

Preparing for What's Next: 5 Quick Hit Discussion Topics

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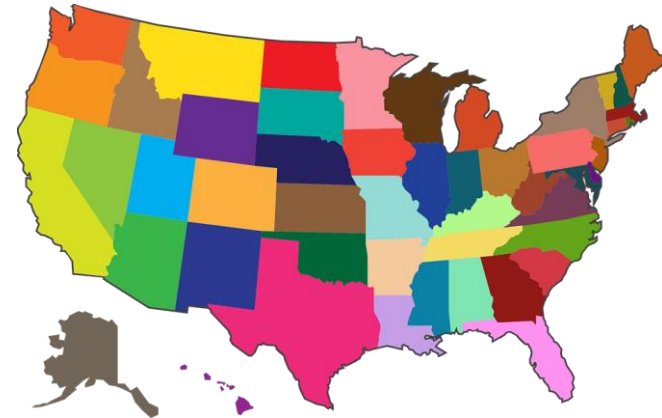
HR Forum

What is a non-compete(NC) agreement?

It is an agreement between 2 parties where one compensates the other for agreeing not to compete with the business directly or indirectly for a specific duration of time after employment has ended.



- Non-competes must adhere to state laws, which can vary greatly.
- The trend is increasingly against NC agreements. For example . . .
 - Minnesota- NCs are prohibited (effective 2024)
 - California prohibits future NCs and voids prior NCs with Notice (effective 2/24/24)
 - New York passed the prohibition, although it was vetoed (signaling discussion of change).



- NCs are often contested if the former EE finds the terms too restrictive.
- Even if allowed by state law, the Courts may invalidate a NC agreement.
- The Courts consider certain factors, such as:
 1. Is the NC needed to protect an ER's legitimate business interest?
 2. Does the NC have a reasonable time limitation?
 3. Is the NC limited to a specific geographic location?
 4. Is the NC supported by "consideration" (EE received some benefit)?



- According to the *Executive Order on Promoting Competition in the American Economy*, Pres. Biden requested that the FTC set limits on the use of NC clauses to curtail any unfair use that may unfairly limit worker mobility.
- The FTC has a proposed rule (awaiting final vote in April of 2024 at the earliest) that would institute a nationwide ban on NCs—prohibiting new and voiding existing. It is expected to be challenged if passed.
- While the Exec. Order has not changed current laws, it's likely that NCs will be facing extra scrutiny moving forward in some jurisdictions.



- Fortunately, ERs can still protect their legitimate business interests, such as confidential information and trade secrets through policies or through an employment agreement.
- Review your employment contracts, severance agreements and business policies to (1) ensure that you are complying with the law and (2) that your confidential business information and trade secrets are protected in some manner.



**“The only HR policy we truly follow is
‘No snacking at your desk’...unless you’re really
good at hiding it.”** ABCRADIO.FM

- As HR, you rely on your handbook and policies to train, ensure consistency and fairness, and better protect you from litigation.
- **However**, written policies are only as good as . . .
 - Their application and
 - Their compliance with current state and federal law.

- Think about just a few of the changes we have seen recently:
 - Expanded paid sick leave (CA, IL)
 - Added protections for off-duty cannabis use (WA/CA/OH)
 - Expanded eligibility for leaves of absence (OR)
 - 2023 Stericycle decision-Can't deter discussion on employment term
 - More stringent standards on the use of non-competes (CO, MN, CA)
 - Changes to state protected classifications (CO)
 - And . . .other topics often being discussed include the rights of EEs with regard to social media use, disruption and inappropriate conduct (off duty), and civility and courtesy.

- Are you changing your policies as quickly as the laws change?



- Take the time and concerted effort to review your employment policies to ensure compliance with the law.
- **Notably**, multi-state ERs must (1) use state-by-state application where EEs are employed or (2) use the laws with the strictest application (most beneficial to the EE).
- Do you have a good process for updating, disseminating and training on updates?



3. Are you prepared for more leave time?

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- More states are adopting or amending leave laws.
- What types of changes are being considered?
 - Paid Leave for PT EEs
 - Expanded use (school events/increased “FMLA”)
 - Minimum leave requirements for FT EEs, etc.
- Some recent examples include:
 - CA (2024) increased paid sick leave from 24 to 40 hrs/yr.
 - IL (2024) - Paid Leave for All Workers Act, gives paid leave of up to 40 hrs/12 mo.
 - MN (2024) requires up to 48 hours of paid leave/yr.



TAKE
SOME
TIME OFF
FOR LIFE

- They need to decide whether to (1) use state-by-state application where EEs are employed or (2) choose the leave plan that follows the strictest application (most beneficial to the EE).
- When deciding the approach, they need to consider morale, culture, and budget and have a planned communication strategy to provide transparency and rationality in application.



