covenant to the extent necessary and enforce the covenant as revised, regardless of whether the employer or the employee brings the action. Previously, the reformation provision applied only when the **employer** brought an action to enforce the covenant. Second, the amended statute explicitly provides that, when the court revises an overly broad covenant, the revised covenant shall "not impose undue hardship on the employee" (among other preexisting constraints).

Attorney's Fees. Under the amended statute, a court **shall** award the employee reasonable attorney's fees and costs if the court finds that the employer imposed a noncompete covenant on an hourly wage employee, as defined above, or violated the statute's prohibition on restricting a former employee from servicing customers or clients the employee did not affirmatively solicit. Notably, this mandatory fee-shifting applies regardless of whether the employer brings an action to enforce the covenant or the employee brings an action to challenge the covenant.

Oregon

On May 21, 2021, Oregon Gov. Kate Brown signed Senate Bill 169 into law, which yet again amends Oregon's noncompete statute. The amended law applies to noncompete agreements entered into on or after January 1, 2022, and makes five notable changes.

Noncompliant Covenants are Void, Not Voidable. Noncompete agreements that fail to comply with the amended law are "void and unenforceable." Under the former version of the statute, noncompliant noncompete agreements are "voidable and may not be enforced by a court of this state." Some courts in Oregon have interpreted the term "voidable" to require an employee who wants to be relieved of an allegedly unenforceable noncompete covenant to take affirmative steps to void the covenant before the employer seeks to invoke the covenant; otherwise, the covenant remains valid and in effect.[4]

Reduced Duration. The amended law reduces the maximum post-employment restricted period to 12 months, down from 18 months. The remainder of a term in excess of 12 months is void.

Revised Pay Threshold. Under the amended law, for a noncompete agreement to be valid, the employee must be an administrative, executive or professional exempt employee under Oregon's wage and hour laws,[5] and the employee's annual gross salary and commissions at the time of the employee's termination must exceed $100,533, adjusted annually for inflation.[6] Although the exemption requirement is not new, this minimum pay threshold replaces the prior requirement that the employee's annual gross salary and commissions exceed "the median family income for a four-person family, as determined by the United States Census Bureau for the most recent year available."

Agreement to Pay. If an employee is nonexempt or does not satisfy the minimum pay threshold, a noncompete agreement under the amended law may still be enforceable if the employer agrees in writing to provide the employee, during the post-employment restricted period, the greater of: (1) compensation equal to at least 50 percent of the employee's annual gross base salary and commissions at the time of termination, or (2) 50 percent of $100,533, adjusted annually for inflation. Under the former version of the statute, it is sufficient for employers to provide such pay, without agreeing to do so in writing, and the second prong of the minimum payment test is based on the median family income for a four-person family.

Written Agreement. The amended law defines a "noncompetition agreement" as a "written agreement," rather than a "written or oral, express or implied" agreement.

Existing Requirements. Employers should remain cognizant of additional statutory requirements that were not modified by the amended law, such as the requirements that employers notify new hires in a written employment offer at least two weeks before their first day of employment that a noncompete agreement is required as a condition of employment and that employers provide a departing employee a signed, written copy of the noncompete agreement within 30 days after the employee's termination date.

Washington, D.C.

On January 11, 2021, Washington, D.C. Mayor Muriel Bowser signed the Ban on Non-Compete Agreements Amendment Act of 2020 ("D.C. Act") into law, which, unless amended, will impose a broad ban on employee noncompete agreements and anti-moonlighting policies in the nation's capital, subject to limited exceptions.[7] The D.C. Act became law in March 2021 and was originally expected to apply to D.C. employers this past fall. Following backlash from some members of the D.C. business community, the D.C. Act's "Applicability Date"—the date D.C. employers must comply with the D.C. Act—was postponed to April 1, 2022. As discussed in further detail below, this delay also gives employers some hope that the D.C. Act will be further amended before April 1, 2022, as amendments to the D.C. Act have been proposed in response to the backlash. In the interim, D.C. employers should continue preparing for the D.C. Act as it currently exists.

Covered Employers. The D.C. Act broadly applies to all "employers," defined as any individual, partnership, general contractor, subcontractor, association, corporation or business trust operating in D.C., or any person or group of persons acting directly or

indirectly in the interest of an employer. The definition includes prospective employers but excludes the D.C. and United States governments. The D.C. Act does not provide any guidance on what it means for an employer to be "operating" in D.C.

