

The Year Ahead 2024: Restrictive Covenants

By Clifford R. Atlas & Erik J. Winton

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Transcript

Alitia Faccone:

Welcome to We get work™ and The Year Ahead 2024 podcast series. Covering workplace issues from both subject matter and industry perspectives, the 19 episodes in our series provide both big picture trends and detailed tactics that can help employers achieve their workplace ideal, while remaining real about regulations, compliance challenges, and more in 2024. Jackson Lewis invites you and others at your organization to experience the report's legislative, regulatory, and litigation insights in full at our website, JacksonLewis.com, or listen to the podcast series on whichever platform you turn to for compelling content.

Cliff Atlas:

Hi everyone. This is Cliff Atlas from the New York City office of Jackson Lewis, co-leader of the Restrictive Covenants, Trade Secrets and Unfair Competition practice group.

Erik Winton:

Hello everybody. This is Erik Winton, sitting here in Boston. I'm a principal at Jackson Lewis as well, and I'm also co-lead of the Restrictive Covenants, Trade Secrets and Unfair Competition practice group. And we're here to speak with you today about what we envision in 2024 within our practice group area of the law. Cliff, we made it through 2023, easily the most active year with respect to restrictive covenant law that I think either one of us can remember, right?

Cliff Atlas:

That's right. It was a year ago today.

Erik Winton:

Yeah, that's right. Starting with the FTC proposed rulemaking in January, when I was sitting on a beach in Aruba and you and I started speaking about this, and I read the whole PDF there on my phone for a few hours, followed by other federal agencies weighing in against non-competes as well as multiple state legislation both passed and considered. It seems like this area of the law, our area of specialty, was constantly in the news. So now 2023 is over, and the question is, what does 2024 have in store for us? We may not have a crystal ball, but reading with tea leaves from 2023, let's

talk about our best guesses, predictions for the coming year, and maybe at the end of the year can look back at our predictions and see how we did. Cliff, what do you think 2024 is going to bring?

Cliff Atlas:

Well, overall, I think we can agree that the attack on non-competes is not going away. There's a possibility that 2024 may be even worse for those in favor of non-competes than 2023 was. Momentum has been very strong in that direction, but we've also seen Governor Hochul's veto of the New York ban, which could have repercussions beyond New York State. Overall, though, the effort to curb non-competes will continue this year, and we'll continue through additional state and federal agencies, state and federal legislatures right up to the White House, where President Biden has had an open disdain for non-competes for many years.

Erik Winton:

I'm not sure you think he's going to speak about it again from a State of the Union address.

Cliff Atlas:

You never know. We'll find out in February, but the first question is, what should we expect from the FTC? As for timing, there was one news report that was repeated by others that hinted at an April 2024 announcement. What will that announcement be? All indications appear that it will support the FTC sticking to its guns and attempting to have rulemaking to ban non-competes subject to very few exceptions. Will there be a carve-out for highly compensated individuals? That would make sense, but there's no guarantee that the FTC will agree, and from what we heard from the FTC during their open forum, it's unlikely. Frankly, I think that the FTC will implement the notice of proposed rulemaking as drafted.

Erik Winton:

I think you're probably right. We had hoped that logic would prevail and that they'd hear some of the noise going against some of the proposed rulemaking as going a step too far, but I think you and I were both surprised by the forum where they heard arguments from both sides and then seemed to ignore them and just beyond the street path to what was the proposed rulemaking, which is the complete ban with very few limited exceptions.

Cliff Atlas:

Well, as you and I wrote in an article published last year, this wouldn't be the first time the FTC has ignored information that's put in front of it.

Erik Winton:

Now, and they seem okay with catching L's, right? It doesn't matter if they lose on this, they're seeing the big picture, and we will get to that in a few minutes.

Cliff Atlas:

Yeah. Well, I think that's a great point because the FTC might lose this battle ultimately, but they may win the war.

Erik Winton:

Yeah. And the war is the war on non-competes, and we're talking about true non-competes really more than the other provisions that I find these types of restrictive covenants like non-solicitation of customers, non-solicitation of employees, and confidentiality or non-disclosure agreements, which are also being attacked but at a much lighter level than true non-competes.

Cliff Atlas:

Right. But if the FTC implements the proposed rule as drafted, Erik, what do you think is going to happen?

Erik Winton:

So what would we expect from that in response to the FTC rulemaking if it comes out like we think it is going to, which is pretty close to what they proposed back in January, a year ago today, the day we're recording this? We expect a fight or multiple fights at every conceivable step along the way. The U.S. Chamber of Commerce has already indicated that they're going to challenge us. There are other entities that will challenge it as well, we're sure. Challenges to what we believe is incomplete and, in some cases, questionable research forming the alleged basis for the rulemaking. There will be challenges to the FTC's authority to promulgate such a rule, which goes back to another article we wrote, Cliff, last year about the January 2020 FTC workshop that I attended, where the FTC invited experts on administrative law to come and tell them that in essence they may not have the power to do this, yet they ignored or appear to ignore from the people they invited themselves.

