



PROGRAM MATERIALS

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Hostile Territory: Drafting and Enforcing Employee Noncompetes and Nonsolicits in a Changing Legal Landscape

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**5301 North Federal Highway, Suite 180, Boca Raton, FL 33487
Phone 561-241-1919 Fax 561-241-1969**

HOSTILE TERRITORY: Drafting & Enforcing Employee Noncompetes and Nonsolicits in a Shifting Legal Landscape

December 9, 2019

Presented By:

Andrew Turnbull, Of Counsel, Employment and Labor Group

Amber Shubin, Associate, Employment and Labor Group

Morrison & Foerster, LLP

INTRODUCTION – WHO WE ARE

**MORRISON
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Andrew Turnbull
Of Counsel
703-760-7717
aturnbull@mofo.com

- Trade secrets and restrictive covenants enforcement and litigation
- Counseling and defending government contractors on employment matters
- Strategic HR advice and Corporate Transactions



Amber Shubin
Associate
703-760-7772
ashubin@mofo.com

- Employment and labor M&A
- Drafting employment related agreements
- Employment counseling and litigation including wrongful termination, discrimination and harassment

- **This presentation is educational in nature and not legal advice.**
- **The material in this presentation does not address all of the legal issues relevant to the subject matter**
- **The application of this material to any particular facts or circumstances requires consultation with an attorney.**
- **Although we hope that you find this presentation helpful, it does not constitute legal advice or form an attorney-client relationship.**

- **Noncompetes and Nonsolicits Overview**
- **Growing Hostility Towards Noncompetes and Nonsolicits**
- **Drafting Noncompetes and Nonsolicits**
- **Enforcing Noncompetes and Nonsolicits**

- **Noncompetition Agreement:** Generally prevents employees from competing with their employer during their employment and for a reasonable period of time thereafter
- **Nonsolicitation of Customers or Vendors:** Generally prevents employees from soliciting clients or vendors of their employer for a reasonable period of time after their employment ends
- **Nonsolicitation of Employees or Contractors:** Generally prevents employees from soliciting employees or independent contractors for a reasonable period of time after their employment ends



GROWING HOSTILITY TOWARDS NONCOMPETES

KEY STATE LAW DEVELOPMENTS

Courts & Legislatures Take Aim at Restrictive Covenants – Laws Recently Enacted

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State	Effective Date	Summary
Washington (HB 1450)	1/1/2020, regardless of when the noncompete was signed	• No noncompetes for employees earning less than \$100,000 annually or independent contractors earning less than \$250,000 annually (adjusted annually for inflation) • Post-employment duration limited to 18 months • New procedural and timing requirements • Requires “garden leave” pay equal to the employee’s base salary at the time of termination (less compensation earned via subsequent employment) for the entirety of the restricted period for any employee terminated via a “layoff” • Requires WA choice of law and forum • If noncompete unenforceable (or only partially enforceable), employer pays employees actual damages or a statutory penalty of \$5,000, whichever is greater, plus reasonable attorneys’ fees, expenses, and costs
Maryland (SB 328)	10/1/2019	• No noncompetes for employees earning \$31,200 or less annually
Maine (Sec. 1. 26 MRSA c. 7, sub-c. 13)	9/18/2019	• No noncompetes with employees earning less than 400% of the poverty line (or \$49,960 for 2019) • New procedural and timing requirements for entry into the agreement and for enforcement (e.g., a 6 month waiting period for the noncompete obligations to become binding)

KEY STATE LAW DEVELOPMENTS

Courts & Legislatures Take Aim at Restrictive Covenants – Laws Recently Enacted

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State	Effective Date	Summary
Massachusetts (M.G.L. c. 149 § 24L)	10/1/2018	• Limits duration of post-employment noncompetition agreements to 12 months • Requires “garden leave” pay or “other mutually agreed upon consideration” • Prohibits noncompetes for nonexempt employees and employees terminated without cause or laid off • New procedural and drafting requirements • Requires MA choice of law and forum for MA employees
Idaho (I.C. § 44-2704(6))	7/1/2018	Places burden on employers to prove harm to legitimate business interests, making it more difficult to restrict the movement of “key employees.”
Nevada (N.R.S. § 613.195)	6/3/2017	• “Valuable consideration” required • No nonsolicit of customers that employee did not previously solicit for employer or customers that voluntarily leave with employee • Must pay for noncompete if employee laid off
California (Labor Code § 925)	1/1/2017	Must use CA choice of law and forum for CA employees, unless employee represented by counsel
Illinois (820 ILCS 90/1 to 90/10)	1/1/2017	No noncompetes with “low-wage workers” (employees paid less than \$13 per hour)

