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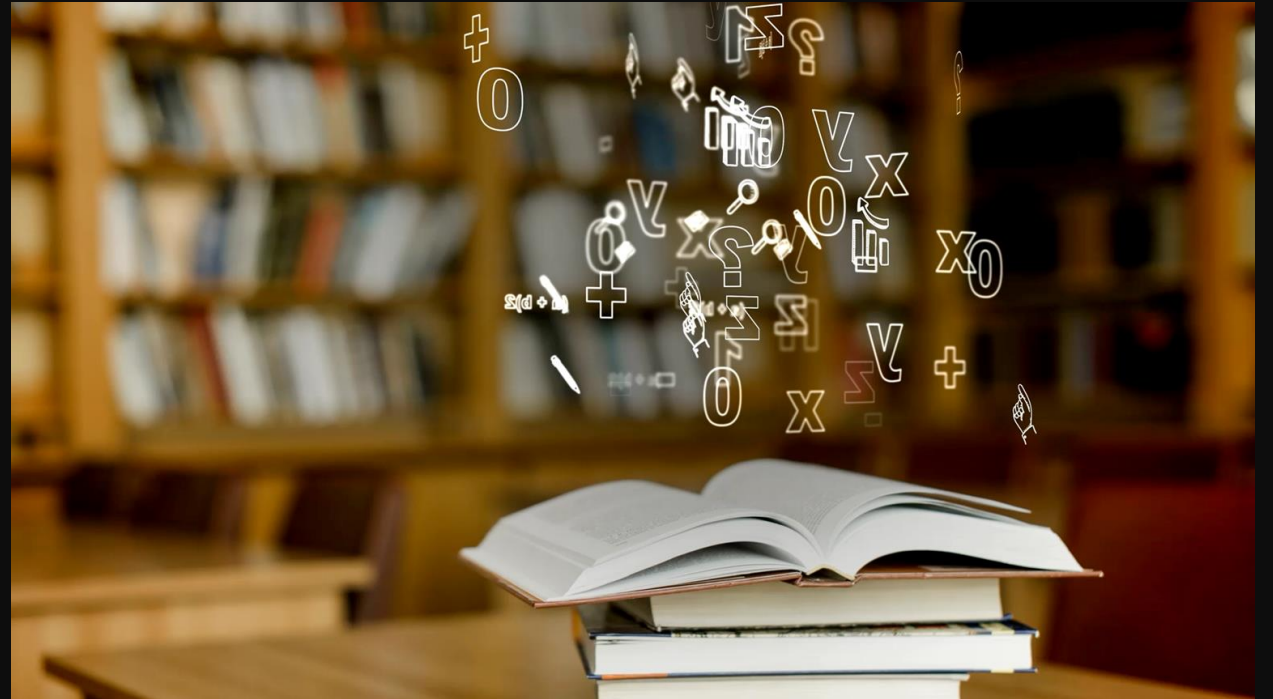
Inland Academy: The Armchair Attorney's Guide to Non-Competes

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Inland Academy: The Armchair Attorney's Guide to Non-Competes





About me

Matthew Leffler is the founder and managing member of Armchair Attorney, LLC, a law firm based in St Charles, Illinois.

Matthew earned a J.D. from Michigan State University College of Law, *Magna Cum Laude*, and a B.A. from the University of Illinois at Urbana-Champaign.

He is licensed to practice in the State of Illinois; U.S. District Court, Northern District of Illinois; and 7th Circuit Court of Appeals.

Learning Objectives

1

Understand the impact of non-competition agreements in the US labor market

2

Identify key elements of a non-competition agreement

3

Discuss the enforceability of non-competition agreements

4

Understand the changing regulatory landscape of non-competition agreements

Post-Employment Restrictive Covenants

PERCs are contractual clauses prohibiting employees from doing a specific thing after their employment ends.

PERCs must go no further than necessary to protect the employer's legitimate business interests or risk being unenforceable.

In other words, if the restrictive covenant is not reasonable, it may be void or voidable.

Sample PERCs

Non-Disclosure. A contract that outlines confidential material, knowledge, or information that the parties wish to share with one another for certain purposes yet wish to restrict access to.

Non-Disparagement. A clause that restricts saying something negative about the company or its products, services, or leaders in any form of communication.

