



Webcast: Restrictive Covenants: Key Considerations for 2025

GIBSON DUNN

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February 26, 2025

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Today's Panelists

Gina Hancock



[Gina Hancock](#) is a partner in the Dallas office. She practices in the firm's Executive Compensation and Employee Benefits Department. Gina has significant experience with executive compensation, complex domestic and international transactional matters, initial public offerings, health and welfare benefit plan, retirement plan, and related matters. Her practice focuses on all aspects of equity compensation; employee stock purchase plans; 401(k), pension and nonqualified deferred compensation plans; executive employment, severance, retention, change in control and restrictive covenant agreements; incentive compensation; and cafeteria and other welfare benefit plans. She also provides advice with respect to general corporate governance and disclosure matters.

Andrew Kilberg



[Andrew Kilberg](#) is a partner in Gibson, Dunn & Crutcher's Washington, D.C. office, where he practices in the firm's litigation department. A member of the firm's Labor and Employment, Administrative and Regulatory, and Appellate and Constitutional Law practice groups, Andrew has significant experience challenging onerous federal regulations, advising on regulatory proposals, and defending agency enforcement actions and investigations. He has represented clients in federal district and appellate courts and before the U.S. Supreme Court, as well as before various agencies, authoring dozens of briefs, comment letters, and other submissions. His matters have covered wage and hour, ERISA, occupational safety and health, anti-discrimination, whistleblower, and labor relations issues.

Ashley Romanias



[Ashley Romanias](#) is an associate in the Washington, D.C. office of Gibson, Dunn & Crutcher. She is a member of the firm's Executive Compensation and Employee Benefits practice group. Ashley's experience includes advising public and private companies on executive officer separations and other transitions. She also provides advice to clients regarding securities law disclosure and advises for-profit and nonprofit companies on corporate governance matters. She also advises clients in connection with mergers, acquisitions, carve-outs, add-ons, spin-offs, and other transactions.

Agenda

01 What's Next for the FTC Non-Compete Ban?

02 State-Specific Considerations

03 Alternative Ways to Protect Confidential Information and Trade Secrets

04 Key Takeaways for 2025

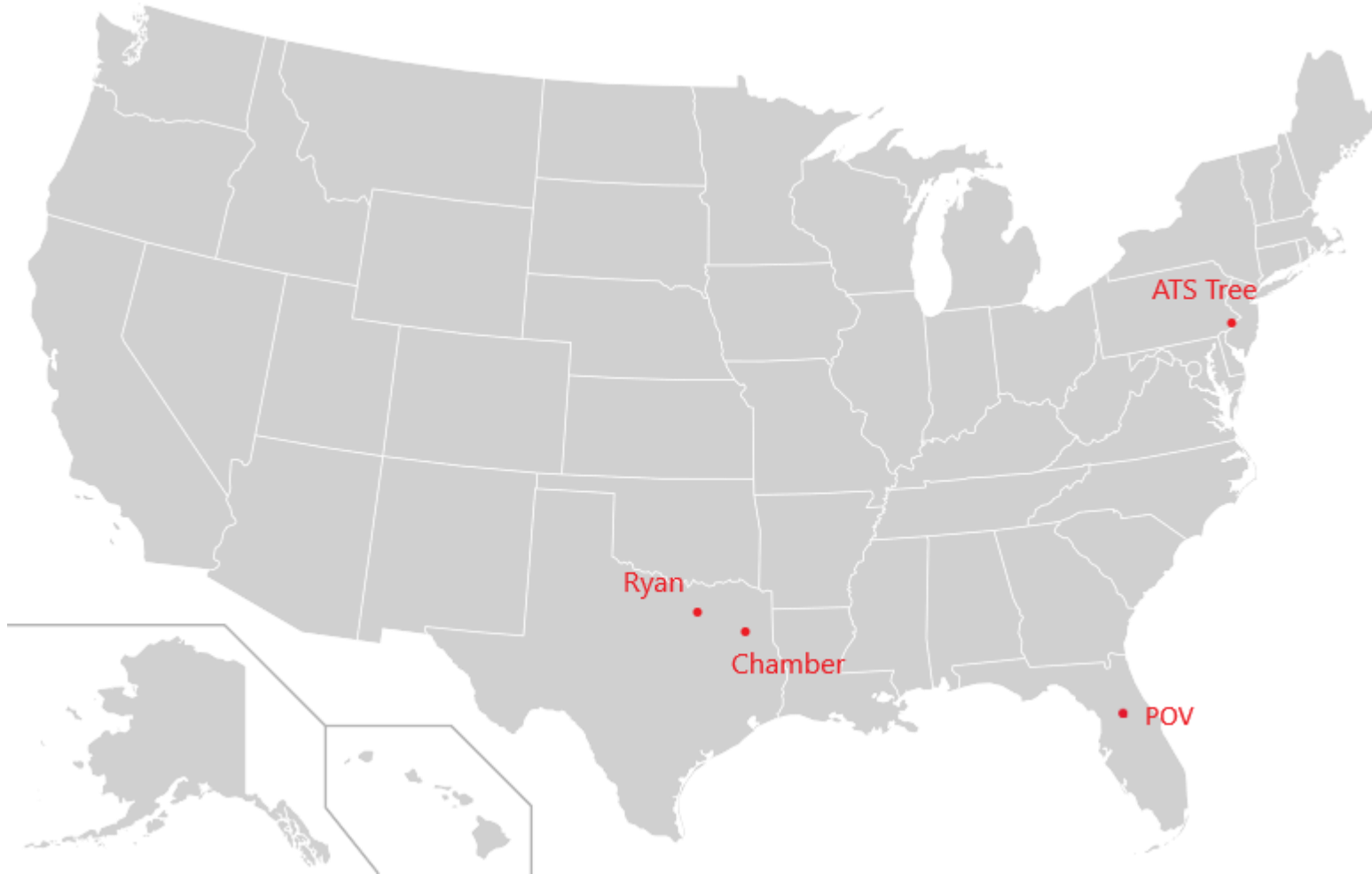
WHAT'S NEXT FOR THE FTC NON-COMPETE BAN?

