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New Non-Compete Laws for California and the U.S.

January 30, 2024

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(Except for California)





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Overview

- **Opening Remarks**
- **New California Statutes**
 - AB 1076 – Business & Professions Code section 16600.1**
Tracy Warren
 - SB 699n - Business & Professions Code section 16600.5**
Jeff Judd
- **FTC Ruling**
Dylan Wiseman
- **Questions in Chat or to Martha Pineda**
- **Conclusion**

California and the U.S.

California's long-standing prohibition on non-compete:

- Helps drive innovation economy
- Flow of information, not flow of employees



The Rest of the U.S.

- **Allows employers to have covenant not to compete clauses or permits it in certain circumstances**
- **Impact on the economy, slows growth and hampers innovation**

Section 16600 states: “Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”

California Business & Professions Code 16600

In the years since its original enactment as Civil Code section 1673, our courts have consistently affirmed that [section 16600](#) evinces a settled legislative policy in favor of open competition and employee mobility. (See [*D'sa v. Playhut, Inc.* \(2000\) 85 Cal.App.4th 927, 933, 102 Cal.Rptr.2d 495.](#)) The law protects Californians and ensures “that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice.” ([*Metro Traffic Control, Inc. v. Shadow Traffic Network* \(1994\) 22 Cal.App.4th 853, 859, 27 Cal.Rptr.2d 573.](#)) It protects “the important legal right of persons to engage in businesses and occupations of their choosing.” ([*Morlife, Inc. v. Perry* \(1997\) 56 Cal.App.4th 1514, 1520, 66 Cal.Rptr.2d 731.](#))

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A.B. 1076 B & P Code section 16600.1

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California Business & Professions Code 16600.1

16600.1.

- (a) It shall be unlawful to include a noncompete clause in an employment contract, or to require an employee to enter a noncompete agreement, that does not satisfy an exception in this chapter.
- (b) (1) For current employees, and for former employees who were employed after January 1, 2022, whose contracts include a noncompete clause, or who were required to enter a noncompete agreement, that does not satisfy an exception to this chapter, the employer shall, by February 14, 2024, notify the employee that the noncompete clause or noncompete agreement is void.
- (2) Notice made under this subdivision shall be in the form of a written individualized communication to the employee or former employee, and shall be delivered to the last known address and the email address of the employee or former employee.
- (c) A violation of this section constitutes an act of unfair competition within the meaning of Chapter 5 (commencing with Section 17200).

California Business & Professions Code 16600.1

- Changes from being merely void to **unlawful**
- Pertains to “non-compete” clauses
- Creates notice requirement for:
 - Current employees or
 - Former employees who were employed after January 1, 2022
- Notice must be made by **February 14, 2024:**
 - Written
 - Individualized
 - Last known address and via email



Business & Professions Code section 16600.1

- **Consequences for not complying:**
 1. **Lawsuit by former employees, current employees, or a competitor under California's Unfair Competition Law.**
- **Best practices**
 1. **Update the company's confidentiality, intellectual property assignment and non-solicitation provisions; and**
 2. **Statutory notice by February 14, 2024**

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S.B. 699 - B & P Code section 16600.5

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Business & Professions Code section 16600.5

16600.5.

- (a) Any contract that is void under this chapter is unenforceable **regardless of where and when the contract was signed.**
- (b) An employer or former employer shall not attempt to enforce a contract that is void under this chapter **regardless of whether the contract was signed and the employment was maintained outside of California.**
- (c) An employer shall not enter into a contract with an employee or prospective employee that includes a provision that is void under this chapter.
- (d) An employer that enters into a contract that is void under this chapter or attempts to enforce a contract that is void under this chapter commits a **civil violation.**
- (e) (1) An employee, former employee, or prospective employee may bring a private action to enforce this chapter for **injunctive relief or the recovery of actual damages**, or both.
(2) In addition to the remedies described in paragraph (1), **a prevailing employee**, former employee, or prospective employee in an action based on a violation of this chapter shall be entitled to recover reasonable **attorney's fees and costs.**

Extraterritorial reach

(e) The California courts have been clear that California's public policy against restraint of trade law trumps other state laws when an employee seeks employment in California, even if the employee had signed the contractual restraint while living outside of California and working for a non-California employer.

"California courts cannot then reach out and nullify those foreign obligations simply because the same obligations, if entered into here, would run afoul of important California policies."

