Trade Secret Quarterly

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Protecting Against the High Cost of Trade Secret Violations

Staggering awards in trade secrets violation cases have become almost commonplace. In recent months, an aerospace company was hit with an $81 million damage award in Seattle after a jury found it misappropriated the trade secrets of an aircraft startup; in California, a reliable energy company was ordered to pay $604.9 million in compensatory damages and $195 million in punitive damages to a low-carbon fuel company in a trade secrets case; in Massachusetts, a manufacturer of wearable insulin pumps was awarded $452 million in damages (though the court later reduced the amount to $59.4 million with a permanent injunction); and in Arkansas, a national retailer was found liable to a startup focused on reducing food waste with an award of $72.7 million in compensatory damages and $150 million in exemplary damages.

Another high-impact case out of Illinois highlights the price tag that a company may pay when it hires an employee who uses a former employer's trade secrets.

The conflict in *that case* began nearly ten years ago with a failed business relationship between a technology company specializing in automation and data collection for the waste hauling industry and a manufacturer of garbage trucks. The two companies initially entered into a confidentiality agreement to explore integrating the tech company's proprietary data monitoring technology into the garbage truck manufacturer's fleet. The companies were ultimately unable to reach a deal—instead, the garbage truck manufacturer acquired another company, which it used to develop and launch a competing product.

During the negotiations, the then-Executive Vice President of the tech company worked with the garbage truck manufacturer to evaluate and demonstrate the technology. He later resigned from the tech company and joined the garbage truck manufacturer, where the tech company claimed he used its trade secret information to aid in the development of the garbage truck manufacturer's competing product. The jury agreed with the tech company and awarded it $29 million in compensatory damages and an additional $30 million in punitive damages.

Companies often take great measures to protect the integrity of their own trade secret information, but this case demonstrates that they should also take steps to ensure that employees they hire away from competitors do not place the company at risk for misappropriating trade secret information from their prior employers. This requires strategic onboarding.

First, companies should inform onboarding employees that as a new hire, they may possess trade secret information belonging to their former employer. Unless these employees are educated, they may not understand their duties to preserve the confidentiality of that information or the severity of the consequences of using or disclosing that information.

Second, companies should communicate a clear policy that prohibits employees from using or disclosing confidential or trade secret information belonging to their former employer or any other third party. This should be set forth in both a policy and in language contained in a notice or an employment agreement with the employee. The language should clearly state that, as a condition of employment, the employee may not bring, use, or disclose any third-party trade secret information. By erecting this type of firewall between the company's own information and that of third parties, companies can both mitigate the risks that employees may misappropriate the trade secret information belonging to others and build a foundation for defending against future allegations that may arise.

Where Does the FTC Final Rule Stand Today?

As you will recall, the Federal Trade Commission's (FTC) noncompete rule, finalized in April 2024, sought to ban most pre-employment noncompete agreements nationwide, with limited exceptions for senior executives and business sales. The rule immediately faced a wave of legal challenges from business groups and employers, resulting in federal court decisions that have blocked the rule's enforcement and cast serious doubt upon the FTC's authority to implement such a sweeping ban.

Although the Biden-era FTC filed appeals in both the Fifth and Eleventh Circuits, on March 7, 2025, the new administration moved to pause each appeal for 120 days. The motions to stay cited public statements by newly designated FTC Chair Andrew Ferguson questioning whether it is "in the public interest to continue defending this rule." In July, the FTC filed motions to stay the appeals for an additional 60 days, saying that "some additional time is necessary to determine whether the Commission should reconsider its defense of the rule challenged in this case." This will give the FTC until the end of September to determine if it will continue to defend the final rule or abandon the appeals.

With Republican Commissioner Mark Meador now confirmed, the FTC has a three-member Republican majority. Most observers expect a Commission vote soon to abandon the appeals and begin a formal rescission of the rule. Such a rescission would leave state law, traditional Section 5 enforcement, and the antitrust agencies' case-by-case approach as the primary federal constraints on noncompetes.

Revocation of the Biden-Harris Competition Order

On August 13, 2025, President Trump revoked Executive Order 14036 *Promoting Competition in the American Economy*, the 2021 directive that prompted multiple agencies—including the FTC, DOJ, DOL and NLRB—to address market concentration and expand protections for workers and consumers, particularly through initiatives targeting noncompete clauses. This repeal signals the Trump Administration's move away from top-down policy toward more traditional, case-by-case enforcement.

FTC Chair Andrew Ferguson noted that the Trump Administration is focusing "on protecting everyday Americans from anticompetitive practices through tailored action, promoting economic growth, and ensuring that American workers benefit from competition for their labor."

In response to President Trump's revocation of Executive Order 14036, Assistant Attorney General of the Justice Department's Antitrust Division, Abigail Slater, stated: "We are unleashing the new American Golden Age through antitrust enforcement that removes barriers to innovation and opportunity and limits regulatory burdens on free competition."

This development further signals that the FTC may abandon the pending appeals in the Fifth and Eleventh Circuits challenging the final rule's noncompete ban. If the agency withdraws, the status quo will remain—noncompete agreements continue to be governed by state law, with the FTC reviewing them on a case-by-case basis.

