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USA: Trends and Developments

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Trends and Developments

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Seyfarth Shaw LLP has 18 offices domestically and abroad, and a team of over 60 trade secret/restrictive covenant attorneys in major US cities. The experienced team emphasises proactive measures to prevent and address intellectual property theft and aggressively protect clients' legitimate business interests. Their approach includes advising on trade secret protection policies, audits of existing secrets, restrictive covenants agreements, electronic information protection systems, and training. In the event of theft or violation, Seyfarth assists clients in protecting and recovering assets, as well as defending clients

from such claims. They pursue injunctions, collaborate with law enforcement, work with private investigators and other experts, and represent clients at trial and arbitration. Recent success stories include injunction victories in high-stakes technology matters, obtaining large jury trial verdicts, and complete defence decisions in "bet-the-company" trials and arbitrations. Seyfarth's resources include its 50-State Non-Competes Desktop References, Trade Secrets Webinar Series, and award-winning Trading Secrets Blog, offering valuable insights for businesses.

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Dawn Mertineit is the co-chair of Seyfarth's Trade Secrets, Computer Fraud, and Non-Competes practice. With nearly 20 years of experience, she focuses on complex commercial litigation with a particular emphasis

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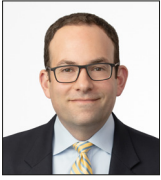


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USA TRENDS AND DEVELOPMENTS

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Introduction

Restrictive covenant laws in the United States continue to undergo major shifts across various jurisdictions, with no sign of slowing down. While the Federal Trade Commission (FTC) has withdrawn its pursuit of a nationwide ban on non-competes, many states continue to recalibrate their restrictive covenant laws, impacting how businesses must draft their agreements (and in some cases prohibiting certain covenants outright or sharply limiting their enforceability). Accordingly, businesses seeking to protect their trade secrets, confidential information, and other valuable assets must navigate an ever-changing legal landscape to ensure that such information remains subject to robust protections.

Federal Restrictions on Non-Competes

While the FTC implemented a rule in April 2024 that would have banned virtually all non-competes nationwide, two separate federal courts blocked the rule from going into effect later that year, prompting the FTC to appeal those decisions to the Fifth and Eleventh Circuits respectively. As anticipated, in September 2025, the FTC voluntarily dismissed both appeals, effectively abandoning its previous efforts to enforce a nationwide ban on most non-competes.

Nonetheless, the FTC has not completely abandoned its focus on non-competes. Instead, it has continued targeting businesses allegedly using overbroad restrictive covenants or requiring a broader swath of employees than is reasonable to execute restrictive covenant agreements in a manner that the FTC has deemed anti-competitive. The FTC has specifically focused its scrutiny on certain industries – most notably healthcare providers – and has also increased case-by-case enforcement efforts.

In fact, in the fall of 2025, the FTC launched a public inquiry “to better understand the scope, prevalence, and effects of employer noncompete agreements” in order to “inform possible future enforcement actions”. The FTC sought comment from members of the public regarding the “use of noncompete agreements”, claiming that “[u]nreasonable noncompete agreements have proliferated for too long in the dark”.

In other words, the regulatory pressure is far from disappearing, and businesses operating in the United States must carefully safeguard their intellectual property in the event their restrictive covenant agreements are struck down or otherwise limited.

State-Level and Judicial Initiatives

Notwithstanding the FTC’s abandoned efforts to effectuate a nationwide ban (and in addition to the more limited FTC enforcement actions discussed above), another significant challenge for employers in the United States is the continued proliferation of state statutes governing – and largely limiting – restrictive covenants.

Among other developments, there has been significant legislative activity in recent years, including but not limited to:

- industry-specific legislation limiting the scope of permissible covenants (most notably in the health-care industry);
- low- or middle-wage bans, which preclude the use and/or enforcement of restrictive covenants with respect to employees or independent contractors earning below a specified compensation threshold; while most of these laws are limited to non-competes, more states are extending such limitations to non-solicitation provisions as well (complicating matters further, each state uses different thresholds – and different methods for calculating them – with many thresholds increasing annually and sometimes unpredictably);
- fee-shifting provisions or other civil (and sometimes criminal) penalties where employers impose or attempt to enforce restrictive covenants in violation of applicable statutes;
- right-to-counsel requirements, where employers must notify employees of their right to seek legal counsel before executing an agreement; and
- limitations on choice-of-law and/or venue provisions in restrictive covenants.

Notably, Minnesota banned virtually all employee non-competes in 2023, the first state to ban such covenants almost entirely in well over a century, becoming the fourth state to do so. Since then, several state legislatures have taken steps to enact similar non-

compete bans; it remains to be seen whether any such attempts will prove successful.

