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# [Podcast]: Developments & Trends Across the Country in Non-Compete Law

**Law and the Workplace Blog** on **November 18, 2021**

In this episode of The Proskauer Brief we are joined by partner Guy Brenner, who heads up Proskauer's D.C. Employment Law practice and co-chairs our Non-Compete and Trade Secrets Practice group and Daryl Leon, an associate in Proskauer's New York office and senior member of the Firm's Non-Compete and Trade Secrets Practice Group. Employers should listen in as we discuss key developments and trends we've been seeing across the country in non-compete law.

**Guy Brenner:** Hello and welcome to The Proskauer Brief: Hot Topics and Labor and Employment Law. I'm Guy Brenner, head of Proskauer's D.C. Employment Law practice and Co-Chair of our Non-Compete and Trade Secrets Practice Group. With me today is Daryl Leon, an associate in our New York office, and senior member of our Non-Compete and Trade Secrets Practice Group. I've asked Daryl to join me today to discuss the developments and trends we've been seeing across the country in non-compete law. Daryl welcome to the podcast.

**Daryl Leon:** Thanks Guy good to be here.

**Guy Brenner:** Daryl, you and I recently discussed on a prior episode of The Proskauer Brief, the D.C. ban on Non-Compete Agreements Amendments Act 2020. How does that D.C. ban on non-compete law fit into the national non-compete landscape and trends that you've been monitoring.

**Daryl Leon:** So Guy, I think that employers around the country can breathe a sigh of relief that D.C.'s near total ban on non-competes appears to be an aberration rather than a growing trend, but there has been a lot of state action over the past few years looking to limit the categories of employees who may be subject to a non-compete, but the near total ban that we anticipate in D.C., which is really more in line with states like California or Oklahoma does not seem to be gaining much traction around the country.

**Guy Brenner:** Thanks Daryl and I note that employers outside of D.C. will be happy to hear that but there has been as you noted a lot of activity in state legislatures trying to restrict non-competes.  What are some of the common trends you're seeing in jurisdictions across the country?

**Daryl Leon:** The big trend that we're seeing around the country is states looking to limit the categories of employees who may be subject to a non-compete or putting additional hurdles in place for employers looking to use non-competes to protect their business interests.

**Guy Brenner:** What kind of categorical limitations are you seeing being implemented across the country?

**Daryl Leon:** That's a great question.  The first that comes to mind and that I think really caused a lot of meaningful consideration for the clients that we work with took place in Massachusetts.  So Massachusetts' non-compete law was signed during the summer of 2018 and it put in place a number of key restrictions on employers ability to use non-compete agreements.  So Massachusetts law prohibits the use of non-compete for FLSA non-exempt employees, for student employees, employees under the age of 18 and employees who have been terminated without cause or who have been paid off.  Notably it also requires a garden leave, which means that employers need to pay their former employees at least 50% of the employees highest base salary during the preceding two years, during the period the non-compete is enforced.

**Guy Brenner:** That garden leave provision can be quite costly.  Are other states following suit and requiring a garden leave to have enforceable non-competes?

**Daryl Leon:** Paid garden leave still doesn't seem common but we do see it cropping up in other circumstances. So in Nevada for example, paid garden leave is required for employees subject to a non-compete if they have been laid off. What I think is really interesting though is the approach taken by a state like Oregon, which has mandatory compensation thresholds and also uses unpaid garden leave. What that means is that in Oregon, employers are prohibited from using non-competes with employees earning less than about $100,000 a year with the threshold updated annually for inflation but employers can actually get around this threshold by providing paid garden leave during the period the employee will be subject to a non-compete. Oregon also requires some of those hurdles that I mentioned earlier, so in this case their perspective employees receive two weeks-notice of their non-compete before starting their new job.

**Guy Brenner:** It seems like that Oregon and Massachusetts are pretty complicated regimes if you're looking to have an enforceable non-compete. What are some of the other states doing in this space?

**Daryl Leon:** The salary threshold really seems to be the most common restriction on non-competes that we're seeing across the country, but actually Guy, this common trend does not make things any easier unfortunately for multi-state employers because the thresholds are all over the place. So for example, we just talked about Oregon that has a threshold of about $100,000 a year, but Maine has a threshold of about $50,000 a year, which is based on the federal poverty level and it prohibits non-compete's employees earning less than 400% of the federal poverty level. Further down the coast in Maryland the threshold is about $15 an hour or $31,000 a year and then we go back over to the Pacific Northwest where Washington State has a limit of about $100,000 a year for an employee but $250,000 a year for an independent contractor.

**Guy Brenner:** That's a lot for multistate employers to keep track of. What can a multi-state employer do to manage this patchwork of non-compete requirements?

**Daryl Leon:** That's a great question.  From a process standpoint, I recommend the clients consider setting calendar reminders and also following our blogs to be aware of new laws in changing compensation thresholds.  I'll also work with clients to see if there are states that can be grouped together when preparing their non-compete agreements so we can see if there are thresholds or other restrictions that we can combine together so that there are fewer for agreements from multi-state employers.  Also at the same time that this podcast is being released we're going to publish an infographic that identifies a number of key state compensation thresholds and employers can use this as a baseline or a gut check on their current use of non-competes so that they know what can be enforced for certain employees around the country based on compensation thresholds.

**Guy Brenner:** And I've seen that infographic and I think it's really helpful.  I think are listeners are going to find it a very useful tool.  Is there anything else on the horizon that you see in terms of non-compete developments?

**Daryl Leon:** The 10,000lb elephant in the non-compete room is the federal government. Over the summer, myself and other colleagues and I know you as well, were religiously watching the White House's press briefing to try and read the tea leaves on an expected executive order for President Biden.  Leading up to the issuance of president's executive order on promoting competition in the American economy there was a lot of excitement and a lot of misleading headlines about the end of non-competes agreements in America.  However, on July 9th when the President actually issued his Executive Order the language was not nearly as apocalyptic as some predicted.  The Order actually only encouraged the federal trade commission to consider using its authority to curtail the use of non-compete clauses and notably for our listeners and for those of us who work in this space during the intervening months we have not seen any further action from the Federal Trade Commission or the White House.  This is of course something that we continue to monitor and we'll post about on our Proskauer Law and the Workplace blog but absent any real movement we're not recommending that our clients alter their non-compete usage based on any changes at the federal level at this time.

**Guy Brenner:** Daryl, I want to thank you so much for what has been an informative and eye opening discussion about emerging trends in non-compete law and I know that you're going to be monitoring this space and reporting on it and I thank all of you for joining us today on The Proskauer Brief.  To our listeners, stay tuned for more insights on the latest hot topics on labor and employment law and be sure to follow us on Apple Podcasts, Google Podcasts and Spotify.

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