***Advanced Bionics Corp. v. Medtronic, Inc.*, (2002) 29 Cal. 4th 697, 709 (Brown, J. Concurring.)**

Business & Professions Code section 16600.5

Best Practices:

- 1. Modify confidentiality and intellectual property assignment agreements;**
- 2. California employers should not have agreements with employees outside of California that contain non-competes.**
- 3. Employers outside California?**

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The FTC's Proposed Rule

Dylan Wiseman – Buchalter San Francisco & Sacramento Offices

The FTC's Proposed Rule



3482

Federal Register / Vol. 88, No. 12 / Thursday, January 19, 2023 / Proposed Rules

FEDERAL TRADE COMMISSION

16 CFR Part 910

RIN 3084-AB74

Non-Compete Clause Rule

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: Pursuant to Sections 5 and 6(g) of the Federal Trade Commission Act, the Federal Trade Commission (“Commission”) is proposing the Non-Compete Clause Rule. The proposed

between employers and workers are traditionally subject to more exacting review under state common law than other contractual terms, due, in part, to concerns about unequal bargaining power between employers and workers and the fact that non-compete clauses limit a worker’s ability to practice their trade.²

In recent decades, important research has shed light on how the use of non-compete clauses by employers affects competition. Changes in state laws governing non-compete clauses have provided several natural experiments

prohibition of unfair methods of competition.⁷

Pursuant to Sections 5 and 6(g) of the FTC Act, the Commission proposes the Non-Compete Clause Rule. The proposed rule would provide it is an unfair method of competition—and therefore a violation of Section 5—for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or, under certain circumstances, represent to a worker that the worker is subject to a non-compete clause.⁸

The FTC's Proposed Rule

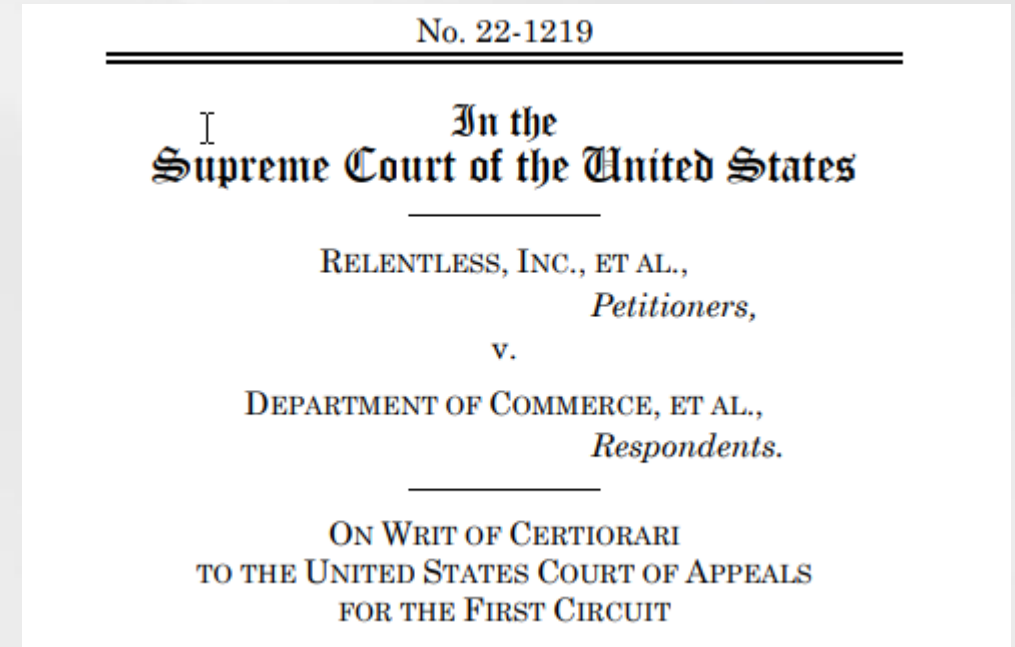
- **Harms worker mobility**
- **Harms innovation**
- **Keeps wages artificially low**
- **Employers have statutory ways to protect trade secrets**

The FTC's Proposed Rule

April 24, 2024 expected vote

Prediction will be approved

Significant litigation



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Questions?

Please add questions to chat or to Martha Pineda at Mpineda@Buchalter.com

If you require CLE credits, please email
MCLEMailbox@buchalter.com
at the conclusion of this webinar.



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