While the vast majority of legislative activity has focused on limiting employers' ability to impose or enforce restrictive covenants, some states have moved in the opposite direction. For example, Florida recently enacted the "CHOICE Act", which bolsters its already employer-friendly laws. The statute permits employers to (i) retain employees during a lengthy, paid "notice period", effectively sidelining them from competitive employment while continuing to pay wages and benefits, and/or (ii) implement certain non-competes lasting up to four years. This development marks a notable departure from broader state trends that increasingly favour employee mobility. While most states are likely to continue limiting restrictive covenant enforceability, others may follow Florida's lead.

Against this already confusing backdrop of state-specific legislation, recent trends in judicial enforcement are also changing the landscape for employers seeking to protect their trade secrets through restrictive enforcement. For example, many courts have held that non-competes that prohibit an individual from joining a competitor in any capacity whatsoever likely violate the so-called janitor rule and are generally overbroad and unenforceable. See, eg, *Med-1 Sols., LLC v Taylor*, 2024 WL 4876906, *8 (Ind. Ct. App. Nov 25, 2024) (non-competes prohibiting work for a competitor "in any capacity", even as a security officer or custodian, are unreasonable and unenforceable "because they extend beyond the scope" of any legitimate interests).

Similarly, in Delaware, despite the well-established public policy favouring "freedom of contract", the Delaware Chancery Court has continued its trend of sharply limiting enforcement of restrictive covenants. While Delaware historically supported a "reformation" approach to limiting overbroad covenants, pursuant to which a court could modify the relevant covenants to narrow their scope or otherwise render them enforceable, in recent years the Delaware Chancery Court has refused to enforce any portion of an overbroad covenant, even where the offending conduct would fall squarely within the portion of a covenant that is reasonably narrow. Despite this, the Delaware Supreme Court has continued to issue decisions

upholding certain covenants, and at times reversing the Chancery Court's decisions. For example, the Delaware Supreme Court has upheld forfeiture-for-competition provisions in multiple cases in the last few years, including a ruling that such provisions are not subject to the "reasonableness" review typically applied to restrictive covenants. See *Hub Grp., Inc. v Knoll*, 2024 WL 3453863, at *1 (Del. Ch. 18 July 2024) (refusing to modify an overbroad covenant, and noting that blue-penciling risks a "perverse incentive towards overbreadth or lack of clarity" and citing *Kodiak Bldgs. Partners, LLC v Adams*, 2022 WL 5240507, at *5 (Del. Ch. Oct. 6, 2022), a sale of business case); *Fortiline, Inc. v McCall*, 2024 WL 4088629, at *4 (Del. Ch. Sept. 5, 2024) (similarly refusing to judicially modify an overbroad-as-drafted covenant, and opining that blue-penciling "supports a regime of 'sprawling restrictive covenants'" (citing *Kodiak and Sunder Energy, LLC v Jackson*, 305 A.3d 723, 746 (Del. Ch. 2023)).

In a similar vein, Massachusetts' highest court confirmed in 2025 that the state's 2018 non-compete statute – which includes strict requirements for non-compete enforcement – does not apply to non-solicits, even those accompanied by a forfeiture. See *Miele v Foundation Medicine, Inc.*, 496 Mass. 171 (2025). On the other hand, a Massachusetts Superior Court recently interpreted the 2018 statute to permit non-competes in the employment context only if they are between the employee and the specific employer – foreclosing enforcement of covenants with a corporate parent (as is common in equity agreements). See *Anaplan Parent, LP v Brennan*, Case No 2584-cv-02350 (Suffolk Superior Court, Massachusetts).

In sum, it is more important than ever for employers to ensure their restrictive covenants are compliant with governing law and reasonably limited in scope to protect legitimate business interests to ensure enforceability.

Trade Secret Trends

Against this backdrop, trade secret protection and related litigation remain a top priority for businesses with operations in the United States, as trade secrets are often among a company's most valuable assets. In fact, trade secret misappropriation costs American businesses approximately USD300 billion annually,

with an average legal spend for misappropriation litigation in the millions.

While restrictive covenants are commonly used as a first line of defence, they can be challenging for businesses operating in jurisdictions that prohibit or limit non-compete or non-solicit agreements. And as restrictive covenant enforceability becomes more difficult in certain jurisdictions, adequate protection of a company's trade secrets becomes all the more important, and trade secret misappropriation litigation tends to become more prevalent. Companies should therefore strengthen holistic policies and procedures to safeguard confidential and trade secret information, and ensure they have a clear action plan for both proactive and reactive efforts (typically, HR, Legal, IT) in the event of potential trade secret misappropriation – particularly when employees depart for competitors. Well-settled law (and common sense) dictates that once the trade secret becomes public, it loses its status as a trade secret, which can have detrimental effects on a company's bottom line.