KEY STATE LAW DEVELOPMENTS

*Courts & Legislatures Take Aim at Restrictive Covenants –
Proposed Laws on the Horizon*

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Jurisdiction	Summary
New Jersey (Assembly Bill A1769)	• Noncompete must be in writing at the earlier of a formal offer or 30 business days before employment • Duration limited to 12 months post-employment • Geographic reach limited to areas where the employee provided services or had a material presence in last two years of employment • Specific services limited to services employee provided in last two years of employment • Cannot restrict employees from working with customers who choose to follow the employee without solicitation
Pennsylvania (House Bill 1938)	• Bans the use of noncompetes • Voids forum selection and choice of law agreements • Does not apply retroactively
Vermont (House Bill 556)	Bans any restrictive covenants that restrain an individual from engaging in a lawful profession, trade, or business

KEY STATE LAW DEVELOPMENTS

Courts & Legislatures Take Aim at Restrictive Covenants – Attempts to End Non-competes

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Jurisdiction

Summary

Various State Attorneys General

- 19 state Attorneys General signed a November 15, 2019 letter to the FTC asking it to ban all non-compete agreements

House Resolution 3920 – End Employer Collusion Act

- Introduced in July 2019 by Rep. Jerrold Nadler (D., NY)
- “This bill makes it unlawful for any entity to enter into a restrictive employment agreement, or to enforce or threaten to enforce a restrictive employment agreement. A ‘restrictive employment agreement’ is any agreement between two or more employers that prohibits or restricts one employer from soliciting or hiring another employer’s employees or former employees.”
- Provides for penalties under the Sherman Act and the Federal Trade Commission Act for entering into a restrictive employment agreement.

KEY STATE LAW DEVELOPMENTS

*Courts & Legislatures Take Aim at Restrictive Covenants –
State Attorney General Actions*

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- Illinois and New York AGs settled claim with Jimmy John's
 - Prohibits noncompetes for entry-level employees
 - Pay 100K to state to educate workers on overbroad noncompetes
- Illinois and New York AGs settled claim with WeWork
 - Release 1,400 rank-and-file employees from noncompetes
 - Reduce restrictions for another 1,800 community leads, managers, interior designers, architects, and senior software engineers
 - Shorten duration from one year to six months
 - Shorten geographic restrictions in 15-mile radius of where employee worked
 - Submit ongoing reports to AG on use of noncompetes
- New York AG posted FAQ on Noncompete Agreements and provided email and hotline to report unreasonable agreements

KEY STATE LAW DEVELOPMENTS

Courts & Legislatures Take Aim at Restrictive Covenants – Courts Strictly Scrutinizing Noncompetes

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Case	Court	Agreement Language	Holding
<i>Leska v. Grant Intern. Co, Inc.</i>	Supreme Court of NY	The Agreement at issue prohibited an employee from competing with the former employer for one year after termination. It also provided that the employee was not to solicit the former employer's customers, employees, contractors or vendors. The employee agreed to protect the former employer's information including vendor and customer lists, profit margins and pricing. There was no geographic restriction.	Overbroad; lacked a geographic restriction and was being used against employees with no unique skill sets
<i>Bower v. FDR Services Corp.</i>	Supreme Court of NY	The employee was prohibited from “engag[ing] in or participat[ing] in any business activity” that was “directly or indirectly, competitive with any business carried on by the[former employer] or its subsidiaries and affiliates”.	Overbroad; no geographic restriction and prevented employee from working in an entire industry.
<i>Manganaro Northeast, LLC v. De La Cruz</i>	D. Mass.	Employee will not, directly or indirectly, whether on behalf of him/herself or on behalf of any other person or entity, solicit, bid, work on, or be involved in any capacity with, any proposal, bid, application, project or customer that the Company contracted with, was involved with or was considering during Employee's employment with the Company. [...] Employee further agrees that, during the same two year period, Employee will not directly or indirectly engage in or contribute knowledge and abilities to any business or entity in direct competition with the Company in Massachusetts, Connecticut, Rhode Island, Vermont, New Hampshire and Maine.	Overbroad; prohibited work of any kind for a competitor