Covered Employees. Currently, the D.C. Act protects any "employee," defined as any individual who performs work in D.C. on behalf of an employer and any prospective employee reasonably anticipated to perform work in D.C. Unlike some jurisdictions that only forbid noncompete provisions with nonexempt or low-wage workers, the D.C. Act does not contain any exclusions for executives or highly-paid employees. The D.C. Act does, however, expressly exclude the following workers from the definition of "employee" (meaning noncompete provisions with these individuals are permitted): (1) volunteers for educational, charitable, religious and nonprofit organizations; (2) certain individuals who hold office in religious organizations; (3) casual babysitters; and (4) certain medical specialists earning at least $250,000 per year.[8]

Prohibited Agreements and Policies. As enacted, the D.C. Act is notable in that it bans noncompete agreements and workplace policies that prohibit employment with other entities both **during** and after the employee's employment, whether such activities are competitive or not. Specifically, the D.C. Act prohibits employers from requiring or requesting that a D.C. employee sign an agreement that includes a noncompete provision. The term "noncompete provision" is defined as a provision of a written agreement that "prohibits the employee from being simultaneously or subsequently employed by another person, performing work or providing services for pay for another person, or operating the employee's own business." Any noncompete provision that is entered into with a covered employee on or after the Applicability Date (currently April 1, 2022) is void and unenforceable. Equivalent workplace policies, whether written or as matter of practice, are also prohibited. Such "anti-moonlighting" policies are commonly found in employee handbooks, codes of conduct, offer letters and employment agreements.

Prohibited Retaliation. The D.C. Act also prohibits employers from retaliating against or threatening to retaliate against any covered employee for: (1) refusing to agree to a noncompete provision; (2) failing to comply with a noncompete provision or workplace policy made unlawful by the D.C. Act; (3) asking, informing or complaining about the existence, applicability or validity of a noncompete provision or workplace policy that the employee reasonably believes is prohibited under the D.C. Act; or (4) requesting from the employer the written notice statement required by the D.C. Act.

Effect on Confidentiality Agreements and Nonsolicitation Provisions. The D.C. Act expressly permits otherwise lawful provisions that restrict the employee from "disclosing" the employer's confidential, proprietary or sensitive information, client lists, customer lists or trade secrets. The D.C. Act is silent, however, regarding nonsolicitation provisions. Although it remains to be seen how courts interpret the noncompete ban, nonsolicitation provisions are likely permitted because a typical nonsolicitation provision merely prohibits an employee from soliciting business from certain customers or recruiting employees in the course of their new employment.[9]

Written Notice. Employers must provide all covered D.C. employees with the following notice in writing: "No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020." The notice must be provided: (1) to existing

D.C. employees within 90 calendar days after the Applicability Date; (2) to new D.C. employees within seven calendar days after their hire date; and (3) to any D.C. employee within 14 calendar days after the employer receives a written request for such statement from the employee.

Recordkeeping Requirements. The D.C. Act instructs the Mayor to issue rules to implement its provisions, including rules requiring employers to keep, preserve and retain records related to compliance. The D.C. Act authorizes the Mayor and the D.C. Attorney General to inspect such records upon demand at any reasonable time.

Consequences of Violating the D.C. Act. In addition to voiding any prohibited noncompete provisions entered into on or after the Applicability Date, the D.C. Act also subjects employers to administrative and civil penalties for violations. The Mayor may assess an administrative penalty between $350 and $1,000 for each violation of the D.C. Act, except that the penalty for each retaliatory act shall be at least $1,000. Affected employees and medical specialists may file an administrative complaint with the Mayor or pursue a civil action in court to recover between $500 and $2,500, depending on the violation, or at least $3,000 for subsequent violations.

Proposed Amendments to the D.C. Act. On May 21, 2021, D.C. Councilmember Elissa Silverman introduced Bill 24-0256, the Non-Compete Conflict of Interest Clarification Amendment Act of 2021, which would amend the D.C. Act if passed. Although the bill does not significantly scale back the D.C. Act, it accounts for some concerns raised by employers in response to the D.C. Act.

First, the bill seeks to clarify that employers would be allowed to maintain a "bona fide conflict of interest provision," defined as "an otherwise lawful written provision or workplace policy that bars an employee from accepting money or a thing of value from a person during the employee's employment with the employer because the employer reasonably believes the employee's acceptance of money or a thing of value from the person will cause the employer to: (A) Conduct its business in an unethical manner; or (B) Violate applicable local, state, or federal laws or rules." The practical effect of this proposed amendment is limited, however, as many employee conflicts of interest would not cause the employer to conduct business unethically or violate laws. Critics of the D.C. Act seek additional changes, such as provisions allowing employers to forbid employees who have access to the employer's confidential information from working for direct competitors during their employment.

Second, the bill adds a provision prohibiting an employer from retaliating against an employee for "[a]sking the employer whether the employee's acceptance of money or a thing of value from another person during or after the employee's employment for the employer violates the employer's workplace policy."

Third, the bill broadens the definition of permissible confidentiality agreements, allowing for agreements that prohibit employees from "disclosing **or using**" the employer's confidential, proprietary or sensitive information, client lists, customer lists or trade secrets. As enacted, the D.C. Act permits confidentiality agreements that prohibit employees from "disclosing" the employer's intellectual property, but the D.C. Act does not address the employees' "use" of that information.

