

Practical Considerations for Employers in a Changing World of Noncompetes

Krista Green Pratt, *Biogen*
Kate Rigby, *Epstein Becker Green*
Erik Weibust, *Epstein Becker Green*

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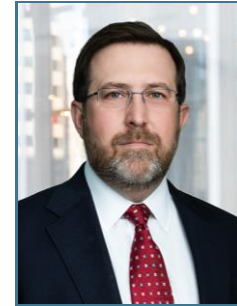
Presented by



Krista Green Pratt
Chief Employment Counsel
Biogen



Kate Rigby
Partner | Boston
Epstein Becker Green
krigby@ebglaw.com



Erik Weibust
Partner | Boston
Epstein Becker Green
eweibust@ebglaw.com

Agenda



1. Recent Federal and State Noncompete Law Updates

- FTC Noncompete Rule
- NLRB General Counsel Memo
- State law changes

2. Why do These Actual and Potential Changes Matter?

3. Practical Considerations for Employers

- Can (and should) my company still use noncompetes?
- What other contractual options are available for protecting my company's business interests?
- Other than contractual restrictions, what else can my company do to protect its legitimate business interests?
- What steps should my company take now considering all these changes?

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Recent Federal and State Noncompete Law Updates

The FTC Noncompete Rule

- **FTC voted 3-2 on party lines to issue the final rule on April 23, 2024**
- **If not enjoined, the rule will go into effect 120 days following formal publication in the Federal Register**
 - However, it is likely, in our view, to be enjoined and ultimately struck down by the Supreme Court
- **Would ban virtually all post-employment noncompetes nationwide**
 - Only exception is *existing* noncompetes with “senior executives”
 - Requires written notice to all affected employees on or before the effective date
- **Does not cover:**
 - Noncompetes entered into with sellers in connection with bona fide sale of a business
 - Causes of action accrued prior to the effective date
 - Non-solicits, NDAs, training cost repayment requirements, garden leave provisions
 - **But . . . it could cover these things if they are too broad*
 - Certain industries the FTC does not have authority over: nonprofits, banks, etc.
 - **But . . . the FTC may challenge nonprofit status*
 - Good faith (but failed) attempts to comply are not unfair business practices



The NLRB General Counsel Memo

- **Section 7 of The National Labor Relations Act** protects employees' right to form, join, or assist a union or not...
 - Also protects employees' right to “engage in other concerted activities for the purpose of...mutual aid and or protection.”
- **Section 8(a)** makes it an “unfair labor practice” for employers to restrain or coerce employees in the exercise of their rights under Section 7.
- Memo advises that the **General Counsel** views noncompete agreements as impinging on employees' exercise of rights under Section 7 of the NLRA, and therefore the “proffer, maintenance and enforcement” of noncompete agreements violates section 8(a)(1) of the NLRA.
- However, the NLRA only applies to “**employees**” as defined by the Act.
 - The statute specifically excludes “supervisors,” and the Supreme Court has also excluded “managerial” employees
 - Managerial: “Those who ‘formulate and effectuate management policies by expressing and making operative decisions of their Employer” *NLRB v. Bell Aerospace Co.*, 416 US 267 (1974)



State Legislative Updates

2024: 72 noncompete bills introduced in 32 states so far

2023: 98 noncompete bills introduced in 35 states

- 15 bills (in 10 states) proposed a complete ban of noncompetes
 - One enacted (**Minnesota**)
 - One passed but vetoed (**New York**)
- 10 bills (in 10 states) proposed compensation thresholds
 - One passed (Maryland – increased threshold)
- 32 bills (in 21 states) proposed changes to noncompetes in the healthcare industry
 - Seven passed (Connecticut, Indiana (x2), Iowa, Kentucky, South Dakota, Tennessee)
- Two bills in **California** that expanded and exported its existing ban



