

Daily Labor Report ®  
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# States Add to 'Fire Hose' of Noncompete Issues Vexing Employers

By Chris Marr

Deep Dive

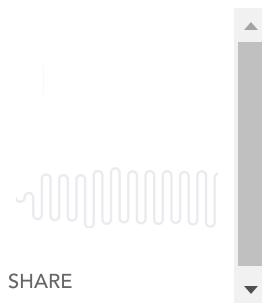
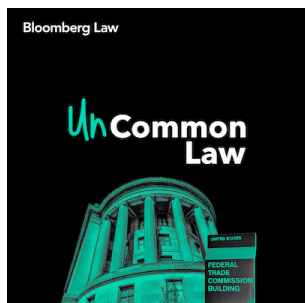
- Barrage of state, federal changes require rethinking contracts
- Minnesota ban effective July 1; other states consider bans

Companies' ability to block employees from going to work for a competitor keeps getting narrower and less legally certain, as state limits on restrictive employment contracts spread alongside federal scrutiny.

Minnesota just became the fourth state to ban virtually all employee noncompetes, and a slew of others have recently considered following suit. The bans add to a diaspora of limits that states have enacted over the last decade and continue to expand, many of them aimed at banning noncompetes for low- or middle-income workers or restricting their use in specific professions, like healthcare.

Although it lacks the nationwide reach of recent federal agency actions, the state legislative activity targeting noncompetes requires immediate attention from employers because it's concrete, takes effect quickly, and is less likely to be overturned in court, according to employment lawyers. Minnesota's ban, part of a sweeping labor bill (SF 3035) enacted May 24, applies to contracts signed on or after July 1.

"There's just a lot going on" related to noncompete policies, said Kevin M. Passerini, an attorney with Blank Rome LLP in Philadelphia. "It's drinking from a fire hose."



**PODCAST:** What happens when an employee signs a noncompete agreement and then leaves to strike out on her own? A look at how a noncompete agreement played out at one Minnesota hair salon.

## Noncompete Debate

An estimated one in five US workers or 30 million people are bound by noncompete agreements, including millions of hourly workers, the Federal Trade Commission said in January when proposing a sweeping ban on the contracts.

Proposals to ban or restrict noncompetes would improve the job mobility of workers and provide an overall boost to the economy and entrepreneurship, according to those measures' supporters. But business groups including the US Chamber of Commerce argue there are legitimate uses for noncompetes, including the protection of companies' trade secrets and confidential information.

California, North Dakota, and Oklahoma already ban post-employment noncompetes for employees. At least 11 states plus the District of Columbia have outlawed them for workers below certain wage thresholds, and those are steadily climbing, exceeding \$100,000 annually now in Colorado, D.C., Oregon, and Washington state.

Aside from Minnesota, New York has heavily debated restricting noncompetes this year. The New York State Senate passed a ban (S3100) on June 7. Though the state Assembly did not clear the measure before the formal end of its 2023 session, the ban could come up for a vote if the Assembly reconvenes to finish its agenda.

Bills pending in the Democratic-majority legislatures of Michigan and New Jersey also would ban or severely restrict noncompetes, but the bills haven't yet made it out of committee to qualify for House or Senate floor votes.

At the same time, the National Labor Relations Board has begun targeting employers' use of noncompetes as labor law violations, following a May 30 memo by the board's General Counsel Jennifer Abruzzo. The NLRB's first enforcement action against noncompetes ended in a private settlement with a Michigan cannabis company.

The NLRB and FTC efforts both will have to survive court scrutiny as business groups sue to challenge the agencies' authority over noncompetes, but they boost federal policing of the contracts at least in the near term.

"It's really a seismic change in the landscape of these agreements happening at the state level and at the regulatory level," said Thomas Muccifori, an attorney at Archer & Greiner P.C. in New Jersey.



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## PODCAST: Biden Admin Escalating Its War on Noncompete Pacts

### 'Tide Has Turned'

State courts in Minnesota and elsewhere already disfavored enforcing noncompetes in many instances, particularly in cases where the former employer seeks an injunction to block the worker from a new job, said Katie M. Connolly, an attorney with Nilan Johnson Lewis PA in Minnesota. But legislation such as Minnesota's new ban expands that policy position to block employers from even asking employees to sign the contracts.

"Any sort of template agreements that they're using need to be revised if they contain a noncompete," Connolly said. Although it's broad, the Minnesota ban is less severe than the FTC's proposal because it doesn't attempt to invalidate existing contracts, only new ones signed after July 1. The New York measure also wouldn't be retroactive.

The building momentum could even improve the chances of Congress passing a bill to restrict noncompetes, she said.

Bipartisan federal proposals have failed without so much as a committee vote in prior congresses. Among the measures reintroduced this year, a bill (S.220) from Sen. Chris Murphy (D-Conn.) would ban most employee noncompetes, while a proposal (S.379) from Sen. Marco Rubio (R-Fla.) would ban the contracts for low-income workers.

