

2021 US Labor & Employment Webinar Week

**Insights and Compliance Strategies for a New World**

February 1 – 4, 2021



# **Non-Competes in Uncharted Territory: Protecting Your Interests Under Restricted Covenants in 2021**

February 4, 2021

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# Presenters

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# Agenda

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- Different Types of Restrictive Covenants
- Recent Legislative Trends and Other Developments
  - New State Laws
  - Federal and State Proposals
- Practical Considerations
  - Impact of COVID/Remote Working
  - Drafting and Enforcement Considerations
  - Post-Termination Investigations & Litigation Considerations





## Different Types of Restrictive Covenants

# How Employers Can Protect Their Interests

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Non-Competes

Non-Solicitation of  
Employees

Non-Solicitation of  
Clients/Customers

Non-Disparagement

Confidentiality  
Provisions/  
Non-Disclosure  
Agreements

# Recent Legislative Trends



# Trends

- Nearly all states permit non-compete agreements in some form, with California as an exception unless there is a sale of business and with North Dakota and Oklahoma allowing them only in narrow circumstances.
- Despite most states permitting them in some form, more states are passing laws limiting restrictive covenants:
  - More restricted when it comes to certain types of workers (*i.e.*, lower wage earners)
  - Notice requirements
  - Legitimate business interests and “indirect” solicitation more narrowly construed
- Trend is to put more restrictive measures in place





# State Laws in the Last Five Years

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Washington

Louisiana

Virginia

Maine

Indiana

Maryland

Oregon

Idaho

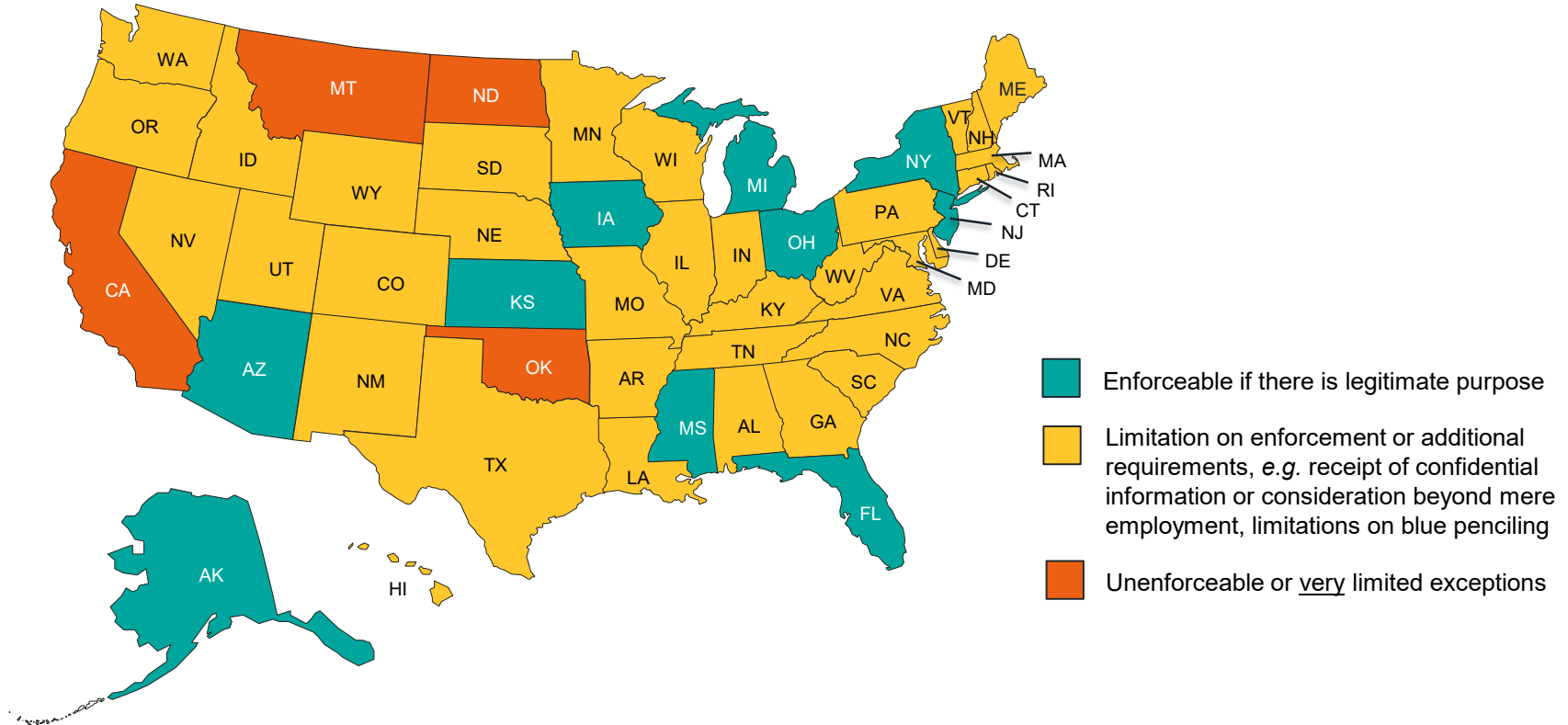
Massachusetts

New  
Hampshire

Rhode  
Island

Illinois

# Overview of Non-Compete Agreements



# Other Upcoming and Proposed Regulations

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- **District of Columbia’s “Ban on Non-Compete Agreements Amendment Act of 2020”**
  - Signed into law by Mayor Bowser on January 11, 2021
  - Broadly bars non-competes with employees who work in D.C., with only narrow exceptions
  - Also contains broad prohibitions on “no moonlighting” agreements that apply during the period of employment
- **New York Senate Bill S3937C**
  - Would create additional restrictions on “no poaching” agreements between employers (including in franchise agreements)
  - Currently in committee