01

What's Next for the FTC Non-Compete Ban?

- In April 2024, FTC issued a **ban** on non-competes with covered workers that would have been effective September 4, 2024.
- Functional definition of non-compete.
- All workers covered—not just employees.
- Limited exceptions: (i) sale of the business; (ii) existing non-competes with senior executives; (iii) good faith basis to believe rule inapplicable.
- The FTC Rule was subject to litigation immediately.

What's Next for the FTC Non-Compete Ban?



Background: Lawsuits

- *Ryan, LLC – N.D. Tex. Gibson Dunn*
- *Chamber – E.D. Tex. Sullivan & Cromwell*
- *ATS Tree – E.D. Pa. Pac. Legal Found.*
- *POV – M.D. Fla. Covington*

What's Next for the FTC Non-Compete Ban?

- Rule was struck down by Northern District of Texas
- Also party-specific injunction in Middle District of Florida
- Currently on appeal in both 5th and 11th Circuits
- Do not expect federal agencies to target non-competes during Trump Administration
- Federal legislation is a possibility
- Additional state experimentation?

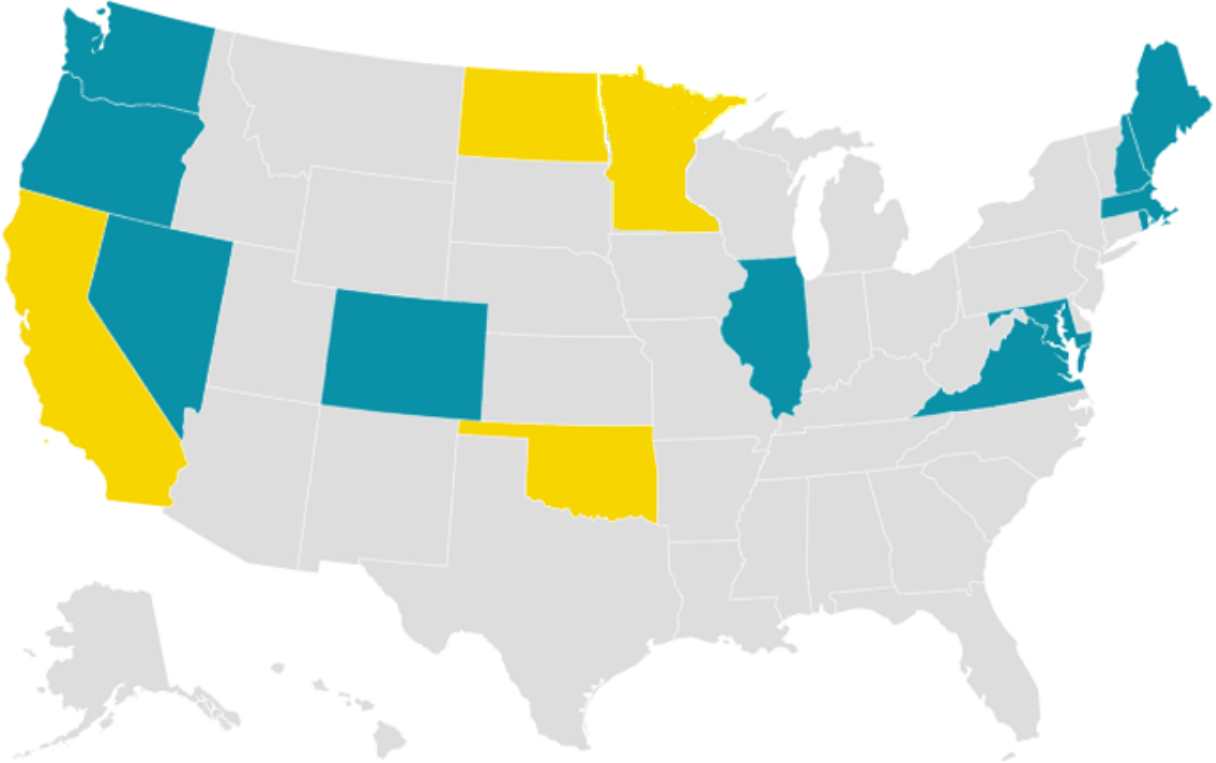
STATE-SPECIFIC CONSIDERATIONS

02

State-Specific Considerations

Numerous states fully or partially ban non-compete agreements

■ Full ban ■ Ban below a certain wage



Source: Fair Competition Law

THE WASHINGTON POST

State-by-State Regulation

- At least 16 states and D.C. established restrictions on enforceability through legislation.
- California, North Dakota, Oklahoma, and Minnesota ban all or nearly all non-competes.
- Some states, like Colorado, allow non-competes to apply only to individuals who earn above a minimum compensation threshold.
- Other states, like Illinois, may impose penalties on employers with non-competes.
- Several states, like New Hampshire, allow non-competes generally but prohibit them for physicians, nurses, and lawyers.
- NY and RI governors vetoed bans in 2023-24

State-Specific Considerations: California

California:

- Noncompetition agreements are unenforceable unless an exception applies. Plaintiff must prove exception applies.
- Ban now applies to non-competes created outside of California.
- Ban generally applies to non-solicitation of customers.
- Employers must have notified by February 14, 2024 all current and former employees employed after January 1, 2022 that any noncompete clauses and agreements not subject to statutory exception are void. Failure to do so may subject employer to civil penalties.
- Possible remedies for unfair competition cases involving non-competes: injunctive relief and damages.



State-Specific Considerations: Minimum Compensation Thresholds

Colorado

- Non-competition covenants are only enforceable against “highly compensated workers (i.e. annualized cash compensation at least \$127,091 for 2025).
- Customer non-solicitation covenants are only enforceable if employee’s annualized cash is at least \$76,254 for 2025, which is 60% of the threshold for highly compensated workers.
