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Securities Law

# Employee Mobility: What to Know About Noncompetes

By Jennifer S. Baldocchi, Michael Murray, and Jessica E. Mendelson

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Paul Hastings attorneys examine what has changed in the past year regarding noncompete agreements. They say President Biden's executive order and new state laws have created new risks for companies and requires new strategies to prevent civil and criminal penalties.

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The use of noncompete clauses for remote workers and hybrid work situations has been complicated by the pandemic and post-pandemic economy.

Does a remote worker, for example, who moved from California to Nevada, now count as a Nevada employee or are they still subject to California law? And just exactly where does an employee work if they are traveling and participating in virtual meetings?

These are the sorts of cases being litigated right now, and the law is developing every day.

Today, 1 in 5 employees in the private sector is working under some form of non-compete covenant. That is roughly 20% of the workforce.

If one also considers related agreements between companies, such as non-solicitation, no-hire, and no-poach provisions, then many more businesses are currently involved in employee mobility issues.

So what's changed in the past year regarding noncompete laws and regulations? Plenty.

## States Restricting, Limiting Use of Noncompetes

From California to the District of Columbia, there have been dozens of moves by legislatures to restrict and limit the use and application of noncompete clauses. In the past year alone, over 60 bills have been introduced across the country that would affect noncompete laws. The changes range from salary caps to criminal and civil penalties for companies that violate certain laws.

California has some of the most restrictive noncompete regulations, but other jurisdictions are adding their own regulations.. Companies should be aware of these changes.

Illinois, for example, is following a growing trend to protect lower-wage employees by forbidding the use of noncompetes for such employees. Oregon now stipulates that those making less than roughly \$100,000 cannot be subject to noncompetes. Nevada has taken steps to ban noncompetes for hourly workers.

Other states have moved to limit the length of noncompetes and void them in cases where it would prevent a former employee from finding work.

On the federal side, President Biden made it clear that limiting noncompetes would be a goal of his administration as part of his executive order on promoting competition in the American economy. Viewing noncompetes as making it more difficult for workers to switch to higher paying jobs, the administration has pledged to restrict or eliminate them.

Toward that end, the White House is encouraging different departments, ranging from the Federal Trade Commission to the Department of Justice to the Department of Labor to work together. The administration has also instructed the FTC to consider new rulemaking in order to curtail the use of noncompetes that may unfairly limit worker mobility.

### **New Restrictions Expected**

An outright ban is unlikely, but some new restrictions are expected.

Using the Sherman Act, which prohibits restraint on trade and can give rise to criminal charges, the federal government is also focusing on related antitrust issues. So no-poaching, no-hire, and no-solicitation agreements between employers are drawing more scrutiny.

Also complicating the employee mobility picture are new state attitudes to so-called choice of law covenants in noncompete agreements. These riders stipulate that the noncompete is enforceable in a particular state that may be more amenable to such agreements.

States such as California have enacted laws to limit such moves. According to the current California Labor Code, for example, an employer cannot require an employee who primarily resides and works in the state, as a condition of employment, to agree to a provision that would deprive the employee of the protection of California law (including the law restricting noncompetes) for claims arising in California (subject to certain exclusions).

Some other states are respecting such regulations when they implicate fundamental public policy.

### **New Strategies for New Risks**

Consequently, the use of noncompete agreements now entails new risks and requires new strategies.

In some states, there is liability beyond being voidable; financial and criminal penalties may apply, as well as the possibility of civil claims.

On the antitrust front, companies also need to think about current policies and HR practices as they interact with competitors to mitigate risk. And when it comes to choice of law, businesses need to understand where employees will be considered as residing.

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### Author Information

*Jennifer S. Baldocchi is co-vice chair of the Paul **Hastings** Employment Department and the chair of the International Employee Mobility and Trade Secrets practice. Her practice focuses on employee mobility and intellectual property, including trade secrets, covenants not to compete, unfair competition, and fiduciary duties.*

*Michael Murray is a partner in the Antitrust and Competition practice of Paul **Hastings** and based in the firm's Washington, D.C., office. He recently served as the principal deputy assistant attorney general of the DOJ's Antitrust Division, the second-in-command official of the division, where he oversaw the work of approximately 350 lawyers.*

*Jessica E. Mendelson is an associate in the Employment Law Department of Paul **Hastings**. Her practice focuses on litigation and counseling on a wide range of labor and employment issues.*

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