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12 Days Of Handbook Updates: Non-Competes

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This is the seventh of our 12 Days of Handbook Updates that take you through 12 important topics for employers as we round out the year.

If there is a “Claus” that should be grabbing employer’s attention this holiday season, it should be the non-compete clause. One mistake employers often make is including restrictive covenants in employee handbooks. These should be in their own separate agreement and tailored to the employee and the requirements of the state where the employee works. As you’ve probably seen, new restrictions to non-competes have been consistent throughout 2023.

In January, the Federal Trade Commission (FTC) [proposed a rule](#) to ban non-competes entirely, arguing that the restrictions hurt workers and harm competition. However, the FTC has not voted on the proposed rule and, according to Bloomberg, the rule [will likely not be voted on](#) until April 2024.

In addition, on May 30, Jennifer Abruzzo, the National Labor Relations Board’s general counsel [issued a memo](#) saying that overbroad non-compete provisions are unlawful because they “reasonably tend to chill employees in the exercise of Section 7 rights” to engage in concerted activity under the National Labor Relations Act.

We have also seen several states pass laws regarding non-competes this

year. Some states have chosen to ban non-competes entirely. California [passed two laws](#) pertaining to non-competes that will go into effect on Jan. 1, 2024. The first law says that attempting to enforce a non-compete agreement will be a civil violation. The second creates a burdensome requirement: “Employers must now affirmatively notify an employee who previously entered into an otherwise illegal non-compete agreement that the agreement is void via a written, individualized communication to the employee. Employers must provide this notice by Feb. 14, 2024, to any current or former employees who were employed after Jan. 1, 2022.”

This summer, Minnesota [also passed legislation](#) banning non-competes entered into after July 1, 2023, but the law does not apply to existing agreements. This summer, the New York State Senate similarly approved a bill that would ban all non-compete agreements. However, Gov. Kathy Hochul has not signed the bill yet and reportedly [may try to scale back](#) the legislation to prevent the ban from covering higher earners.

It appears non-competes will continue to face not-so-jolly competition in the coming year. Employers are encouraged to check if their state (or the state their remote workers are in) has passed a law governing the use of non-competes, and to stay tuned.