

HR Insights

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How Noncompete Agreements Impact Hiring

Noncompete agreements are often viewed as a double-edged sword in hiring and employee management. While they may help safeguard proprietary and confidential information, they can pose hiring challenges.

As such, employers must carefully navigate the complexities of noncompete clauses, balancing their protective benefits with the need to maintain a motivated and mobile workforce. As regulatory landscapes evolve, companies may need to reevaluate their reliance on noncompete agreements and explore alternative strategies for safeguarding their competitive interests. This article explores noncompete agreements, their impact on employers and considerations when drafting them.

Overview of Noncompete Agreements

A noncompete agreement, also known as a restrictive covenant agreement, is a contractual term between an employer and a worker. It blocks the employee from working for a competing employer or starting a competing business, typically within a certain geographic area and period of time after their employment ends. These agreements can protect companies from losing valuable employees and confidential information to competitors and help maintain competitive advantages.

Noncompete agreements are more prevalent in industries such as technology, sales and health care, where sensitive information and specialized skills are crucial. However, enforceability varies by jurisdiction.

Noncompete Bans

The enforceability of a noncompete agreement is generally determined by state and local legislatures and courts. Some states impose strict limitations or outright bans on noncompete clauses.

On April 23, 2024, the Federal Trade Commission (FTC) voted to issue a final rule prohibiting employers from entering into or enforcing noncompete clauses with most employees. Scheduled to take effect on Sept. 4, 2024, the final rule applies to noncompete agreements with all current and former workers, whether full-time or part-time, including but not limited to employees, independent contractors, interns, externs and apprentices. However, employers should note that the FTC ban will only prohibit post-employment noncompetes. Employers may still restrict current employees from engaging in competitive activities.

The FTC stated that it aims to promote competition by protecting workers' freedom to change jobs, increasing innovation and fostering new business formation.

The Hiring Impact of Noncompetes

The labor market likely will continue to be competitive. Without a noncompete, workers have more freedom to move to another company in the same industry without legal repercussions. As a result, the fight for talent could get even tougher.

As with any workplace decision, using noncompete agreements comes with advantages and drawbacks. Consider the following pros of noncompetes as they relate to employee attraction and retention:

- **Increased employee retention**—Noncompetes discourage employees from leaving the organization and working for competitors, which can result in lower turnover rates. Organizations invest heavily in their workers, including onboarding, learning and professional development resources.
- **Maintained competitive advantage**—Noncompetes aim to protect sensitive business information, including trade secrets and customer base. Organizational success will likely be achieved by safeguarding company information and relationships that differentiate them from the competition. As such, top talent wants to work for a leading company.

Conversely, here are some talent-related cons of noncompetes for companies to consider:

- **Deterrent to candidates**—Job candidates may have concerns about the necessity of noncompetes, causing them to remove themselves from consideration or reject offers.
- **Increased legal liability and costs**—Noncompetes are employment contracts with complex rules. Organizations that impose unfair restrictions could face employee lawsuits. Additionally, it can be costly for employers to enforce such agreements. Employee lawsuits also have the potential to damage the employer's reputation, impacting attraction and retention.

Employer Considerations

First, employers should consider whether a noncompete agreement is legally enforceable in their state. Legal counsel can advise employers on how enforceable a noncompete agreement would be in the company's location and industry.

Employers can also assess any industry-specific concerns. For example, companies with patented technologies or workers in sales roles may use

noncompete agreements. Organizations can also research whether industry competitors require noncompetes with their employees to strengthen attraction and retention efforts. It can be beneficial to remain consistent with the industry, which levels the playing field when competing for talent.

Aside from legality, employers can also consider if noncompete agreements are fair and reasonable to departing employees. When employees who have signed a noncompete leave the company for another job, it's important for the agreement not to hinder their ability to make a living. Employees may take a new job for many reasons, such as a career progression the current employer couldn't offer, greater compensation and a more suitable location. Employers should review the terms of their noncompetes to ensure fairness even if the employee is moving to a competitor.

Lastly, being upfront about whether an organization requires new hires to sign noncompete agreements is important. Include that information in job postings or communicate it immediately with candidates so the clause doesn't become an issue later in the interview or hiring process. Companies may lose good candidates due to noncompetes, but it's better to have the conversation early on to avoid wasting the time of candidates and recruiting teams. Employers may also keep candidates formerly employed by competitors in the pipeline and reconnect with them after their noncompete has expired.

Summary

Employers need to take many considerations into account before implementing a noncompete agreement while also staying up to date on the latest rules and laws. Furthermore, since noncompete agreements are often the subject of litigation, employers should consult their legal counsel before making any decisions.

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