

PRESENTED AT

31st Annual Labor and Employment Law Conference

May 30-31, 2024
Austin, TX

**Will The FTC's Ban On Non-Competes
Resolve The Balkanization of Non-Compete
Laws Amongst The States?**

Ken Hughes

Author Contact Information:

Ken Hughes PLLC
Houston, TX

khughes@khughesplc.com

713-588-0890

TABLE OF CONTENTS

I.	The Growing Balkanization Amongst States Regarding Noncompete Agreements	1
II.	The FTC’s Proposed Rule Banning Non-Competes.....	3
	A. Definitions.....	3
	B. Applicability of & Exceptions to Final Rule.....	5
	C. Exemptions from FTC Act	5
	D. State Law Preemption	6
	E. Notice Requirements for Existing Non-Competes	6
	F. Challenges to FTC’s Legal Authority.....	7
	G. FTC’s Legal Authority to Promulgate the Final Rule.....	7
	H. Major Questions Doctrine.....	8
	I. Non-Delegation Doctrine.....	8
III.	A Summary Of Non-Compete Laws Amongst The States	9
	A. Alabama.....	9
	B. Alaska	10
	C. Arizona	11
	D. Arkansas	12
	E. California	13
	F. Colorado	14
	G. Connecticut	14
	H. Delaware.....	15
	I. District of Columbia	16
	J. Florida	17
	K. Georgia	18
	L. Hawaii	20
	M. Idaho	21
	N. Illinois.....	22
	O. Indiana	25
	P. Iowa	26
	Q. Kansas	27
	R. Kentucky.....	27
	S. Louisiana	27
	T. Maine.....	28
	U. Maryland	29

V.	Massachusetts	29
W.	Michigan.....	29
X.	Minnesota.....	30
Y.	Mississippi.....	30
Z.	Missouri.....	31
AA.	Montana	31
BB.	Nebraska.....	32
CC.	Nevada.....	32
DD.	New Hampshire	32
EE.	New Jersey	33
FF.	New Mexico	33
GG.	New York.....	34
HH.	North Carolina	34
II.	North Dakota.....	35
JJ.	Ohio	35
KK.	Oklahoma	35
LL.	Oregon.....	35
MM.	Pennsylvania	36
NN.	Rhode Island	36
OO.	South Carolina.....	37
PP.	South Dakota.....	37
QQ.	Tennessee	37
RR.	Texas.....	44
SS.	Utah	38
TT.	Vermont.....	38
UU.	Virginia.....	39
VV.	Washington	40
WW.	West Virginia.....	42
XX.	Wisconsin	42
YY.	Wyoming	43
IV.	Texas Noncompete Law	44
1.	The Primary Sources Of Law That Govern Covenants Not To Compete in Texas	44
A.	The Texas Covenant Not to Compete Act	44
B.	The Effect of the Preemption Clause In The Act	44
C.	Cases Holding That The Act Does Not Preempt the Common Law or Other Statutes	45
1.	Cases Involving Temporary Injunctive Relief	45
2.	Cases Involving Declaratory Judgments	46

D.	Can Another State’s Law Regarding Non-competes Apply to a Texas Employee?	47
2.	The Basic Requirements For A Non-Compete Under Texas Law	48
3.	When Is A Covenant Not To Compete Ancillary To An Otherwise Enforceable Agreement?	49
A.	The Requirement That The Non-Compete Be Ancillary To An Enforceable Agreement	49
B.	Types Of Consideration That Courts Have Found To Be Sufficient For A Non-Compete Agreement	51
4.	The Reasonability Requirement	52
A.	Geographic Scope	52
B.	Duration of Non-Compete	53
C.	Scope Of Activity Restrained	54
5.	Evidence Required To Establish A Violation Of A Covenant Not To Compete Sufficient For Temporary Injunctive Relief	54
6.	Attorneys’ Fees In Non-Compete Cases.....	55
A.	Employers Cannot Recover Attorneys’ Fees In Cases Involving Covenants Not To Compete	55
B.	An Employee May Recover Attorney Fees Under The Act; However, The Burden Is High Under the Statute	55
7.	Injunction Orders and Bonds	56
A.	Tex. R. Civ. P. 683: Form and Scope of Injunction Order	56
B.	Rule 684: The Bond Requirement	57
8.	Texas Cases Involving Non-Competes in 2024	57
A.	Training Repayment Program Treated As Noncompete	57
B.	Global Noncompete Held Unenforceable	58
C.	Forum Selection Clause Involving Nebraska Employees Required Suit Be Filed In Texas	58
D.	Industry-wide Noncompete Held Unenforceable	58

I. The Growing Balkanization Amongst States Regarding Noncompete Agreements

Like many other areas of law and politics in the United States, conflicts are growing amongst states (both state courts and legislatures) regarding non-compete agreements. According to the Federal Trade Commission, approximately one in five American workers—approximately 30 million people—are bound by a non-compete clause. Yet, state laws regarding the enforceability of non-compete agreements vary widely amongst the fifty states and other political subdivisions in the United States. See Robert McAvoy, *How Can Federal Actors Compete on Non-competes? Examining the Need for and Possibility of Federal Action on Noncompetition Agreements*, 126 Dick. L. Rev. 651, 683, n. 40 (2022); see also Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. Pa. J. Bus. L. 751, 778-79 (2011) (detailing the spectrum of approaches taken by states).