- Employer must also provide a separate notice of covenant not to compete and obtain signature.

Virginia

- Non-competition covenants are prohibited for “low-wage employees” (excludes any employee whose earnings are derived, in whole or in predominant part, from sales commissions, incentives, or bonuses paid by employer).
- For 2025, “low-wage employees” are those with annual earnings of less than \$76,081.20.

Washington

- Non-competition covenants are void unless, among other things, an employee earns an annual threshold amount (\$123,394.17 for 2025) and an independent contractor earns an annual threshold amount (\$308,485.43 for 2025), in each case, as adjusted for inflation.



ALTERNATIVE WAYS TO PROTECT CONFIDENTIAL INFORMATION AND TRADE SECRETS

03

Alternative Ways to Protect Confidential Information and Trade Secrets

Garden Leave:

- Employee remains legally employed but does not work. During this time, employee continues to receive base salary and benefits and is unable to accept competitive employment.
- In rare cases, states have codified this practice (e.g., Massachusetts).

Fixed Term Employment:

- Ask employees to sign an employment agreement with a fixed term of employment.
- Popular in California, particularly in the entertainment industry.

Extended Notice Period:

- Revise employment agreements to include an extended notice period (e.g., 6-12 months) for terminations.

Others

- Strengthen non-solicits (but beware state law considerations).
- Strengthen confidentiality clauses and internal data protections.
- Severance tied to acceptance of a new position.
- Tie variable compensation to continued employment (e.g., retention bonuses).

KEY TAKEAWAYS FOR 2025

04

Key Takeaways for 2025

- 1 Review all agreements to identify any hidden restrictive covenants.**

These covenants may appear in standalone restrictive covenant agreements, offer letters, employment agreements, equity plans, equity award agreements, severance agreements, and/or deal-based documents.
- 2 Understand which states ban, limit, and penalize non-competes.**

If your company maintains operations in certain states, then you may need to revise your arrangements with employees who live or work in these states to minimize litigation risk and avoid penalties.
- 3 Understand which groups of employees your company asks to enter into restrictive covenants.**

Are you over-inclusive by asking all employees with a certain title/grade/level to sign non-competes? Do you include non-competes as part of your standard onboarding practice? If so, should you revise that practice?
- 4 Audit your restrictive covenants annually for compliance with applicable law.**

Assess whether your non-solicits may be attacked as purportedly non-competes in disguise.
- 5 Consider alternative ways to protect confidential information and trade secrets.**

Is now the time to switch to a garden leave policy, fixed term employment arrangements, or other protective mechanisms for your trade secrets?



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