STATE	Employee Noncompetes Permissible?	General Noncompete Statute?	Industry-Specific Statutes or Rules?	Other Excluded Employees?	Continued Employment: Sufficient Consideration?	Notice Requirements	Other Unique Requirements	Customer and Employee Non-Solicits Permissible?	Enforceable Against Terminated Employees?	Judicial Modification Permitted? (Blue Pencil and/or Reformation)	Tolling Permissible?
ALABAMA	Yes	Ala Code § 9-1-190-197 (effective January 1, 2018)	Lawyers (Ala R Prof C 5-6) Mediators (Ala Code of Ethics for Mediators Std 11)	N/A	Yes	N/A	Must be reduced to writing and signed by all parties.	Yes	Unresolved	Yes	Yes
ALASKA	Yes	No	Lawyers (AK R. Prof. C. 5.6)	N/A	Unresolved	N/A	N/A	Yes	Unresolved	Yes	Unresolved
ARIZONA	Yes	No	Broadcasting Industry (Labor § 23-494) Lawyers (AZ R. Prof. C. 5.6)	N/A	Yes	N/A	N/A	Yes	Unresolved	Yes	Unresolved
ARKANSAS	Yes	AR Code § 4-75-101	Licensed medical professionals (Arkansas Code Title 17, Subtitle 3) Lawyers (AR R. Prof. C. 5.6)	N/A	Yes	N/A	N/A	Yes	Probably not	Yes	Unresolved
CALIFORNIA	No, with narrow exceptions in the sale of a business context or dissolution or disassociation relating to a partnership or LLC	Cal. Bus. & Prof. Code § 16600, et seq.	Entertainment Industry (Cal. Labor Code § 2859) Lawyers (Cal. R. Prof. C. 5.6)	N/A	N/A	N/A	N/A	No, with narrow exceptions in the sale of a business context or dissolution or disassociation relating to a partnership or LLC	No	N/A	Probably not
COLORADO	Yes	C.R.S. § 9-2-113 (amendments effective August 10, 2022)	Physicians (C.R.S. § 9-2-113 (3)) Lawyers (Cal. R. Prof. C. 5.6)	Minimum income thresholds for agreements entered into on or after August 10, 2022	Yes	For agreements entered into on or after August 10, 2022, before acceptance of an offer of employment for new or prospective workers, at least 14 days before the effective date of restrictions for existing workers. Must provide separate written notice in either case.	Penalties and potential criminal liability for violations of statute; approved workers may seek injunctive relief and attorneys' fees; out-of-state choice-of-law and venue provisions are unenforceable.	Yes, subject to minimum income thresholds for agreements entered into on or after August 10, 2022	Unresolved	Yes	No
CONNECTICUT	Yes	No	Security Guards (Conn. Gen. Stat. Ann. § 31-50a) Broadcasters (Conn. Gen. Stat. Ann. § 31-50b) Physicians (Conn. Gen. Stat. Ann. § 20-14g) Home Health Care, Companion or Homemaker Service Workers (Conn. Gen. Stat. Ann. § 20-68b) Lawyers (Conn. R. Prof. C. 5.6)	N/A	Generally no, but unsettled as to at-will employees	N/A	N/A	Yes	Yes	Yes, but only if agreement states that terms are severable	No
DELAWARE	Yes	No	Physicians (Del. Code Ann. tit. 6, § 2707) Lawyers (Del. R. Prof. C. 5.6)	N/A	Yes	N/A	N/A	Yes	Yes	Yes	Yes

<https://www.ebglaw.com/50-State-Noncompete-Survey>

In total, 12 noncompete laws were enacted in 10 states in 2023

Noncompetes in New England

Massachusetts

- Noncompetes unenforceable against:
 - employees classified as nonexempt under FLSA;
 - undergraduate or graduate student working part time;
 - employees who are terminated without cause or laid off;
 - employees who are 18 and under; and
 - certain healthcare workers: physicians, nurses, psychologists, and social workers
- 10 business days' advance notice required
- Continued employment insufficient consideration
- Limited to 12 months absent breach of fiduciary duty or theft, in which case two years
- Must be signed by employer and employee
- Must state that employee has right to counsel
- No out of state choice-of-law or venue provisions