State Noncompete Reform Marches On: 2025 Legislative Highlights

Employers and practitioners once again find themselves recalibrating restrictive-covenant strategies as state legislatures accelerate efforts to reshape—and often limit—the use of employee noncompete agreements. In 2025 alone, a wave of new statutes, amendments, and clarifications has further narrowed the circumstances in which post-employment restraints may be imposed. Below is a survey of the most significant developments to date.

Broader Bans and Near-Bans

Wyoming *(effective July 1, 2025)*

Wyoming moved from a common-law "reasonableness" regime to one of the country's most restrictive statutory frameworks. With limited exceptions (sale of a business, protection of bona fide trade secrets, and covenants with executive-level personnel and their professional staff), all noncompete clauses are now void.

Kansas (effective July 1, 2025)

Although positioned as pro-business legislation, Kansas's new law imposes bright-line temporal limits: employee non-solicitation provisions may not exceed two years; customer non-solicitation provisions are "conclusively presumed to be enforceable" if the covenant is limited to "material contact customers" and does not exceed two years after employment.

Expanding Low-Wage and Hourly-Worker Protections

Virginia (effective July 1, 2025)

Since 2020, Virginia has prohibited noncompetes for "low-wage" employees, defined by reference to the state's average weekly wage. SB 1218 dramatically broadens that protection: any worker who is *entitled to overtime* under the Fair Labor Standards Act—regardless of salary level—now falls outside the permissible noncompete universe.

Healthcare–Specific Limitations

Arkansas (effective July 15, 2025)

Physicians licensed under the Arkansas Medical Practice Act can no longer be subjected to post-employment covenants that restrict practice scope or location. The statute leaves common-law principles intact for other professionals but closes the door on medical noncompetes entirely.

Texas (effective Sept. 1, 2025)

Texas retains its "reasonableness" standard for most employees but tightens rules for *all* healthcare practitioners (physicians, dentists, nurses, physician assistants, et al.).

Key provisions include:

- A mandatory buy-out right capped at the practitioner's then-current annual salary;
- A one-year/five-mile hard ceiling on duration and geographic scope; and
- Automatic voiding of any covenant if the practitioner is involuntarily terminated without cause.

Indiana – 2025 Amendment (effective July 1, 2025)

Building on its 2023 restrictions for primary-care providers, Indiana outlawed new noncompetes between physicians and hospitals or hospital systems. Existing agreements remain in place, and renewal or modification after July 1 is prohibited.

Utah (effective May 1, 2025)

Utah targeted the "gig-style" deployment of healthcare workers by barring healthcare services platforms from requiring noncompetes. The prohibition covers independent-contractor arrangements that commonly bind traveling nurses, locum tenens physicians, and allied health professionals.

Minority-Owner and Equity-Holder Carve-Outs

Colorado – 2025 Amendments (effective Jan. 1, 2026, with retroactive effect for agreements entered after Jan. 1, 2025)

Colorado, already a leader in restrictive covenant reform, has refined its 2022 statute to address minority owners who receive equity as compensation. When a noncompete is tied to the sale of that equity, the restraint may not extend beyond a period calculated as the ratio of (i) the total consideration paid to the individual seller divided by (ii) the seller's average annual cash compensation over the prior two years. Practically, this formula turns the covenant's duration into a math exercise, ensuring a direct link between payout and restraint length.

The Rise of Garden-Leave Alternatives

Florida – CHOICE Act (effective July 1, 2025)

In a state historically friendly to robust noncompetes, Florida introduced a fresh option: the "garden-leave" covenant. Employers may enforce up to four-year notice-period agreements if (1) the worker earns at least twice the county's mean annual wage and (2) the employer continues full salary and benefits during the restricted period.

Traditional noncompetes remain enforceable under existing Florida law, but the new statute provides an incentive to trade covenants for paid "cooling-off" periods.

Bills to Watch

Ohio - Pending SB 11 would effectively ban noncompetes in the state. The bill would also prohibit employers from enforcing out-of-state venue or forum provisions against workers who primarily reside and do business in Ohio. SB 11 is currently under review in the Senate Committee.

New York – A revamped ban with a *$500,000 "highly compensated" carve-out* for financial services and C-suite talent has been refiled after Governor Hochul's 2024 veto.

Practical Takeaways for Multistate Employers

- **Abandon One-Size-Fits-All Templates.** With duration caps, salary thresholds, and profession-specific bans diverging sharply, national employers must localize restrictive covenant language.
- **Revisit Equity and Bonus Programs.** As noncompetes fade, employers are turning to retention bonuses, deferred compensation, and stronger confidentiality agreements to fill the gap.
- **Audit Healthcare Practices.** The medical sector is under scrutiny; existing agreements with physicians, nurses, and advanced practitioners warrant immediate review.
- **Train the Front Line.** HR and recruiting personnel must understand where noncompetes are unenforceable to avoid over-promising protections or triggering statutory penalties.
- **Pair NDAs with Trade Secret Hygiene.** States continue to view narrow confidentiality covenants favorably—but only when employers can demonstrate diligent protection of proprietary information.

FOR MORE INFORMATION

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