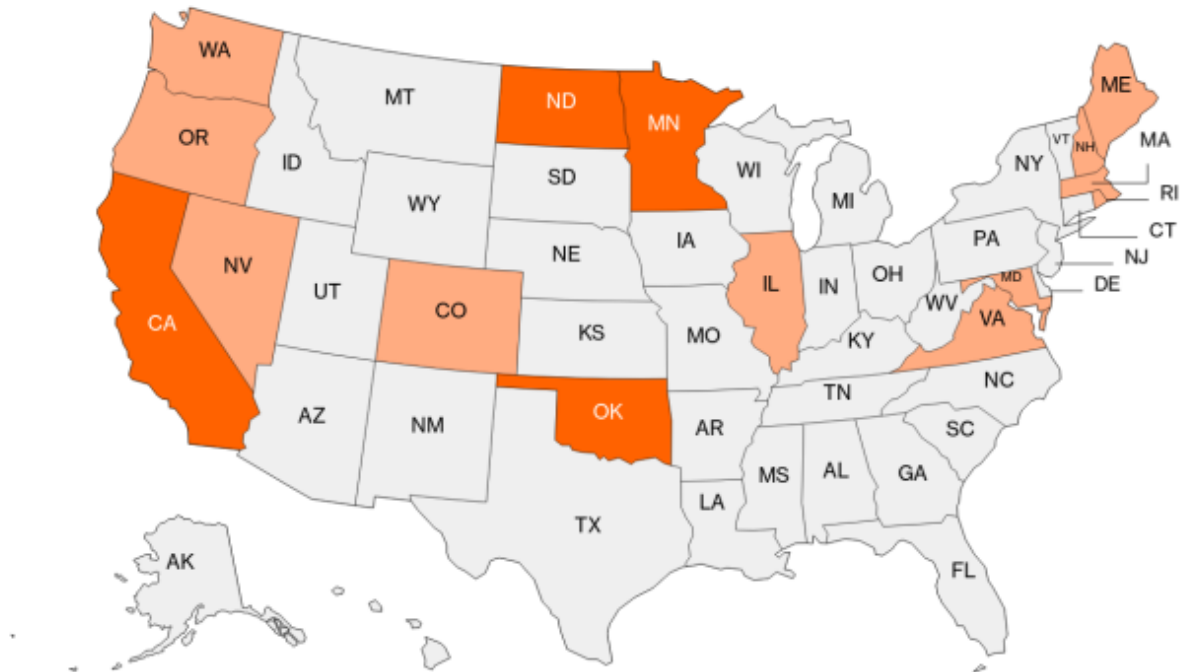
"The tide has really turned against these, and it could be that we would see something soon federally," Connolly said.

Some of Minnesota's major industries such as medical device makers already have moved away from using noncompetes, Connolly said, but those restrictions are still commonly used for financial advisors, physicians, hairstylists, and cosmetologists.

Beyond the broader bans, states continue to pass and expand noncompete limits related to hourly workers or those below a certain wage threshold. Maryland this year enacted a higher cutoff for worker noncompetes, at 150% of the state minimum wage, soon to be \$15 an hour starting Jan. 1, 2024. Virginia's employment commission increased the threshold earlier this year for its ban on noncompetes for low-wage workers to \$1,343 per week, just shy of \$70,000 annually.

## State Limits on Employee Noncompetes

■ Largely banned ■ Banned for low-wage/hourly workers



Source: Bloomberg Law analysis  
Minnesota ban takes effect July 1.

Bloomberg Law

### Alternative Strategies

Employers nationwide, but especially in states enacting strong restrictions, need to think carefully about when and why they've used noncompetes historically and consider alternative strategies going forward, said Russell Beck, an attorney at Beck Reed Riden LLP in Boston.

"Typically what they're trying to protect is their information including trade secrets and confidential information, as well as their relationships with the customers," he said.

Other ways to protect those assets include strengthening physical and electronic security for confidential data, training employees on their obligations, and improving processes for reinforcing customer relationships immediately after a key employee leaves, according to Beck.

Some companies also have begun to use notice requirements in place of noncompetes, he said. For example, a company might require an employee to give a 30- or 60-day notice before leaving, and the business could opt to keep them on the job or else pay them to stay home for that time period while the company takes steps to secure customer relationships that might be affected—a version of the garden leave concept that's common in UK employment contracts.






Businesses also can continue in many states to use nondisclosure agreements covering confidential business information and nonsolicitation agreements barring employees from attempting to carry customer relationships off to a new employer or their own company.

"Companies are going to want to be as aggressive as they can within the confines of the legislation," Passerini said.

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### Documents

-  [New York S3100](#)
-  [Minnesota SF 3035](#)
-  [S.220](#)
-  [S.379](#)
-  [FTC's proposed noncompete rule](#)

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