Connecticut

- Certain healthcare exceptions

Rhode Island

- Minimum income threshold of \$37,650 in 2024
- Noncompetes unenforceable against:
 - employees classified as nonexempt under FLSA;
 - minors;
 - students in internships or short-term employment while enrolled at an educational institution; and
 - physicians

New Hampshire

- Must provide a copy of the agreement to a prospective employee before s/he accepts offer of employment
- Certain healthcare exceptions

Maine

- Minimum income thresholds of \$60,240 in 2024
- Certain healthcare exceptions, including veterinarians

Vermont

- No statute



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Why Do These Actual and Potential Changes Matter?

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- **Most trade secrets are misappropriated by insiders, usually employees!**

- Intentionally or otherwise – does not matter

- **Trade secret laws vs. noncompetes**

- Noncompetes are a key proactive measure to protect trade secrets
 - Trade secret laws can be very reactive
- Trade secret litigation is typically more costly and time consuming

- **Increased mobility = increased opportunities for mischief**

- More difficult to monitor/react quickly
- Offboarding is more complicated

- **Decreased protection = decreased information sharing and collaboration**

- Less likely to share sensitive information and client relationships if they can be taken to a competitor

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Practical Considerations for Employers

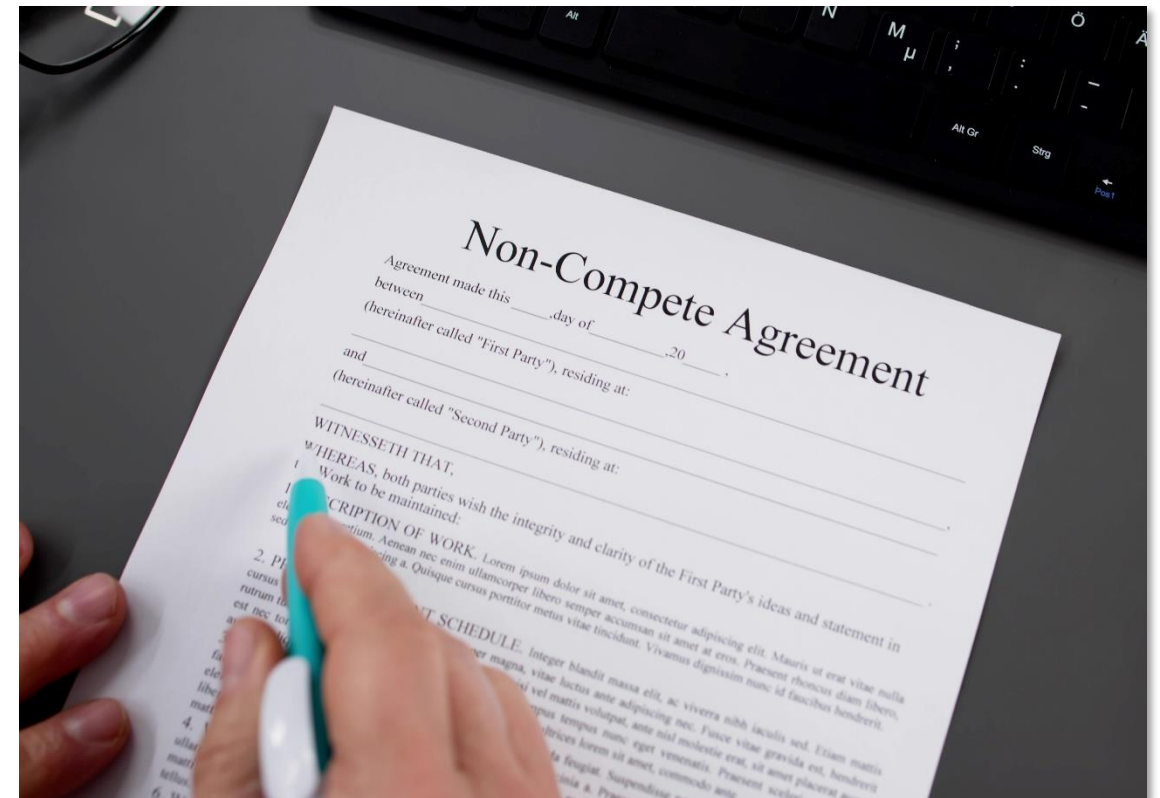
Can (and should) my company still use noncompetes?

