

WHAT EMPLOYERS CAN LEARN FROM UTAH'S NONCOMPETE SURVEY

by Bryan Benard, *Law360*, New York (March 14, 2017, 10:39 AM EDT)

In a unique and comprehensive research study, Utah employers and employees were surveyed about the use, enforcement and perceived fairness of noncompete agreements. The study, funded jointly by the Utah state legislature and private sector donations, arose after Utah enacted a noncompete law in 2016 that limits the duration of post-employment competitive restrictions to one year. On Feb. 24, 2017, the results of the survey were released, providing a fascinating look at how noncompete agreements are viewed and used in Utah, and the effect that noncompete legislation may have on the business community.

Noncompete Study Objectives

The goal of the research study was to obtain objective and Utah state-specific data on the impact of noncompete legislation so that state legislators and business leaders could make informed choices on future bills affecting post-employment restrictions in Utah. The study, conducted by The Cicero Group, identified the following objectives:

- Determine key issues related to noncompete agreements
- Identify how noncompete agreements are used in the employment context in Utah
- Determine how the 2016 Utah noncompete law, H.B. 251, affects such use
- Determine how Utah's noncompete laws affect out-of-state companies' decisions to locate operations in Utah or elsewhere, and
- Determine whether the 2016 noncompete law should be further revised and if so, if such revisions will be supported.

The Cicero Group received and analyzed responses from 937 employer representatives and 2,000 individual employees working in Utah private businesses.

Use and Enforcement of Noncompetes in Utah

On the employer side, 49 percent of the overall Utah employer respondents reported that they ask at least some employees to sign noncompete agreements. That number goes up substantially for larger employers, with 73 percent of employers with 2,500 or more employees using noncompetes with at least some employees. Overall, 82 percent of employer respondents who use noncompetes make signing the agreement a condition of employment.

On the employee side, roughly 18 percent of employee respondents reported that they have a noncompete agreement with their current employer. Thirty-five percent have been asked to sign a noncompete agreement at some point in their career. As might be expected, the percentage of employees who have signed noncompete agreements goes up with higher salaried positions — nearly 40 percent of employee respondents earning more than \$150,000 had signed noncompete agreements versus only 8 percent for those making less than \$15,000 per year.

When it comes to enforcing noncompete agreements, most employer respondents

For more information, please contact:



Bryan Benard

801.799.5833

bbenard@hollandhart.com

reported that they rarely, if ever, have to address violations of a noncompete. Thirty-seven percent of employer respondents answered that they have never had to address a violation while an additional 50 percent reported that they address violations less than once per year.

When asked if they hire an employee who has an existing noncompete restriction, 35 percent of the employer respondents said no, while another 42 percent stated that they will only hire if a release of the provisions is obtained.

Fairness of Noncompete Agreements

Forty percent of employees with current noncompetes in Utah believed their noncompete agreement was completely or moderately fair, while another 34 percent believed that their noncompete was somewhat fair. Twenty-six percent of employees felt that their current noncompete was slightly unfair or not fair at all.

When asked the reasons that employees felt their most recent noncompete was unfair, the top four reasons were that the restriction would not allow them to use their skills in the future, the length was too long, the agreement was used to limit their compensation, and they were principally opposed to such agreements. Ninety-six percent admit to knowing they signed a noncompete provision.

Effect of Noncompete Legislation

The study was conducted less than one year after Utah passed its noncompete law. Numerous questions were designed to determine the impact of noncompete legislation on both employers and employees as well as businesses considering moving into Utah.

Interestingly, 57 percent of employers and 70 percent of employees answered that Utah's new noncompete bill would have little to no impact on their organization. When asked if additional legislation were to limit noncompetes in Utah even further, or prohibited their use entirely, 53 percent of employers responded that such further limits would have a significant or somewhat negative impact on their organization.

Focus Groups and In-Depth Interviews

The Cicero Group conducted focus groups and in-depth interviews to help learn the underlying reasons and motivations behind respondents' survey answers. Both employers and employees identified some common positive themes behind the use of noncompete agreements, including that they can encourage investment in employees, protect the company and job security, and create trust and synergy. Some of the common negative perceptions of the use of noncompetes were that they discourage competition and innovation, create friction between employers and employees, and disproportionately hurt lower-level and less experienced employees.

Legislative Response to Survey Results

Speaker Greg Hughes, R-Utah and Reps. Mike Schultz, R-Utah, and Tim Hawkes, R-Utah, supported this unprecedented effort at obtaining Utah-specific information that will then drive their policy decisions. With Utah's 2017 legislative session coming to a close, Schultz issued a statement indicating that he and Hawkes remained committed to working with the noncompete legislative working group and other stakeholders to analyze the study results and take sufficient time to consider whether further legislation

would be appropriate. As a result, it appears that no further legislative action on noncompete agreements will occur this session but continued work will take place before the 2018 legislative session.

Research Study Process

This unique research endeavor grew out of a working group that was formed during the 2016 legislative session to try to reach a compromise on the 2016 noncompete bill. The working group included the legislators proposing the noncompete legislation, business leaders (Randy Shumway, Vance Checketts, Jeffrey Nelson and Dan Sorenson), the Salt Lake Chamber (Lane Beattie, Abby Osborne and Michael Parker), the Governor's Office of Economic Development (Val Hale, Aimee Edwards), and myself. After last year's session ended, the working group discussed the concept of a Utah-specific research study of Utah-based employees and employers, related to the use of noncompetes in Utah. At that time, the Cicero Group was engaged to conduct the research study and provide analysis of the results.

The Cicero Group developed the survey questions with input from two employment law lawyers who donated their time, Jaqualin Friend Peterson (employee-side) and myself (employer-side). The draft survey questions were then circulated to each legislator, the business community, and the public for input. All comments and suggestions were reviewed, discussed and addressed through several revisions to the study questions. Those involved spent hundreds of hours to prepare a comprehensive, unbiased survey, with separate versions tailored to employees and employers covering the same issues.

Employers and employees representing a wide variety of private Utah companies (both large, medium and small in size) were eligible to participate in the survey. The Cicero Group conducted the survey, focus groups and in-depth interviews over several months and formulated the results which were recently released. Additional information about the study methodology can be found in the survey results.

Impact on Employers

With more and more states enacting legislation to limit or even prohibit organizations from using noncompete agreements, this study offering specific feedback from employees and employers alike presents a unique and valuable perspective for businesses and legislators nationwide. Of course, it is difficult to extrapolate the Utah survey results to predict perceptions in areas that have a different economic and political environment. Yet, the study results offer employers useful information to help tailor their use and enforcement of noncompete agreements in a manner that benefits both their employees and their organization.

Moreover, legislators in other states may take a page from their Utah colleagues' book by opting to collect objective data on this topic before introducing noncompete bills elsewhere. This "research-first" approach makes good common sense and results in legislation that the business community and its workers can both get behind.

—By Bryan Benard, [Holland & Hart LLP](#)

Bryan Benard is a partner at Holland & Hart's Salt Lake City office. He advises clients regarding employee relations, employee contracts, discrimination and leave issues, with a focus on noncompete and nonsolicitation agreements. He also litigates employment cases at the federal, state and administrative level.

DISCLOSURE: Benard was involved with the creation and distribution of The Cicero Group's Utah noncompete study.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.