Non-Solicitation. A clause that prevents an employee from soliciting his or her former employer's clients or coworkers, sometimes referred to as an anti-poaching clause.

Non-Competition. A clause where an employee agrees not to compete with an employer after the employment period is over.

Facts about Non-Competes

18%. More than 30 million workers, at least 18% of the U.S. workforce, are required to sign non-competes as a condition to accepting a job.

Every worker is impacted. These include a wide range of workers, from supply chain executives to sandwich makers and outfit designers.

10%. Less than 10% of workers negotiate these clauses.

30% to 40% of workers are asked to sign non-competes after they have already accepted the position.

30% of non-competes cover workers who make below \$20 per hour.

Origins & Impact of Non-Competes

Non-competes can be traced back English Common law, but expanded considerably in the US during the Reconstruction Era.

Non-competes can have a stronger impact on women and people of color.

Studies have shown that women are less willing to violate the terms of non-competes and are less likely than men to leave their jobs or start rival companies if they are subject to a non-compete.

Women and workers of color also are less likely to negotiate than their white counterparts, which may result in more restrictive agreements for them.

Non-Competes for Attorneys

According to the ABA, “ethics rules do not allow non-competition clauses in partnership, member, shareholder, or employment agreements” among attorneys.

However, a recent decision from a Colorado trial court held the ethics rules only bar agreements between attorneys, so a company may ask an in-house lawyer to sign a non-compete.

Once the lawyer signs a non-compete, even if ethically prohibited from doing so, that lawyer cannot use the ethics rules to break the contract.



Factors of Non-Competes

- Non-competes restrict workers through **time**, **geography**, and **industry**.
 - **Time**. Prevents someone from working for a competitor or starting a competing business for a defined period of time after leaving a position.
 - **Geography**. Prevents someone from accepting work in specific regions of the United States.
 - **Industry**. Prevents someone from working for a particular type of company or starting their own competitor company.

Enforcement Considerations

Consideration. Generally speaking, consideration is something of value provided to an employee in exchange for signing an agreement. What constitutes adequate consideration for a noncompetition agreement could include a raise, a bonus, an equity award, a promotion, specialized training, and educational benefits. But note, simply continued employment in certain jurisdictions is enough consideration.

Legitimate Interest. The employer must have a legitimate interest to protect, typically an employer's trade secrets or customer relationships. These can be especially compelling in the context of the sale of a business.

Enforcement Considerations Cont.

Reasonableness. Reasonableness has to do with whether the geographic scope prevents the worker from making a living, the length of the restriction, and whether the agreement prevents the worker from doing different work from what they are doing.

Blue-Penciling. In some jurisdictions, courts may exercise their discretion to partially enforce or even rewrite overbroad non-competes, known as “blue-penciling”.