■ Can you use noncompetes? **Yes, in most states with many different types of employees.**

- The FTC Rule has not yet gone into effect, and may never do so
- 46 states permit noncompetes; only 4 ban them (CA, OK, ND, MN)
- Several states have compensation thresholds and notice requirements, but generally permit noncompetes
- Drafting multi-state (including 50-state) agreements is more difficult now, but certainly not impossible.

■ Should you use noncompetes? **It depends.**

- Company culture
- Competitive landscape
- What are you trying to protect?
- With whom are you utilizing them?
- Are they necessary to protect your legitimate business interests?
- Will other, narrower, restrictions suffice?



What other contractual options are available for protecting my company's business interests?

- **Garden Leave / Mandatory Paid Notice Period**
 - During or post-employment
- **Non-Solicitation Agreements**
 - Customers and/or employees
 - Collaboration agreements
- **Nondisclosure / Confidentiality Agreements**
- **Forfeiture-for-Competition Provisions**
 - Employee choice
- **Term Contracts**
 - Used in California

***** Beware of entering into illegal no-poach agreements with competitors! *****

Other than contractual restrictions, what else can my company do to protect its legitimate business interests?

- **Create and maintain a culture of compliance**
 - Help employees understand the “why” not just the “what” and “how”
- **Policies and procedures**
 - Onboarding
 - Ongoing
 - Offboarding
- **Training, training, training**
- **Enhanced cybersecurity / physical protections**
- **Use carrots in addition to sticks**
 - Retention bonuses
 - Equity grants/options
 - Happy employees are typically more loyal

What steps should my company take now in light of all these changes?

Stay the course and focus on compliance with evolving state laws and trends . . .

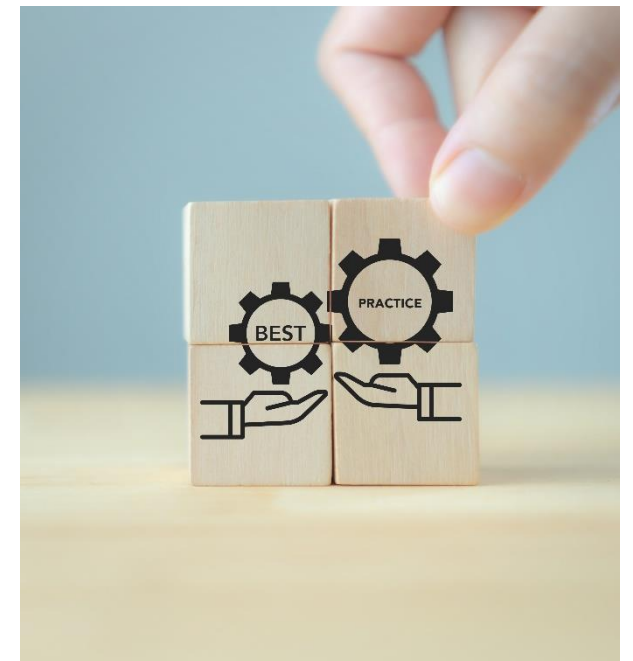
- Compensation thresholds
- Notice requirements

. . . but take a holistic review of your restrictive covenant strategy and practices.

- Take an inventory of your current restrictions – which roles, agreement/scope variations, state, etc.
- Consider overall use of restrictive covenants – who, what, when, where, why?
- Are non-solicits and confidentiality provisions sufficient for some groups / levels?
- Are other types of contractual restrictions appropriate?
- Review onboarding and offboarding policies and procedures
- What improvements / changes can be made?

Focus on trade secret protection and securing customer relationships

- Consider a trade secret audit
- Good old fashioned in-person meetings





Questions?