Finally, the bill would incorporate the D.C. Act's mandatory notice language into D.C.'s already existing "Notice of Hire Form," which D.C. employers must provide to new

hires, as well as to current employees upon certain changes, under the Wage Theft Prevention Amendment Act of 2014.

The bill was referred to the Committee on Labor and Workforce Development on June 1, 2021, and a public hearing was held on July 14, 2021. At this time, it is unknown when or if the bill will pass or whether it will be amended before its passage. D.C. Councilmember Brooke Pinto has voiced support for additional amendments that would further limit the restrictions under the D.C. Act and allow for targeted noncompete provisions with certain categories of employees.

Practical Considerations

As the landscape for restrictive covenants continues to evolve, employers should evaluate whether their restrictive covenants are enforceable in the jurisdictions in which they operate and whether they have appropriate protocols in place to comply with any applicable procedural requirements, such as providing employees advance notice of any noncompete covenants. Employers operating in jurisdictions where the minimum earnings threshold for enforceable noncompete agreements is adjusted annually for inflation or is tied to the federal poverty level, such as Maine, Rhode Island and the State of Washington, should be mindful of increases that took effect on January 1, 2022, or will take effect in early 2022.[10]

Additionally, as noncompete agreements become more difficult to enforce in certain jurisdictions, employers should consider what additional actions they can take to protect their trade secrets and confidential information. For example, employers should review existing nondisclosure and confidentiality agreements to identify gaps in coverage, including with respect to the language of the existing agreements and the scope of the employee population subject to such agreements.

[1] Although the Employment Freedom for All Act is not expected to pass the current Democratic-controlled Congress, employers should monitor similar legislative efforts at the state level. For example, Texas and Tennessee have legislation pending related to employers' vaccine mandates and the enforceability of certain restrictive covenants.

[2] *See, e.g., Phx. Cap., Inc. v. Dowell*, 176 P.3d 835, 844 (Colo. App. 2007).

[3] Colorado's noncompete statute includes additional provisions that apply only to physicians.

[4] *See, e.g., Bernard v. S.B., Inc.*, 350 P.3d 460, 464-65 (Or. Ct. App. 2015); *Millennium Health, LLC v. Barba*, No. 3:20-CV-02035-HZ, 2021 WL 1254349, at *6-8 (D. Or. Apr. 5, 2021), *aff'd*, 2021 WL 4690940 (9th Cir. Oct. 7, 2021).

[5] *See* Or. Rev. Stat. § 653.020(3).

[6] Noncompete agreements with certain on-air talent employed by employers in the business of broadcasting are not subject to the minimum pay threshold and must instead satisfy other statutory requirements.

[7] With this new law, Washington, D.C. joins California, North Dakota and Oklahoma as the jurisdictions that effectively ban noncompete agreements altogether outside the context of a sale of a business.

[8] The D.C. Act contains additional requirements for noncompete agreements with medical specialists, including that the employer must provide the medical specialist with the proposed noncompete provision at least 14 days before execution of the agreement containing the provision, along with a written notice containing certain statutory language.

[9] A November 19, 2020 Committee Report discussing the D.C. Act suggests that nonsolicitation provisions are not intended to be covered by the prohibition on noncompete agreements. *See Report on B23-0494, the "Ban on Non-Compete Agreements Amendment Act of 2020"*, Committee on Labor and Workforce Development, Council of the District of Columbia, at 2-3 (Nov. 19, 2020) ("As an initial matter, what constitutes a 'non-compete agreement' can be misunderstood. Often the non-competition requirement is contained within a broader agreement that also restrains the employee from taking customers or stealing confidential information.

Accordingly, many people erroneously believe that non-compete agreements protect against these other harms. But those problems can be avoided through trade secrets laws, non-disclosure agreements, and non-solicitation agreements which specifically target these business risks.").

[10] Maine prohibits noncompete agreements with employees earning wages at or below 400 percent of the federal poverty level. Me. Stat. tit. 26, § 599-A(3). Rhode Island prohibits noncompete agreements with employees whose average annual earnings are not more than 250 percent of the federal poverty level for individuals. R.I. Gen. Laws §§ 28-59-2(7), -3(a). The federal poverty level is expected to be revised in early 2022. Additionally, effective January 1, 2022, the State of Washington now prohibits noncompete agreements with employees who earn less than $107,301.04 per year and with independent contractors who earn less than $268,252.59 per year (up from $101,390 and $253,475, respectively, for 2021). *See* Wash. Rev. Code §§ 49.62.020-.040; *Non-Compete Agreements*, Wash. St. Dep't of Lab. & Industries, https://lni.wa.gov/workers-rights/workplace-policies/Non-Compete-Agreements (last visited Jan. 13, 2022).