Indeed, “at your fingertips” technology continues to illustrate vulnerabilities associated with trade secret theft. Technological advancements also contribute to new ways for employees to misappropriate information that were unthinkable just a few years ago, and businesses may thus lag behind in identifying conduct that may amount to misappropriation if they are not aware of such technology (and how to detect and/or prevent theft by these new methods). For example, the wide availability of cloud-based transfer and storage technology, particularly for companies that have a remote-employee base, can make it challenging to discern actual threats from business-as-usual. Additionally, external threats including phishing scams and the use of generative AI to facilitate such scams make data breaches and misappropriation a near-constant threat. All the more reason for companies to make sure that they have a belt-and-braces approach to ensure protection of critical trade secrets and confidential information, because in the unfortunate event of misappropriation – actual or threatened – courts will not hesitate to deny relief to those who fail to demonstrate reasonable efforts to protect them.

For example, in August 2025, the Tenth Circuit Court of Appeals held that a party that fails to take adequate steps to protect confidential information cannot maintain claims for trade secret misappropriation under either federal or state law. *Snyder v Beam Technologies, Inc.*, 147 F.4th 1246, 1256 (10th Cir. 2025) (former employee failed to take reasonable measures and efforts to maintain secrecy of alleged trade secrets, precluding DTSA and CUTSA claims).

Nonetheless, for companies that are able to prove a violation of trade secret misappropriation statutes, potential damages awards can be enormous, especially considering the availability of exemplary damages for wilful and malicious misappropriation. For example, in July 2025, after a nearly decade-long legal battle in the US District Court for the Northern District of Illinois, a jury awarded a verdict of nearly USD29 million in actual damages and an additional USD30 million in punitive damages after determining that the plaintiff's confidential business information had been misappropriated arising out of a failed business relationship. See *Sonrai Systems, LLC v Anthony M. Romano*, Case No 16-cv-03371 (N.D. Illinois). Additionally, in late 2024, a Defend Trade Secrets Act case in the US District Court for the District of Massachusetts resulted in a jury verdict of USD452 million (USD170 million in compensatory damages and USD282 million in exemplary damages). See *Insulet Corp. v EOFLOW, Ltd.*, Case No 23-cv-11780 (D. Mass.).

However, such eye-popping damages awards are subject to reversal on appeal. While a decision has not been made as of the time of this publication, the defendants in the *Insulet* case have appealed the District Court's judgment to the Federal Circuit on a variety of grounds, including the damages award. See also *Pegasystems Inc. v Appian Corp.*, 924 S.E. 2d 621 (Va. 2026) (affirming Virginia Court of Appeals' reversal of trial court's denial of defendant's motion to strike and set aside plaintiff's USD2 billion damages award).

Finally, many courts are requiring plaintiffs in trade secret misappropriation cases to show that they moved promptly to protect their assets. This is a case-by-case analysis, and courts will consider the underlying circumstances in determining whether the

statute of limitations has run and/or whether injunctive relief is warranted. See, eg, *Elite Semiconductor, Inc. v Anchor Semiconductor*, 2025 WL 82217 (N.D. Cal. Jan. 13, 2025) (statute of limitations begins running upon discovery of any evidence of misappropriation, even if ultimately unable to prove claim); *Pliteq, Inc. v Mostafa*, 775 F. Supp. 3d 1231, 1259 (S.D. Fla. Mar. 31 2025) (delay of approximately two months after learning of data breach was not fatal to request for injunctive relief, although the court noted it was a close call, while also crediting plaintiff for trying to arrange informal return of data in the interim); *Talent v Kotha* (N.D. Cal. Sept. 19, 2025) (“The Court notes that the gap in time between itD’s filing of the initial complaint and submitting the TRO application is explained by the need to conduct a thorough investigation before asking the Court for relief”).

Of course, the glaring juxtaposition of these divergent outcomes highlights the need for ongoing vigilance to protect trade secrets (including through strong confidentiality policies and practices, well-drafted contracts, and rigorous internal controls amid an ever-evolving technological landscape), as well as reasonable measures to prepare for potential litigation (including identifying trade secrets in advance of a mandatory disclosure in discovery, moving promptly to protect critical IP, and developing defensible damages models).

As for businesses hiring employees from competitors, the significant trade secrets verdicts we have seen in recent years make it clear that such businesses must implement strict protocols to guard against misappropriation of the former employer’s critical trade secret assets, which can lead to damages awards that may even have the potential to bankrupt the company. Even if the defendant company defeats a trade secret claim, it can spend millions of dollars defending against such suits, further underscoring the need to avoid threatened lawsuits entirely.

Conclusion

Businesses should regularly review their restrictive covenant agreements to ensure compliance with various state laws, federal rules, and/or judicial trends. They should also take measures to prevent information loss and mitigate harm that may occur notwithstanding best efforts to prevent trade secret misappropriation.

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