Choice of Law



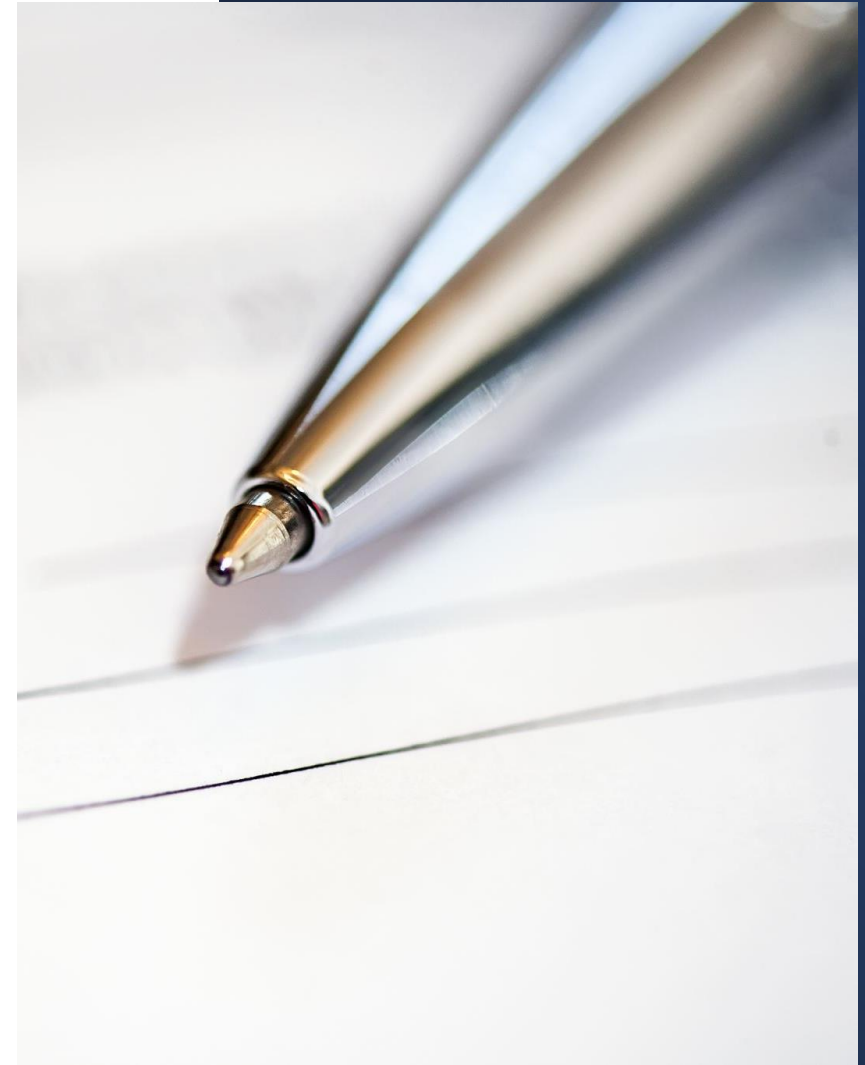
Nearly all PERCs will include a choice of law clause in which the parties specify a particular jurisdiction.



Oftentimes that choice of law clause is for a state with a more favorable outlook of non-competes.

Enforcement of Non-Competes

- Send a cease-and-desist letter.
- File a request with the court for a temporary restraining order (TRO).
- If the company is successful in securing this restraining order - even temporarily - that can put the former employee out of work until a further order of the court.
- Given the high stakes involved, the company seeking this relief bears a high burden of proof on its request for such an order that it has a legitimate business interest worth protecting, and that unless this emergent relief is granted, the company will suffer immediate and irreparable harm.



Jimmy John's

- Jimmy John's is an American sandwich chain headquartered in Champaign, Illinois with over 2,700 locations.
- Required workers to sign an agreement that prohibited employees during their employment and for two years afterward.
- Competitive business was defined as any business that earns more than 10 percent of its revenue from selling “submarine, hero-type, deli-style, pita, and/or wrapped or rolled sandwiches” within 3 miles radius of any Jimmy John's store.



Jimmy John's Non-Competes

- Jimmy John's non-compete restricted workers through **time, geography, and industry.**
- **Time.** Prevented someone from working for a competitor during their employment and for two years after leaving a position.
- **Geography.** Prevented someone from accepting work within a three-mile radius of any Jimmy John's store in the country.
- **Industry.** Prevented someone from working at any other business that earns more than 10 percent of its revenue from selling “submarine, hero-type, deli-style, pita, and/or wrapped or rolled sandwiches.”

Jimmy John's Aftermath

- Jimmy John's food chain received a lot of negative publicity by requiring most of its employees, including lower-wage delivery drivers and sandwich makers, to sign non-competes.
- The company settled lawsuits in New York and Illinois over the issue.
- Jimmy John's eventually announced that it would not try to enforce these agreements.

Future of Non-Competes

State laws that ban non-competes generally fall into one of three categories: (1) laws to eliminate non-competes for everyone; (2) laws to eliminate non-competes for some, based on occupation or income level; and (3) laws to codify stricter requirements in enforcing them.

Some examples of states that have passed progressive bans on non-competes include California, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Hampshire, Oregon, and Washington.

However, even in states that have non-compete bans, some workers are still required to sign them. In California, for example, non-competes have been unenforceable for over 100 years, but research showed that 19% of workers had signed unenforceable non-competes.

The Federal Trade Commission

In 2018, the Federal Trade Commission began to study non-competes through public hearings and workshops.