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Krista Green Pratt

Chief Employment Counsel
Biogen

After more than a decade in private practice focusing on complex employment litigation and serving as advisor to national and global companies across a variety of industries, Krista transitioned to an in-house role at Biogen supporting a global Human Resources organization in the fast-paced and innovative pharma/biotech industry. As an experienced in house leader and Chief Employment Counsel, Krista provides business-focused legal and strategic advice to clients in 40 countries covering nearly 10,000 employees. Krista advises on all phases of the employment cycle, from hire to offboarding. This includes managing employment litigation, establishing effective HR compliance practices and policies, directing workplace investigations, advising on performance management, discipline and terminations, fostering effective diversity, equity and inclusion programs, mitigating risk in connection with contingent labor engagement, supporting workforce reorganizations, and implementing and enforcing restrictive covenants. Krista provides strategic support for business development transactions as well as geographical expansion into new markets. She plays a key role in executive compensation and corporate governance, forming effective partnerships with stakeholders including the C-suite and board. Krista places a high value on providing practical and actionable legal advice, proactively managing risk, and finding creative and compliant solutions to drive business objectives and innovation.



Katherine G. Rigby

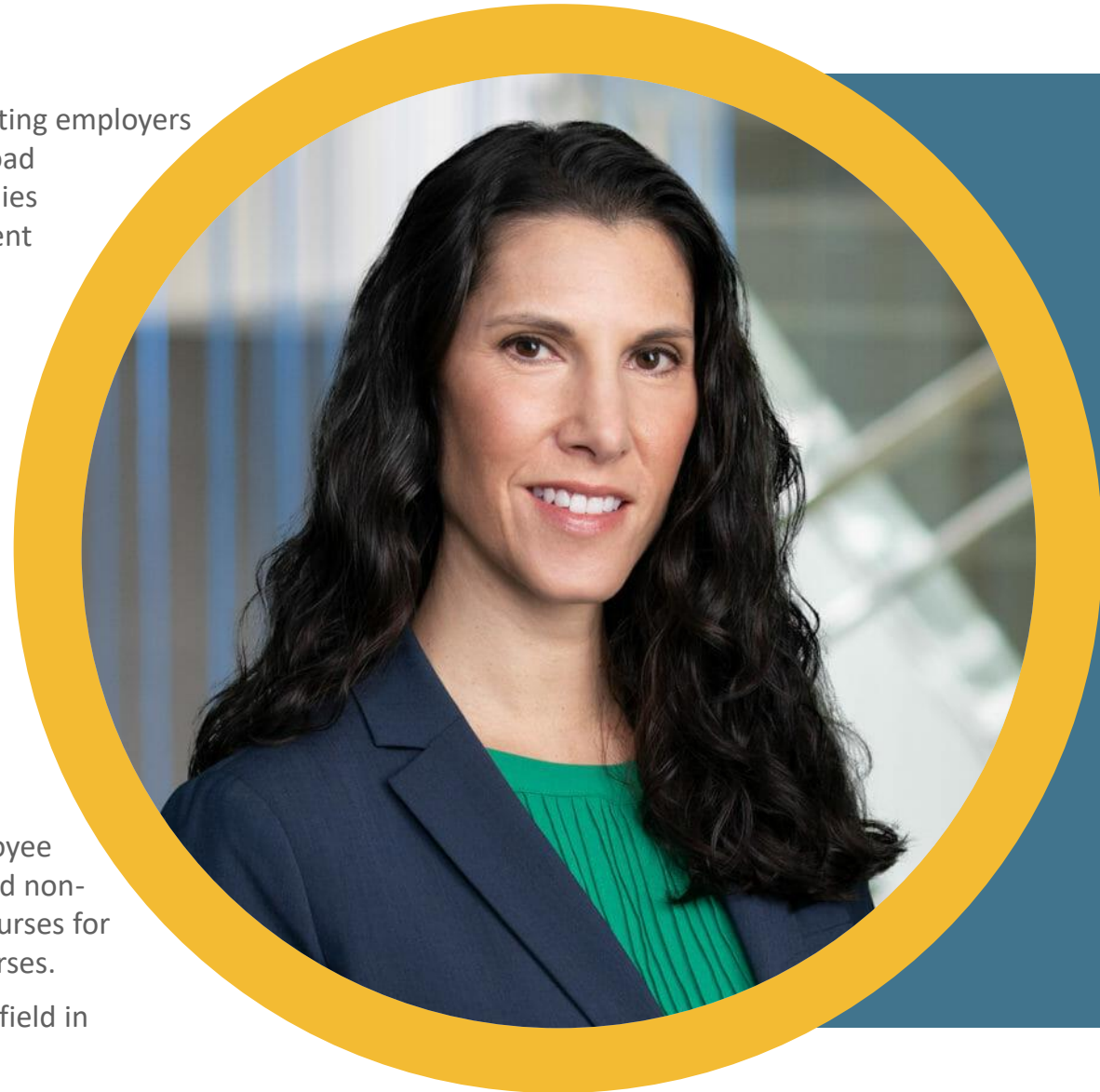
Boston, Massachusetts
krigby@ebglaw.com
+1 (617) 603-1091