Differences amongst state laws has the potential to cause substantial uncertainty. For example, several states including Minnesota, California, Oklahoma, and North Dakota ban non-compete agreements altogether. Other states are considering similar prohibitions. On December 23, 2023, New York’s Governor vetoed a proposed ban that had been approved by the legislature.

Other states have a more focused approach in which certain types of employees are exempt from noncompete agreements. For example, since 2016, at least ten states banned the use of noncompete agreements against certain “low wage” employees. Christopher J. Sullivan & Justin A. Ritter, *Banning Noncompetes in Virginia*, 57 U. Rich. L. Rev. 235 (2022).

Many states now impose various types of penalties whenever an employer attempts to enforce a non-compete agreement. The type of penalty depends on the nature of the violation.

In California, non-compete agreements are prohibited by law (Cal. Bus. & Prof. Code § 16600), and employers cannot require employees or applicants to agree in writing to any term or condition known to be prohibited by law (Cal. Lab. Code § 432.5). California employers who violate the ban may be found guilty of a misdemeanor and either fined up to \$1,000, imprisoned up to six months, or both (Cal. Lab. Code § 23 and Cal. Lab. Code § 433).

In Colorado, entering into, presenting to an employee or prospective employee as a term of employment, or attempting to enforce an unenforceable non-compete agreement is a violation of Colorado law (C.R.S. § 8-2-113). An employer that uses force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation wherever the person chooses to work may be found guilty of a Class 2 misdemeanor. An employer may also be liable for actual damages and a \$5,000 penalty per harmed employee or prospective employee.

Illinois law establishes various non-compete restrictions including an income threshold (820 Ill. Comp. Stat. 90/). For violations of the non-compete restrictions, the Illinois Attorney General may request — and a court may impose — a civil penalty not to exceed \$5,000 for each violation and \$10,000 for each repeat violation within a five-year period.

Maine establishes an income threshold and various notification requirements, among other things (Me. Rev. Stat. Ann. Tit. 26, §§ 599-A to 599-B). Employers who violate these requirements may be found guilty of a civil violation and can be fined a minimum of \$5,000.

In Nevada there is an income threshold and various other requirements for employers who enter non-compete agreements (Nev. Rev. Stat. §§ 613.195, 613.200). Employers who violate these requirements may be guilty of a gross misdemeanor and fined up to \$5,000 for each violation. In addition, the “Labor Commission may impose against each culpable party an administrative penalty of not more than \$5,000” for each violation.” If fines or administrative penalties are imposed against an employer, the employer may also be liable to pay for the cost of the proceeding, “including the investigative costs and attorney’s fees.”

Oregon’s non-compete law is part of the state’s minimum wage laws (Or. Rev. Stat. § 653.295). It does not state how or if the law can be “violated.” Instead, it merely states that a non-compete agreement is void and unenforceable if various requirements are not satisfied. Per the state’s catchall statute regarding its minimum wage laws (Or. Rev. Stat. § 653.991), a violation constitutes a misdemeanor. However, it is unclear when, if ever, entering an invalid non-compete agreement gives rise to a misdemeanor.

In Virginia, an employer violates Virginia’s non-compete law (Va. Code Ann. § 40.1-28.7:8) by entering into, enforcing, or threatening to enforce an invalid non-compete agreement with a low-wage employee. Employers who violate these restrictions may be subject to a \$10,000 civil penalty for each violation. Virginia law also creates posting requirements. An employer who fails to post the non-compete law in the workplace will be issued a written warning for the first offense, a civil penalty not to exceed \$250 for the second offense, and a civil penalty not to exceed \$1,000 for each subsequent offense.

In Washington, if a court or arbitrator finds that a non-compete agreement violates Washington’s non-compete law, the violator may be required to pay the aggrieved party actual damages or a statutory penalty of \$5,000 — whichever is greater — along with reasonable attorney’s fees, expenses, and costs (Wash. Rev. Code. § 49.62.080). An employer seeking to enforce a non-compete agreement may be subject to this penalty, even if a court or arbitrator reforms, rewrites, modifies, or partly enforces the agreement.

Washington DC non-compete law establishes an income threshold and various notice requirements (D.C. Act 24-256). Employers that violate these restrictions may be subject to an administrative penalty between \$350 and \$1,000. Moreover, an employer that attempts to enforce an unenforceable or void non-compete provision is liable for a minimum of \$1,500 to each employee against whom the employer attempted to enforce

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: The New Balkans: Non-Compete and Restrictive Covenants Under Siege Yet Still Commonplace

Also available as part of the eCourse

[Employment Litigation Hot Topics \(2024\)](#)

First appeared as part of the conference materials for the
31st Annual Labor and Employment Law Conference session

"The New Balkans: Non-Compete and Restrictive Covenants Under Siege Yet Still
Commonplace"