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**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

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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

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