On January 19, 2023, the FTC proposed the Non-Compete Rule- which would “prohibit employers from entering into non-compete clauses with workers starting on the rule’s compliance date” and “require employers to rescind existing non-compete clauses no later than the rule’s compliance date.”

Over 26,000 comments were filed during the comment period with over 25,000 comments in support of the rule.

The FTC's Findings

Banning noncompetes:

Good for workers, businesses, and the economy



The FTC estimates that banning noncompetes will mean

- ▶ **More innovation:** an average of 17,000-29,000 more patents each year
- ▶ **More startups:** a 2.7% increase in new firm formation - that's 8,500+ new businesses per year
- ▶ **Higher earnings:** typical workers earn \$524 more per year

Who's affected?



An estimated
18%
of U.S. workers
are covered by
noncompetes.

That's 30 million people.

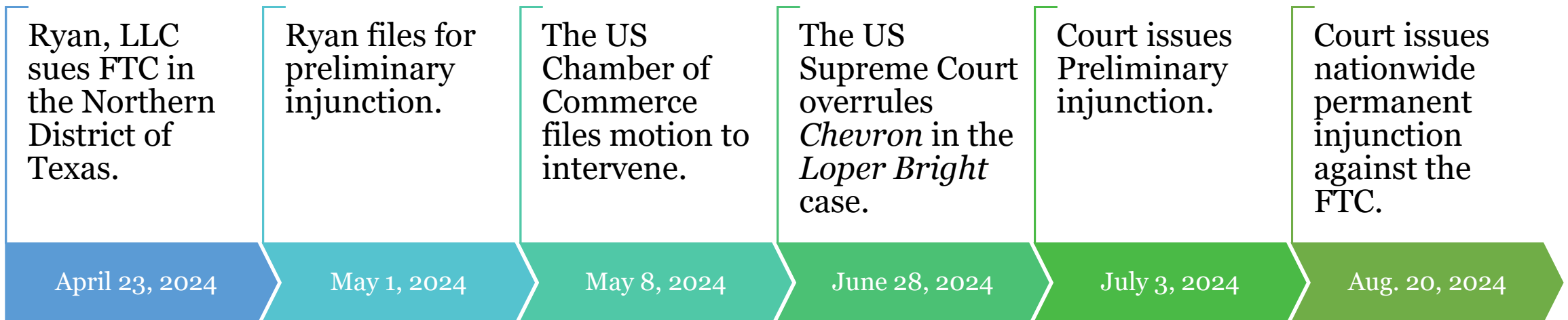
FTC's final Non-Compete Rule

On April 23, 2024, the FTC adopted the final Non-Compete Rule, which would go into effect on ***September 4th, 2024***

(a) *Unfair methods of competition—(1) Workers other than senior executives.* With respect to a worker other than a senior executive, it is an unfair method of competition for a person:

- (i) To enter into or attempt to enter into a non-compete clause;
- (ii) To enforce or attempt to enforce a non-compete clause; or
- (iii) To represent that the worker is subject to a non-compete clause.

FTC sued!



FTC sued!



On August 20, a district court issued an order stopping the FTC from enforcing the rule on September 4. The FTC is considering an appeal. The decision does not prevent the FTC from addressing noncompetes through case-by-case enforcement actions.

Non-Competes at the Federal Level

- [The Workforce Mobility Act of 2021](#) which would, among other things, restrict the use of non-compete agreements to situations involving the sale of a business or the dissolution of a partnership and create a private cause of action for aggrieved workers. Introduced in the Senate as [483](#) and in the House of Representatives as [H.R. 1367](#) on February 25, 2021, neither of the proposed bills appears to have moved.
- [The Freedom to Compete Act](#) (S. 2375) which would amend the FLSA to ban non-compete agreements for non-exempt workers, and would apply retroactively to existing non-compete agreements. The bipartisan bill was introduced on July 15, 2021, and appears to have stalled in committee.

Employer Considerations of PERCs



Use with caution. Only where you have a compelling business need and limit in time and space.



Identify business interests. Exactly what information or relationships you are trying to protect specific to the particular job or role;



Limit scope. Select the minimum type, area, scope, and duration of PERCs that is adequate to protect the specific information or relationships you have identified; and



Use non-competes sparingly. Non-compete clauses are the hardest PERCs to enforce. Only use them when no other restriction will do.

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