KEY STATE LAW DEVELOPMENTS

Validity of Nonsolicitation Agreements in California After AMN Healthcare

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- ***AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.***
 - AMN and Aya were competitors in the business of providing temporary workers to medical care facilities. AMN brought suit, claiming that former AMN recruiters working for Aya breached the nonsolicitation agreements with AMN by recruiting AMN temporary workers to join Aya.
- **Holding** – Employee nonsolicit was invalid under CA section 16600 because it prohibited “soliciting or recruiting...any employee of AMN” restrained individual defendants from practicing with Aya their chosen profession—recruiting temporary nurses listed in AMN’s database.
- **Takeaways**
 - *AMN Healthcare* provides authority to invalidate employee nonsolicits.
 - *AMN Healthcare* creates a split with *Loral v. Moyes* (1985) where court found nonsolicit of employees were reasonable
 - Trial courts must decide between the conflicting decisions.
 - Many subsequent courts have agreed with AMN

DRAFTING ENFORCEABLE NONCOMPETES AND NONSOLICITS IN LIGHT OF SHIFTING LEGAL LANDSCAPE



➤ Necessary

- Is a noncompete or nonsolicit necessary?
- Are there other options for obtaining the desired result?

➤ Context

- New or continued employment
- Level and role of employee
- Independent contractor
- Sale of a business or significant investment



➤ What law applies

- Some states will not enforce noncompetition agreements (e.g., CA, ND, OK).
- Other states exempt certain professions (e.g., physicians, attorneys, broadcasters)
- Choice of law provisions do not mean that chosen forum will automatically apply

- *Consideration*
- *Legitimate business interest*
- *Duration*
- *Geography*
- *Functional Restrictions*
- *Public Policy*

➤ Start of at-will employment

- Generally sufficient in most states (e.g., NJ, NY, VA, MD, DC, DE, FL, IN, KY, PA)
- Some states may require more, such as continued employment for certain period, bonus, stock options (e.g., IL, NC, SC, TX, WA, OR, TN)

➤ Continued at-will employment

- Sufficient (e.g., MD, NJ, NY (under certain circumstances), DE, IN, FL)
- Not sufficient (e.g., CT, MA, DC, KY, PA, WV)

➤ Some states have laws requiring specific timing or format for presenting noncompete (e.g., MA, NC, WA)

➤ Separation agreements

- Require compliance with all existing noncompetes and nonsolicits to receive severance
- Including noncompete and nonsolicits in separation agreements for first time may face enforceability issues

- Restriction must be no broader than the employer's legitimate protectable interest
 - Trade secrets
 - Confidential information
 - Customer goodwill
 - Unique skills or training
 - Certain relationships
 - Customer or prospective customers
 - Some states require long term relationship or carve out employee's pre-existing customer relationships
 - Employees
 - Vendors?
 - Referral sources?



- Depends on state and other circumstances surrounding the employee
 - Rule of thumb
 - Under one year generally enforceable
 - Over 2 years harder to show legitimate interest
 - Some states have statutory caps or presumptions (e.g., FL, MA, LA)
- Some states balance duration with geographical restriction



- What geographic territories can employers protect
 - Where the company conducts business
 - Where the employee works
 - Where the customers are located
 - Some states have laws governing the scope of geographic restrictions (e.g., LA, GA, MA)
- Lack of geographic restrictions
 - Company must really operate worldwide or show other factors to make it reasonable
 - Employee operated on global scale because of technology (e.g., ecommerce based company)
 - High-ranking employee that oversaw global operations
 - Restriction only covers certain clients or products/services
- Dynamic/variable restrictions may not be enforceable

- Janitor rule – blanket prohibition of working for competitors in ***any capacity*** is usually NOT enforceable
- Limit restrictions to:
 - Performing similar role at competitor
 - Positions at competitor that would require disclosure or use of confidential information/trade secrets
- Definition of employer's business
 - Is it specific or does it contain potentially overbroad “catch all” (e.g., “any” business that works in the same field as the company versus actual competitors)
- Definition of competitor
 - Should inform employee of what activities are competitive

- Most jurisdictions generally view nonsolicits under the same standards as noncompetes
 - Some states apply a lower degree of scrutiny (e.g., IL, AZ, IN)
- Definition of client
 - Should be narrow (e.g., clients that employee had material contact with or obtained confidential information about during employment)
 - Prospective clients – needs to show clear protectable interest (e.g., active pursuit by employee, letters of intent, etc.)
- Potentially overbroad terms
 - Non-acceptance of business
 - No contact



- Employee nonsolicits are generally viewed under the same rubric as noncompetes, but some states will apply less scrutiny
- Generally enforceable to prohibit solicitation of employees supervised by or worked closely with the restricted employee
- May be unenforceable if restriction includes:
 - All employees at the company; or
 - Former employees that left a long time ago
- Watch for no hire provisions
- DOJ prohibition on “no poach” agreements does not apply to agreements with individual employees



