

Non-Competes: Movement on both sides of the Atlantic

Article By:

Christopher Hitchens

Julie L. Gottshall

Brigitte Weaver

Non-compete provisions are receiving a lukewarm reception by the authorities on both sides of the Atlantic at the moment. With plans to make changes in the UK being actively discussed, and at a federal level in the United States as well as in several states, businesses should plan for some choppy and potentially uncharted waters.

Here is the current forecast.

The Prohibition Era

On 5 January 2023, the US Federal Trade Commission (FTC) announced a proposed rule that would prohibit post-employment non-compete clauses in employment contracts across the United States. This was followed by a period of public comment, which ended on 19 April 2023. We have yet to see a final version published in the *Federal Register*, which would start the clock on a 60-day countdown before the rule would become effective.

The proposed rule, which would supersede state law, be retroactive in scope and would require employers to affirmatively provide notice to employees rescinding already signed non-competes, would stop employers from imposing direct non-competes on their workers (as well as preventing the use of indirect or de facto non-competes). Although some employers – such as certain financial institutions, nonprofit organisations and air carriers – may be exempt, violations of the proposed rule, which seeks to put an end to what the FTC describes as an 'unfair method of competition,' could result in fines and penalties.

New York

Legislation to effectively ban post-employment non-compete agreements in the state of New York has been proposed and it will be for Governor Kathy Hochul to approve (or not approve) it. If approved, the legislation would amend the current New York labour law by (i) banning employers from requiring their employees to sign up to post-employment non-compete agreements; and (ii) limiting the practice of restrictive covenant agreements. Note that many "restrictive covenants" will

remain available, including terms for confidentiality, employee non-solicitation, non-interference with customers learned about during employment, etc., and in equity agreements.

The reasoning behind this shift is an apparent desire (at a federal level but echoed by New York lawmakers) to end the perceived negative effect non-competes have on consumers and the labour market, while improving employee career mobility. If signed, the bill will take effect 30 days later, and will apply, on a prospective basis, to any non-compete agreements that are entered into or modified after that date. At this point, conventional wisdom holds that the Governor will not sign such a broad ban bill. However, it is an indication of the prevailing wind at state level that such a bill has been proposed, with Minnesota also just recently passing a law prohibiting employment-based non-competes.

Caps in the UK

In lieu of an outright ban (and after a consultation on the reform of post-termination non-compete clauses launched in December 2020), the UK Government proposed in May 2023 that there should be a maximum three-month cap on non-compete restrictions in employment contracts.

Subject to any parliamentary shift in the next year, this legislation is currently due to be brought forward 'when parliamentary time allows.' Whether this occurs before the next UK general election is unclear.

As in the United States, the UK Government is keen to increase competition and employee mobility in an attempt to drive forward the labour market. It is not yet clear whether this limitation, which will apply both to employees and casual workers (i.e., those working under a contract for service), will be retroactive or entirely forward-looking.

The UK Government suggests that the use of 'garden leave' will be largely unaffected by the current proposals and so it looks like this will continue to be used as a de facto paid non-compete period.

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