

BELL NUNNALLY'S KRIS HILL AND SCOTT LARSON ON TEXAS CEO MAGAZINE EXPLORE POSSIBLE LOOMING CHANGES TO NON-COMPETE LAW

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Bell Nunnally Partner Kristopher D. Hill and Associate Scott R. Larson authored the *Texas CEO Magazine* article “Out with the Old, in with the New: The Biden Administration’s Plan for Non-Competes.” The piece explores the mechanics of non-compete agreements, President Biden’s plans for their reform, Texas and neighboring state non-compete regulations and steps employers should consider to best position themselves for change. The pair cautions that then-candidate Biden’s “Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions” is “not likely campaign rhetoric” and that, “Employers should be ready for attempts at the federal and state level to strip or diminish their ability to rely on non-competes. Prudent employers will devote time and resources to ensure they can protect their trade secrets, confidential information, goodwill, and other valuable business interests.”

Hill and Larson conclude by noting, “If the Biden Administration succeeds, non-competes may be a thing of the past. But your confidentiality, non-solicitation, and related policies, when drafted carefully, could provide many of the same protections previously provided by your non-compete agreements. In 2021, you should make a resolution to revisit those agreements and policies. Even if Biden’s proposed legislation does not become law, you should confirm that your current non-compete, non-solicitation, and related policies and training programs comply with state law.”

Full text of the article is below and can be viewed on *Texas CEO Magazine*'s website, by clicking [here](#).

The Biden Administration may put an end to non-compete agreements. In his “[Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions](#),” President (then candidate) Biden promised to:

[e]liminate non-compete clauses . . . that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers.

. . . As president, [I] will work with Congress to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets

Biden's plan is not likely campaign puffery. In 2016, the Obama-Biden administration called on state legislatures to abolish non-competes by issuing a "[State Call to Action on Non-Compete Agreements](#)" and accompanying "[Non-Compete Reform: A Policymaker's Guide to State Policies](#)." Two years later, Democratic senators Elizabeth Warren (D-Mass.), Christopher Murphy (D-Conn.), and Ronald Wyden (D-Or.) sponsored the [Workforce Mobility Act of 2018](#), aimed at banning most non-competes. Democrats are not alone in seeking non-compete reform. In 2019, Chris Murphy (D-Conn.) and Todd Young (R-Ind.) introduced the bipartisan [Workforce Mobility Act of 2019](#), targeting a ban on most non-competes. That same year, Senator Marco Rubio (R-Fl.) introduced the Freedom to Compete Act, which sought to ban non-competes for non-exempt workers under the Fair Labor Standards Act.

Non-Competes: An Overview

Non-competes are contracts that limit an employee's ability to join or start a business in competition with their current or former employer. Non-competes are firmly rooted in the country's business and legal landscape. Except for [California](#), [North Dakota](#), and [Oklahoma](#), every state allows non-competes, though each state's non-compete regime differs slightly. Under Texas' [Covenant Not to Compete Act](#), a non-compete is enforceable if it:

- is ancillary to an otherwise enforceable agreement that is supported by sufficient consideration, such as confidential information, trade secrets, or specialized training; and
- contains reasonable limitations as to time, geography, and scope that do not impose a greater restraint than necessary to protect the goodwill or business interests of the employer.

Two of Texas' neighbors employ similar statutory frameworks. Arkansas' statute is almost identical to Texas'. Louisiana imposes similar requirements, but provides precise requirements as to time and geography: e.g., non-competes may not exceed two years and must be limited to parishes where the employer actually does business. In contrast, New Mexico's regime is more relaxed. With no statute except for medical practitioners, New Mexico's common law permits non-competes that are reasonable and necessary to protect a legitimate business interest of the employer.

Non-Competes: Pros and Cons

Proponents of non-competes advocate that entering into a legitimate non-compete agreement is a voluntary act for both parties, which can promote commerce by:

- encouraging employers to entrust trade secrets and confidential information to key employees, promoting innovation;
- increasing employee training; and
- incentivizing employers to invest valuable resources into developing, and providing employees access to, goodwill that—absent a non-compete—an employee could otherwise take and use against them in a competing business.

To be sure, the majority of non-competes are supported by legitimate business concerns. And existing state laws limit abusive non-competes by almost universally mandating reasonable restrictions on the scope, geography, and duration of non-competes that protect employees, as discussed above.

In contrast, non-compete opponents believe that non-competes inherently stifle commerce by impeding:

- legitimate competition between businesses; and
- the professional mobility of skilled employees.