Challenges to the aspects of the rulemaking itself as to whether it supports the stated objectives of the FTC, as they say in Princess Bride, challenges galore, which, if they lose, will turn into humiliations galore. So what will all these challenges mean? I think that the proposed rule will likely not go into effect for years, if not ever, pending all these challenges, and one might ask if the FTC's potential rulemaking will be challenged and likely successfully challenged, and as a result, the rule will never be enforced. Why should we care? It's a good question, right? That's why I asked it. Cliff, you want to answer?

Cliff Atlas:

Well, I think that you're probably right because, as I suggested earlier, they may win the war because the cat is out of the bag, right? This issue is now front and center. Other agencies and legislators, both state and federal, are following the FTC's lead and feeling emboldened. What was previously a minority, or at least the quiet position that non-competes should be banned, seemingly is becoming a majority, or at least the very loud minority position. Do we think that Minnesota would've banned non-competes in 2023? The first state to move to outright ban non-competes in decades would've done so, if not for the momentum from the FTC, would New York, if so seriously considered an outright ban before a last-minute veto by the governor? If not for the push from the FTC and others, who knows? But it sure didn't hurt. Like the

FTC, we also can expect the NLRB to continue its own assault on these kinds of agreements. Following General Counsel Abruzzo's position, this can take the form of additional complaints filed by the NLRB against employer use of non-competes.

How these complaints will play out after undoubtedly being challenged is another issue, and that likely won't be resolved in 2024. Erik, what do you think about potential legislation in 2024?

Erik Winton:

Yeah, so we've spoken about the potential for rulemaking, which is not legislation, but at the state level, we'll likely see other states propose legislation either banning or severely curtailing non-competes, which has been something we've been seeing now for many years. Federal legislators will also likely push for similar legislation, and the agencies like the NLRB and DOJ will do what they can to combat what is viewed as non-compete abuse. I mean, heck, even the FTC, while caught up in the challenges to a proposed rule, may step up its enforcement actions, which they are more easily able to do without legal challenges. What are some of the other provisions we envision legislators supporting in this area? Well, as we've seen with the FTC proposed rule and the new California laws, other states may require employers to provide notice to employees regarding the enforceability or not of previously signed agreements. And as for some specific states, what other developments might we see for those states that have not yet restricted non-competes based on salary thresholds or required advanced notice of the requirement to sign a non-compete or not allowed non-competes for certain professions like physicians?

These are less controversial provisions that will likely be added to more states in the coming year. What about some specific states?

Cliff Atlas:

Well, Erik, you mentioned California in the upcoming February 14th Valentine's Day deadline to notify employees that they are not bound by void non-competes is a significant issue, and it's a real challenge for a lot of our California employers and non-California employers with employees in California to comply with. And we've been talking to a lot of people about that. It would not be surprising to see creative and aggressive plaintiffs lawyers in California challenging employers compliance with the two new statutes, perhaps by bringing PAGA claims. Hopefully we're not giving anyone listening any ideas, but on the other side of this issue, we may see challenges to the California legislation as it applies or not to out-of-state employers and out-of-state employees. Remember, the new 16600.5 has some provisions that point towards extraterritorial application of California law. Another state is Delaware, and in Delaware we've seen over the last several years, and we expect this to continue in 2024, a trend of Chancery Court judges being less friendly to enforcement actions and choice of law provisions, and the days of rubber stamping, non-compete by a Delaware choice of law provision, and a restrictive covenant are gone.

I think that one needs to approach Delaware matters in a very careful way and not just select a Delaware choice of forum as a knee-jerk reaction because that happens to be where the company is incorporated. In New York, as I mentioned, Governor Hochul vetoed the proposed legislation banning non-competes. We expect the

measure to be reintroduced, but we also expect her to continue to try to negotiate the scope of any potential non-compete legislation. She has made it very clear that her aim is to protect middle and low-wage earners, and she's looking for a carve-out for senior people, highly compensated executives who, as she's described, can pretty much take care of themselves. We also hope that any bill that comes down the pike in New York winds up including important provisions about permitting, restrictive covenants, and non-competes in the context of a sale of business, something that was really missing from the proposed New York ban.

Erik Winton:

So stay tuned because there will be some activity in New York, it sounds like. We just don't know exactly what.

Cliff Atlas:

We don't know what, we don't know when.

Erik Winton:

As for litigation trends, with the multi-pronged attack we're seeing on non-competes, we expect to continue to see more litigation involving other provisions and claims such as non-solicitation of customers, employees, non-disclosure, and trade secret misappropriation. What are the key takeaways, Cliff, for 2024 in our view of what's going to happen? Still no need for employers out there to panic, but at the same time, stay on top of developments throughout the year, especially for those of you who are multi-state employers. Make sure your agreements are current and are as enforceable as it can be. Think strategically about what restrictions you should use and for what level of employee. Consider beefing up the other restrictions other than the non-compete to take steps to protect your confidential information, your trade secrets, your customers, and then your employees. And if when legal changes are made, make sure you can be nimble enough to address the new challenges, and that's where we can come in and help you with that.

Cliff Atlas:

I think today we've scratched the surface of some of these issues, and there are many more to come, but thank you for your time.

Erik Winton:

Agreed. Have a good day.

Alitia Faccone:

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