- Yes, the law matters!
- Keep up with it (starting at the legislative stage) and follow it!
- Also remember that the way you approach paid and unpaid leave may also impact recruitment and retention.
- So, in addition to knowing the laws, be sure that you know what your competitors are offering.

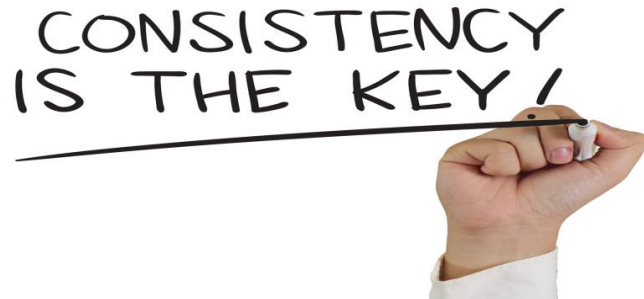


RETURN TO THE OFFICE

The phrase that some deem as curse words in the workplace.



- Review existing policies to establish clear guidelines for in-office and remote work.
- Clarify EE eligibility and scheduling expectations.
- Ensure consistency in application (especially by different supervisors) to avoid discrimination claims.
- If you change policies to in-office work, consider how those hired for remote work will be affected (ex: commute time, “promises” of remote work, childcare, flexible hours).



- Regardless of your policies, remote work can be an ADA accommodation request. Do you have an interactive process to receive and review such ADA requests?
- Because you can't easily supervise those working remotely, do you have measures in place to make sure that remote workers are being paid for all time worked?
- As always, no EE should be working at home off the clock (except the cat)!



- These are topics gaining traction in discussion, application and the law.
- Changes in how you approach pay and pay communications can affect your candidate pool and your existing workforce.
- Think through the application of new requirements and contemplate the financial, moral and cultural consequences of your approach.
- Pay transparency and equal pay is a focus at both the federal and the state levels.



- EEOC bulletins and communications can provide insight as to their current or future compliance targets and topics. (Resources at [eeoc.gov](https://www.eeoc.gov))
- The EEOC periodically adopts a multi-year plan, called the *Strategic Enforcement Plan (SEP)*, to establish substantive agency enforcement priorities to guide all aspects of its work to advance equal employment opportunity for all and prevent and remedy unlawful discrimination in employment.
- The latest SEP for 2024-2028 was issued in September of 2023 and lists “Advancing Equal Pay for All Workers” as one of its five top priorities of the EEOC.



In summary, the SEP notes:

1. A continued focus on combatting pay discrimination in all forms.
2. The use of directed investigations and Charges, as appropriate, to facilitate enforcement since many EEs don't know how their pay compares to their coworkers' and are less likely to discover and report pay discrimination
3. A focus on ER practices that may impede equal pay or contribute to pay disparities, such as:
 - a. Pay secrecy policies,
 - b. Discouraging/prohibiting EEs from asking about or sharing pay with others, and
 - c. Reliance on past salary history or applicants' salary expectations to set pay.
4. The Plan also includes the elimination of barriers in recruitment and hiring and in advancing equal pay for all works as one of its priorities.

- States are continuing to enact legislation requiring ERs to provide compensation-related information in the hiring process.

Examples include:

- New York and Hawaii recent legislation.
 - In 2025, IL will require ERs to include the pay scale and benefits in job postings.
- Pay transparency and pay equality go hand in hand, as it will become apparent where wages are not commensurate with the work or current postings.



As pay practices are more highly scrutinized, women's pay, and potential inequality of pay, also will be on the radar.

Recent survey data about women's pay noted:

- Pay equality stalled during the pandemic.
- Pay inequality often starts when they have their first child



Survey data also noted:

- 50% of people will not apply to a job if the posting doesn't include the pay range,
- 90% of Gen Z feel comfortable sharing their pay info with others.

Bottom Line: Employees want to know that they are being paid fairly.

- Are you benchmarking positions to see how your pay ranges compare . . .
 1. To the market, and
 2. For existing employees in similar positions/responsibilities.

- As you setting pay ranges, are you making any corrections upward for your existing workforce?

- Are you including the finance team to make sure you are financially prepared for change?

- The laws in this area are changing. As always, the Federal laws apply to all. However, remember to follow the state laws . . . where your EEs work.

Quick Hit Topics for Discussion:

1. Future of Non-Compete Agreements
2. Handbook and Policy Updates
3. Are you prepared for more leave time?
4. Return to the Office Practices
5. Pay Transparency and Equal Pay



let's talk

Quick Summaries from Breakout Groups