- **Revise to make enforceable**
 - DC, CT, FL, OH, NJ, NY, MO, TX, GA, WV, PA
- **Blue Pencil (strike language but will not revise)**
 - AZ, CO, IN, MD, LA, NC, SC, WI
- **Red Pencil (“All or nothing”)**
 - NE, VA

- Choice of law and forum provisions in contracts generally upheld unless:
 - Chosen law lacks substantial relationship or application is contrary to forum with materially greater interest
 - Overreaching, against public policy, or unreasonable/burdensome
 - Statutory restrictions (e.g., CA, MA)
- Arbitration clause
 - Consider carve out for injunctive relief

OTHER TERMS TO INCLUDE IN THE AGREEMENT

- Employee agrees that the restrictions are reasonable
- Advise employee to have attorney review
- Employee agrees to injunctive relief without posting bond and pay attorney fees for breach (avoid prevailing party language)
- Severability and reformation
- Assignment to successor
- Consent to inform subsequent employer
- Tolling of restricted period for breaches (not enforceable in all states)
- Nondisclosure
- Return of company property and confidential info

STRATEGIES FOR MULTI-STATE EMPLOYERS

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One size fits all –
danger of being
unenforceable
(potential action
by state attorney
generals)

Separate
agreements for
certain
categories of
employees or
groups of states

Separate
agreements
for each state
for certain
groups of
employees

Custom
tailor
agreements
for each
employee –
burdensome

ALTERNATIVES TO NONCOMPETES AND NONSOLICITS

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- Forfeiture of Compensation and/or Benefits
 - Varies by state
 - Employee Choice Doctrine (e.g., NY, VA, MD)
- Garden Leave
 - Paying for a noncompete period
 - Usually short period
 - Law in this area is still developing – MA now requires garden leave; states tend to enforce garden leave only if the covenant it is supporting is enforceable (e.g., NY)

ENFORCING NONCOMPETES AND NONSOLICITS



- Is there credible evidence of one or more violations?
 - Gather all relevant agreements and policies
 - Are the agreements enforceable? (e.g., employer first breach, employee terminated without cause)
 - Issue litigation hold
 - Immediately preserve evidence (e.g., don't repurpose a former employee's laptop)
 - Investigate suspected improper activities
 - Review company e-mail, electronic systems, social media – Does the company need to engage a forensic expert or private investigator?
 - Talk to witnesses. Consider obtaining affidavits
- Secure networks and limit access to company systems
- Get people in place to secure customer relationships

DETERMINE STRATEGY FOR ADDRESSING SUSPECTED VIOLATION

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IS LITIGATION THE RIGHT OR ONLY CHOICE?

May allow competitor to unfairly enter the market

Failing to act quickly may hinder chances to obtain relief in the future (i.e. cannot show irreparable harm)

Need to send a message to employees and competitors that company is serious about protecting its rights

Could lose valuable business, trade secrets, or confidential info without litigation

Possibility of counterclaims

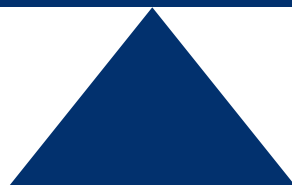
Lack of sufficient evidence of a violation or restriction is likely unenforceable

May negatively impact customer relationships or employee morale

Costly and time consuming

LITIGATION

NO LITIGATION



- Possible reasons to send cease and desist Letter
 - Potentially avoids expensive litigation while preserving rights
 - Opens dialogue for potential negotiated resolution
 - Can serve as useful information gathering
 - Can be used in litigation to show investigation and good faith effort to resolve
 - Puts employee/new employer on notice to preserve discovery
- Possible reasons NOT to send cease and desist letter
 - Could trigger race to the courthouse
 - Potential tortious interference or defamation claim
 - Credible evidence of violation and harm to company too great to delay enforcement
- Consider whether to copy or send a separate letter to the new employer

- Decide whether to pursue a TRO/preliminary injunction
 - Generally, the stronger the admissible evidence, the more likely should consider TRO
 - Consider requesting a preliminary injunction with request for expedited discovery
- Determine where to file
 - Forum selection clause – enforceable?
 - State or federal court
 - Arbitration

➤ Pros

- Deep pocket if case of damages
- Discovery is easier to obtain against a party

➤ Cons

- May not have come to employee's defense but for being sued
- Brings additional resources into fight
- Added expense
- Jurisdiction?
- Negative consequences with customers or in industry

POTENTIAL CAUSES OF ACTION

- Breach of contract
- Tortious interference with contract or business relations
- Breach of fiduciary duties
- Misappropriation of trade secrets (state USTA or DTSA)
- Unfair competition
- Civil or common law conspiracy



Questions?