Opponents often point to the uneven bargaining power between employers and employees in negotiating non-competes. President Biden's plan, like a previous plan submitted by Senator Warren, also claims that ending non-competes will necessarily result in higher wages and salaries. In a press release supporting their proposed legislation, Senators Murphy and Young claimed that "noncompete agreements are blunt instruments that crudely protect employer interests and place a drag on national productivity."

The Federal Government's Ability to Impose a Nationwide Ban on Non-Competes

State law ordinarily governs non-competes. To fulfill his promise of a nationwide ban on non-competes, Biden would need to rely on new federal legislation or, otherwise, on what would be highly controversial executive action or on regulation by the Federal Trade Commission under its rule-making authority to define and prohibit unfair or deceptive acts and unfair competition.

Federal legislation banning non-competes would almost certainly pass Constitutional scrutiny under the Constitution's Commerce Clause, which provides Congress the power to "regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes." Existing Supreme Court precedent places an expansive definition on what constitutes "Commerce . . . among the several states," and a federal ban on non-competes would fall within that definition.

If non-competes are banned during Biden's presidency, existing non-competes signed before the effective date of the legislation would likely be spared or grandfathered into an exception. Prior legislative attempts to ban non-competes only included non-competes entered after the law's enactment. Further, any legislative attempt to disrupt existing contractual rights would meet fierce lobbying resistance, risk the loss of necessary votes in Congress, and could ignite serious constitutional challenges to the legislation.

The Road Forward for the Biden Administration

Biden's road to banning non-competes is by no means clear of obstacles. Democrats control both houses of Congress. But the Senate is split 50-50; thus, if party lines were to hold on a vote to ban non-competes, Biden would need Vice President Harris to cast the deciding vote. Nevertheless, it is unclear what priority the Biden administration will place on a non-compete ban. Midterms are two years away. High COVID-19 numbers persist. Vaccine production and distribution remain objects of concern. And the administration has a vast array of other legislative objectives coming on the heels of President Trump's tenure.

Priorities aside, Biden would also face pushback from the states and corporate America. An overwhelming majority of states—whether Republican-leaning or not—allow non-competes. There is little doubt that corporate America would field an army of lobbying resources to prevent an outright ban. Despite these obstacles, Biden has the numbers to achieve his legislative goal, so long as Democrats in Congress fall in line.

If Biden's administration ultimately falls short of an outright legislative ban of non-competes, it could attempt executive action to rein in non-competes. Or Biden could call upon the Federal Trade Commission or other agencies to draft regulations to impose greater restrictions on the use of non-competes. But such attempts would have much more difficulty surviving legal challenges than duly enacted legislation would. In any event, Biden will almost certainly continue calls for non-compete reform in state legislatures and for increased enforcement actions and judicial scrutiny, much as President Obama did.

The Road Forward for Employers

Employers should be ready for attempts at the federal and state level to strip or diminish their ability to rely on non-competes. Prudent employers will devote time and resources to ensure they can protect their trade secrets, confidential information, goodwill, and other valuable business interests. Responsible planning should include asking the following questions about whether specific contractual options can help protect those interests:

- **Non-competes** – Does your company's existing non-compete comply with the laws of the applicable state(s) that governs your employees?
- **Confidentiality agreements** – Does your company require all employees who receive and use confidential information or trade secrets of the company to sign enforceable confidentiality or non-disclosure agreements?
- **Non-solicitation agreements** – Does your company's non-solicitation agreement prohibit employees from: (a) soliciting their employer's customers or prospective customers to do business with another company; or (b) soliciting employees to join or start a competing business? In many cases, state laws governing non-competes apply equally to non-solicitation agreements.



- **Policies and training** – Do your company policies clearly dictate: (a) procedures for employee onboarding and departures; (b) allowed and prohibited use of confidential information and trade secrets, computer systems, and email; and (c) other specific requirements necessary to protect valuable company assets like confidential information, trade secrets, goodwill, and customer relationships? Periodic training for employees subject to these policies is a must.

If the Biden Administration succeeds, non-competes may be a thing of the past. But your confidentiality, non-solicitation, and related policies, when drafted carefully, could provide many of the same protections previously provided by your non-compete agreements. In 2021, you should make a resolution to revisit those agreements and policies. Even if Biden's proposed legislation does not become law, you should confirm that your current non-compete, non-solicitation, and related policies and training programs comply with state law.

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