# Federal Ban?

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- Prior to taking office, President Biden released his [“Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions.”](#)
- “Biden will work with Congress to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets, and outright ban all no-poaching agreements,” which are common in franchisor/franchisee and other arrangements.
- Federal Trade Commission Action?
- Workforce Mobility Act
- Freedom to Compete Act



# Computer Fraud and Abuse Act

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- Prohibits unauthorized access of computers, mobile devices, websites, and certain databases. Also prohibits “exceed[ing] authorized access.”
- Allows for private civil causes of action for injunctive relief and damages, often creating a claim for theft of trade secrets and a basis for federal court jurisdiction.
- US Supreme Court: Van Buren v. United States
  - Cert. granted April 20, 2020. Argued November 30, 2020.
  - Case involved a police officer who accessed a law enforcement database with the intention of selling certain information to a private party.
  - Court to decide whether a person violates the CFAA where they are authorized to access for one purpose, but instead access and “obtain” for an unauthorized purpose.
  - Sotomayor, Kavanaugh, Gorsuch, and Kagan signaled that they believe the government had interpreted the CFAA in an overly broad manner.



## Case Highlights



# Key Cases

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## California: *Ixchel Pharma LLC v. Biogen Inc.*

- California Business and Professions Code § 16600: “[E]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”
- California Supreme Court held, for the first time, that § 16600 applies to business-to-business restrictive covenants.
- However, the Court held that a “rule of reason” will govern whether such restrictive covenants are enforceable. This standard assesses “whether an agreement harms competition more than it helps by considering the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption.”
- Particularly relevant for out-of-state parties dealing in California, given California’s choice-of-law standard.

# Key Cases

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## Massachusetts: *Robert Half Int'l v. Simon*

- Massachusetts Superior Court preliminarily enjoined former employees from working for a competitor within 50 miles and soliciting certain clients with whom they personally worked
- Court did not, however, prohibit the former employees from soliciting clients with whom they did not personally work because the employer lacked a protectable interest
- Court also narrowly interpreted an employee non-solicit covenant, holding that it did not bar a former employee from telling a current employee to contact him if she was interested in leaving

## Massachusetts: *Townsend Oil Co. v. Tuccinardi*

- Massachusetts Superior Court held that former employee did not violate customer non-solicit when his new employer sent mailers to customers with his name on them, and when he took and returned calls from his former employer's customers
- Court emphasized, among other facts, the broadly distributed nature of the mailers and the fact that the employee did not prepare them himself
- Court showed that Massachusetts tribunals (and those in states with similar laws) will heavily favor employees when balancing the harm, and afforded little weight to the impact on the employer's good will and the fact that the former employer lost certain customers to the new employer

A blurred background image of an office interior. In the foreground, there are white desks with various electronic devices like laptops and tablets. Several people are seated at the desks, working. The background shows more office space with fluorescent lighting on the ceiling and other workers in the distance. A semi-transparent teal rectangle is positioned on the right side of the image, containing the title text.

# Practical Considerations



# What is Lawful vs. What is Recommended

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- Impact of COVID-19
  - Increased unemployment may make it easier to obtain covenants from candidates
  - Modifying geographic scopes to track any changes created by remote working
  - Did COVID-19 shift priorities regarding covenants (*e.g.*, making a particular customer or employee particularly more important than they had been in the past)
- Does it make sense for your business?
- Does it make sense for the employee at issue?
  - How much access to information does the employee actually have?
  - Are we preventing ability to earn a living?
- Are we willing to consistently enforce?

# Drafting Considerations

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Legitimate Business Interest

Injunctive Relief/  
Attorneys' Fees

Tolling Provision

Reasonableness:

- Duration
- Scope
- Geographic Reach

Identity of Competitors

Posting of Bond

Defend Trade Secrets Act

# Enforcement Considerations

- Increased remote working creates an increased need to preserve any electronic devices after the departure of a key employee
- Where COVID has adversely affected an adverse party's financial circumstances, that may affect their approach to litigation (possibly more inclined to avoid litigation, but possibly more inclined to litigate over critical employees or customers)
- Impact of COVID on ability to obtain timely hearings (which will likely be remote) and decisions
- Tribunals' potential aversion to strictly enforcing restrictive covenants on employees outside key positions, given the overall position of the job market and the economy







# Post-Termination Considerations and Investigations



# Post-Termination

- Review and revise any exit interview procedures (especially for remote employees) to ensure that all property has been returned
- If the employer offers a severance agreement, employee should renew any pre-existing restrictive covenants (with any necessary changes)
- Address separation decisions in a manner that does not impede the enforceability of restrictive covenants (*e.g.*, understanding which states will void a covenant upon termination by the employer, structuring the separation to minimize any potential claims by the employee that could attempt to force the employer into a global settlement)





## Post-Termination Actions if there is a Breach

- Soft Letter
- Internal investigation
- Forensic investigation
- Cease and desist letter to former employee
- Letter to subsequent employer

# Questions? Please let us know.

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