NON-COMPETES & RESTRICTIVE COVENANTS
SURVEY RESULTS

HR POLICY ASSOCIATION SURVEY RESULTS  |  JANUARY 2023
128 Responses | Survey open January 11–26, 2023

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USE OF RESTRICTIVE COVENANTS
Q: Does your company utilize restrictive covenants such as non-competes, non-solicitations or forfeiture provisions in equity award agreements, severance agreements or employment agreements in the U.S.?

Yes, we utilize restrictive covenants including (where permissible) non-competes. 93%

Yes, we utilize restrictive covenants other than non-competes. 6%

No, we do not utilize any form of restrictive covenant. 1%
USE OF NON-COMPETES
VARIETY OF DOCUMENTS USED TO DETAIL NON-COMPETES

Q: If your company utilizes non-competes, in which document(s) are they detailed?

*Please specify other documents:

- Separate agreement which enables ongoing updates (with consideration) without having to open employment agreements. (4)
- Supplemental executive retirement plan documents (4)
- Separate restrictive covenant agreement when hired and/or promoted to an officer role. (3)
- Offer letters (2)

**NOTE:** Respondents could select more than one choice; totals may not equal 100%
EXECUTIVES, EQUITY RECIPIENTS SUBJECT TO NON-COMPETES

Q: Which employees are subject to non-competes?

*Please specify other employees:

- Sales employees/ executives (11)
- Employees at or above specific leadership levels (e.g., VP and above) (9)
- On a selective basis (5)
- All officers (3)
- Positions with access to confidential and proprietary information (2)

NOTE: Respondents could select more than one choice; totals may not equal 100%
75% HAVE LESS THAN 10% OF EMPLOYEES ON NON-COMPETES

Q: Approximately what percentage of your U.S. workforce is subject to non-compete restrictions?

- Less than 1%: 28%
- Between 1% and 10%: 47%
- Between 10% and 20%: 14%
- More than 20%: 11%
Q: How long is the non-compete agreement in effect following the employee’s departure?

*Variable based on position, other factors:

- 6 to 24 months, depending on position (e.g., 2 years for NEOs/C-Suite; 1 year for other officers; 6 months below officer level) (19)
- Subject to terms of separation agreement and vesting of equity (6)
Q: If an employee is entitled to a severance benefit, does the non-compete period cover the same period as the benefit (e.g., a severance benefit of 2x salary would equal a non-compete of two years)?

46% Yes
30% No, shorter
24% No, longer
NON-COMPETE NEGOTIATIONS, VIOLATIONS INFREQUENT

Q: In the past three years, how many times has:

An employee joined a competitor based on a successful negotiation between your company and the competing company?

- Don't know: 8%
- 5 or more: 5%
- 3-4 times: 12%
- 1-2 times: 20%
- Zero: 54%

An employee violated a non-compete agreement (for example, because no negotiation was attempted or successfully concluded)?

- Don't know: 7%
- 5 or more: 2%
- 3-4 times: 8%
- 1-2 times: 24%
- Never: 58%

An employee violated a non-compete and your company pursued enforcement?

- Don't know: 6%
- 5 or more: 2%
- 3-4 times: 12%
- 1-2 times: 25%
- Never: 55%
USE OF FORFEITURE CLAUSES
EQUITY RECIPIENTS, EXECUTIVES, OFFICERS SUBJECT TO FORFEITURE CLAUSES

Q: If your company utilizes forfeiture clauses to enforce restrictive covenants, which employees are subject to them?

- All equity recipients: 56%
- All executives: 49%
- Named executive officers: 40%
- Other*: 21%
- All employees: 2%

**Note:** Forfeiture clauses are commonly included in severance agreements.

**NOTE:** Respondents could select more than one choice; totals may not equal 100%.
EMPLOYEE ACTIONS MAY RESULT IN FORFEITURE

Q: Which actions on the part of the employee may result in forfeiture under the terms of the clause?

- Soliciting other employees or customers: 83%
- Breaching company confidentiality agreements: 83%
- Working for a competitor post-departure: 81%
- Disparaging the company: 51%
- We do not use forfeiture clauses: 10%

*NOTE: Respondents could select more than one choice; totals may not equal 100%*
FTC’S PROPOSED RULE
WHERE DO WE DRAW THE LINE?

Q: With which of the following provisions of a final rule on non-competes would you be comfortable?

- A ban on non-competes for all hourly workers: 75%
- A ban on non-competes for all hourly workers plus salaried employees under a certain salary threshold: 62%
- A ban on non-competes for all hourly workers plus salaried employees under a certain level (e.g., Director and below): 62%
- A ban on non-competes for all workers except “senior executives”: 20%
- Other*: 12%

*Other, please specify:

- We do not believe the FTC has the legal authority to prohibit non-competes on a national basis. (4)
- A ban on non-competes for all workers not in specific, company identified roles where access to proprietary knowledge exists (e.g., executives, unique scientific roles). (3)
- A ban on non-competes for anyone who does not receive equity/LTI.
- Ban on skilled, direct workforce.

**NOTE:** Respondents could select more than one choice; totals may not equal 100%.
Q: Would a total ban on non-competes have a negative impact on your talent or compensation strategy?

*Please explain your answer:

- The restriction would impact both talent and compensation strategies as well as our ability to protect proprietary information. (25)
- We use non-competes very sparingly (12)
- We would examine both our talent and compensation strategies and consider modifying them to retain talent. (7)
- We may need to explore changing our STI/LTI vesting approach for senior executives (3)
- Ban would have an initial ripple effect within a highly competitive industry. Once common, playing field would level to focus on talent retention strategy. (2)
- While it would have an impact on talent strategy, “significant” seems too strong a word. (2)
- Losing the non-compete provision would likely force us to more aggressively pursue clawbacks and forfeitures.