# Part II: State Legislatures' Initial Response to the Call to Action

Insights
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Following the Obama White House's Call to Action in October 2016, state legislatures have been busy enacting restrictive covenant reform, particularly to non-compete laws. By our count, eight (8) states have enacted some type of reform since the Call to Action. Some of this activity may have been in the works prior to the Call to Action, but others are undoubtedly following the Obama White House's Best-Practices Policy Objectives:

- banning non-competes for categories of workers (such as workers in public health and safety, low wage earners, and workers laid off or terminated for cause);
- improving the transparency and fairness of non-competes (through notice or consideration provisions or regulating the timing of execution);
- encouraging employers to draft enforceable agreements through the adoption of the "red pencil doctrine".

The states that have enacted restrictive covenant reform since the October 2016 Call to Action are as follows:

- **California**. California enacted California Labor Code § 925, which became effective January 1, 2017. The law prohibits employers from entering into forum selection or choice of law agreements with California workers that primarily live and work in California. The purpose of the law is to ensure that California workers receive the protections of California law and are not required to litigate employment disputes outside of the state. The law does not apply to contracts entered into before January 1, 2017, or to an employee represented by counsel in negotiating the agreement.
- **Colorado**. Colorado amended its non-compete statute, C.R.S. § 8-2-113(2), as it applies to physicians. While the statute already prohibits non-competes with physicians, it does permit for the recovery of damages against them so long as the damages are reasonably related to the injury. Under the amendment, even damages are not recoverable against physicians who treat "rare disorders." The amendment limits the scope of the exception to those patients with rare disorders treated by the physician.
- **Idaho**. Idaho repealed a two-year amendment (I.C. §§ 44-2701, *et seq.*) that provided employers with a rebuttable presumption of irreparable harm for departures involving "key employees" when the court found a violation of the non-compete. Key employees could only rebut the

when the court found a violation of the non-compete. Key employees could only rebut the presumption by showing they had "no ability to adversely affect the employer's legitimate business interests." The effect of the law is a return to the *status quo*. Employers have to establish irreparable harm to obtain injunctive relief, even if the dispute involves a "key employee."

- **Illinois**. Illinois enacted the Illinois Freedom to Work Act (820 ILCS 90, *et seq.*), which became effective January 1, 2017. It prohibits employers from entering non-competes with "low-wage workers" defined as employees making the greater of (1) $13/hour or (2) minimum wage under federal, state, or local law. Currently, this threshold is $13/hour. The Act only prohibits "covenants not to compete" and does not address non-solicitation or nondisclosure agreements. The Act is being actively pursued by the Illinois Attorney General in a pending enforcement action with a payday lender.
- **Nevada**. Nevada enacted sweeping reform to its non-compete laws on June 3, 2017 (NRS § 613.200). The amendment rejected the Nevada Supreme Court's adoption of the red-pencil doctrine in *Golden Road Motor Inn, Inc. d/b/a Atlantis Casino Resort v. Islam and Grand Sierra Resort*, 376 P.3d 151 (Nev. 2016). Nevada now permits courts to "revise" non-competes "to the extent necessary." The amendment did not stop there and includes other substantive protections for employees such as (1) the requirement of "valuable" consideration, (2) the imposition of appropriate restrictions in relation to the consideration, (3) the imposition of restraints no greater than necessary, and (4) restraints that do not impose an undue hardship on the employee. Additionally, the law prohibits restraints that prevent a customer from voluntarily choosing to follow a former employee, and requires an employer to pay salary and benefits to employees that are laid off if it wants to continue to enforce its non-competes against those employees.
- **New Mexico**. New Mexico has a law on the books (N.M.S.A. § 24-1i-1) that voids non-competes with workers in dentistry and certain medical professions including physicians. A recent amendment in April 2017 expands those categories to include certified nurse practitioners and midwives. Perhaps of greater importance, the amendment also prohibits forum selection and choice of law agreements with these workers similar to California Labor Code § 925.
- **Oregon**. S.B. 1534. On January 1, 2018, Oregon signed into law a statute that bans non-competes, employee raiding agreements, and customer non-solicitation agreements for home care workers.
- **Utah**. On March 27, 2018, Utah expanded its Post-Employment Restrictions Act (Utah Code § 34-51-101, *et seq.*) to provide for protections to employees in the broadcasting industry. Non-competes with these employees now must meet a salary threshold ($913/week or $47,746/year). If the salary test is met, then the term of employment cannot exceed four (4) years, and is only enforceable against employees terminated for cause or who breach their contract.

This wave of activity is likely only the "tip of the iceberg." There is an abundance of proposed legislation working its way through state legislatures at the time of this writing. Part III of our series on state-level legislative activity will examine this proposed legislation in detail.