Attorney Kate Rigby has devoted her entire legal career to representing employers in life sciences, technology, hospitality, and other industries in a broad spectrum of employment issues and disputes. Life sciences companies view Kate as their “go to” advisor, helping them confront employment law issues as they emerge from startups to growing enterprises.

Kate understands the unique challenges life sciences companies face with respect to talent acquisition and retention, protection of confidential information, incentive compensation structures, and performance management, among other issues. Kate helps clients ensure compliance with federal and state employment laws. Clients seek her practical counseling on all areas of human resources, including discipline and termination, hiring, reductions in force, EEO complaints, accommodation of disabilities and leaves of absence, wage and hour issues, employment agreements, restrictive covenants, handbooks, and policies. She regularly litigates employment and wage and hour claims before state and federal courts and agencies.

Employers also benefit from Kate’s significant experience handling investigations of internal employee complaints and providing employee and management training. Kate regularly conducts management and non-management equal employment and diversity/inclusion training courses for clients and has completed all MCAD-Certified Train-the-Trainer Courses.

Before becoming an attorney, Kate worked in the human resources field in recruiter, generalist, and management positions.



Erik W. Weibust

Boston, Massachusetts
eweibust@ebglaw.com
+1 (617) 603-1090

Companies of all sizes and in various industries call upon attorney Erik Weibust for his practical and thoughtful advice—and his aggressive representation in high-stakes trade secret, non-compete, and commercial litigation.

Many of the world's leading pharmaceutical, biotech, medical device, technology, financial services, staffing, and insurance companies look to Erik for thoughtful and practical advice concerning how best to protect their trade secrets and customer relationships from misappropriation by former employees, ex-business partners, competitors, and hostile actors in the United States and abroad, and to avoid liability when hiring from competitors. When necessary, clients rely on Erik for aggressive representation in litigation, where he has won substantial victories in court and at the negotiating table, including broad-reaching injunctive relief and multimillion-dollar payouts, in trade secret misappropriation, unfair competition, and breach of restrictive covenant cases.

Erik's national litigation practice provides him with particular insight into how courts and arbitrators in a variety of jurisdictions analyze relevant issues, keeping him abreast of cutting-edge legal arguments, industry trends, and litigation strategies that he brings to bear in all of his representations. In addition to serving as the immediate past Chair of the American Intellectual Property Law Association (AIPLA) Trade Secret Committee, Erik regularly publishes articles and speaks locally and nationally about trade secret and restrictive covenant law, and he has been quoted on these topics in publications such as *The Washington Post*, *Bloomberg*, *Law360*, *Business Insurance*, and *Financial Times*.

Erik serves as Co-Chair of Epstein Beker Green's Trade Secret & Employee Mobility Practice Group and as a member of the firm's national Litigation Department Steering Committee.

