

***Changes to Utah's Non-Compete
Laws and the Unprecedented
Utah-based Non-Compete
Research Study***

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Non-Compete Bill (HB251) 2016

- **Background**
 - Post-employment restrictions bill introduced in House by Representative Mike Schultz (with support from Speaker Greg Hughes), in Senate by Senator J. Stuart Adams
 - As first introduced, bill would have prohibited all post-employment non-competes and restrictions
 - People with strong feelings on both sides of this issue
 - Went through 10 different versions before passing both houses

New Non-Compete Law

H.B. 251, as passed:

- **Allows non-compete agreements for up to one year after employment**
- **Does not apply to the sale of a business**
- **Does not apply to non-solicitation, non-disclosure, or confidentiality agreements**
- **Permits reasonable severance agreements that include post-employment restrictions (if entered at time of termination)**

Non-Compete Bill

H.B. 251, as passed:

- **Applies to agreements entered into on or after May 10, 2016**
- **If agreement is found to be unenforceable, employer is liable for employee's costs, attorney's fees and actual damages (this is to agreements post May 10, 2016 as well)**
- **Found in Utah Code § 34-51-101 -301**

Current NCA Law in Utah

- **Common law:**
 - Reasonable in scope/market/geography
 - Reasonable duration (not to exceed 1 year/statute)
 - Narrowly tailored to protect legitimate business interests (goodwill, trade secrets, customer/client base, significant investment in employee, employees with specialized/unique services, etc.)
 - Negotiated in good faith
 - Supported by Consideration

Impacts of 2016 Process and Law

H.B. 251 stirred TONS of conflict, press conferences, articles, op-eds, meetings, etc.

- Salt Lake Chamber and Governor's Office of Economic Development created a Working Group consisting of:
 - Speaker, Bill Sponsors, their counsel
 - Business Leaders
 - Vance Checketts, Dell EMC
 - Randy Shumway, Cicero
 - Jeff Nelson, Nelson Labs
 - Dan Stevenson, Domo
 - Bryan Benard, Holland & Hart
- Met almost daily during 2016 session to try and broker some peace, reach some middle ground, and convey business community's interests to legislative leaders

Working Group Efforts

- Working Group continues meetings post 2016 session as Speaker/Sponsors are Set on Additional Changes to the Law
- Sponsors attend White House summit on NCAs
- Working Group conceives of Utah-based research study to inform legislative decisions and action
- Costs \$100,000 (legislature 50%; business community 50%)
- Ongoing Meetings as legislation coming in 2018

Methodology of Study

- Cicero Group, Bryan Benard, Jaqualin Peterson created and revised the survey questions Summer/Fall 2016, with significant input
- 937 Employer responses
- 2000 employee responses
- Lists obtained from various Chambers, UTC, BioUtah, AGC, etc.
- Survey went out over several weeks end of year/first of year
- Numerous focus study groups held and facilitated by Cicero Group
 - (Report p. 6)

Quantitative Research Methodology

1



- Designed, programmed, and fielded a 15-minute survey
 - Gathered 937 responses from employer representatives that have key HR decision making authority (business associations throughout Utah aided in recruiting employers for this study)
 - Gathered 2,000 responses from individual employees working in Utah private companies
 - Survey questions were developed by Cicero Group in conjunction with two employment law lawyers who donated their time, Jaqualin Friend Peterson (employee-side) and Bryan K. Benard of Holland & Hart LLP (employer-side)
 - Input was then sought from each legislator, the business community, and the public, with all comments and suggestions reviewed, discussed, and addressed through several revisions to the study questions
- Gathered key information across company size (adhering to international size classifications, with additional stratification for small- and medium-sized companies)

“Employee” Qualifications

Work in a competitive, for-profit company

Broad variety across industries, company sizes, demographic sets, and job functions

“Employer” Qualifications

General responsibilities for hiring and retention

Must have employees

Must be competitive, for-profit company

Broad variety from several industries, company sizes, demographic sets, and job functions

Employer Distribution Lists

Salt Lake City Chamber	Vernal Chamber	UVU Chamber	BioUtah*	Employers Council	Davis Chamber
Sandy Chamber	Utah Technology Council	Payson & Santaquin Chamber	Cache Chamber	Utah Business License	Associated General Contractors
St George Chamber	Utah Manufacturers Association	Richfield Chamber	ABC Utah	Ogden/Weber Chamber	

Research Study Objectives

- **The goal of this research is to discover employer and employee perspective with regards to non-compete agreements**
- **Objectives:**
 - Determine key issues related to non-compete agreements
 - Identify how employer-employee non-compete agreements are used in Utah
 - Discover how Utah employers and employees are affected by H.B. 251 legislation
 - Determine how Utah's non-compete agreement laws influence non-Utah based companies ultimate decision whether to relocate to Utah or elsewhere
 - Determine whether additional revisions to H.B. 251 are necessary or would be supported

The majority of Employers and Employees were unaware that Utah passed H.B. 251 in 2016.

Understanding of Utah Non-Compete Agreement Laws

n= 937 | 2000

True False Don't Know

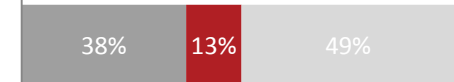
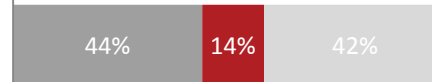
Employer

Employee

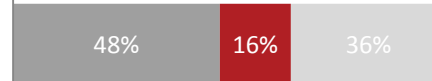
In Utah, employers are only allowed to enforce non-compete agreements against employees making \$13 per hour or more



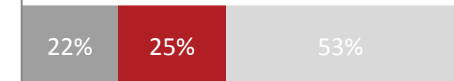
In Utah, employers are allowed to enforce non-compete agreements against non-management employees



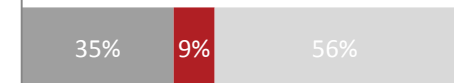
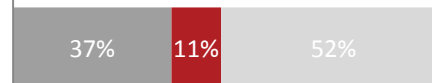
In Utah, employers are allowed to enforce non-compete agreements against employees whom the employer has terminated



In Utah, employers are allowed to enforce non-compete agreements that last longer than one year



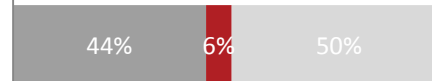
In Utah, if an employer sues an employee to enforce a non-compete agreement but loses, the employer must pay the employee's attorney fees and costs



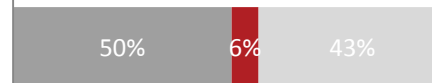
In Utah, if an employer sues an employee to enforce a non-compete agreement and wins, the employee must pay the employer's attorney fees and costs



In Utah, a law limiting the use of non-competes was passed in 2016



Prior to 2016, Utah courts limited the enforcement of non-compete agreements to those that serve a legitimate business interest...



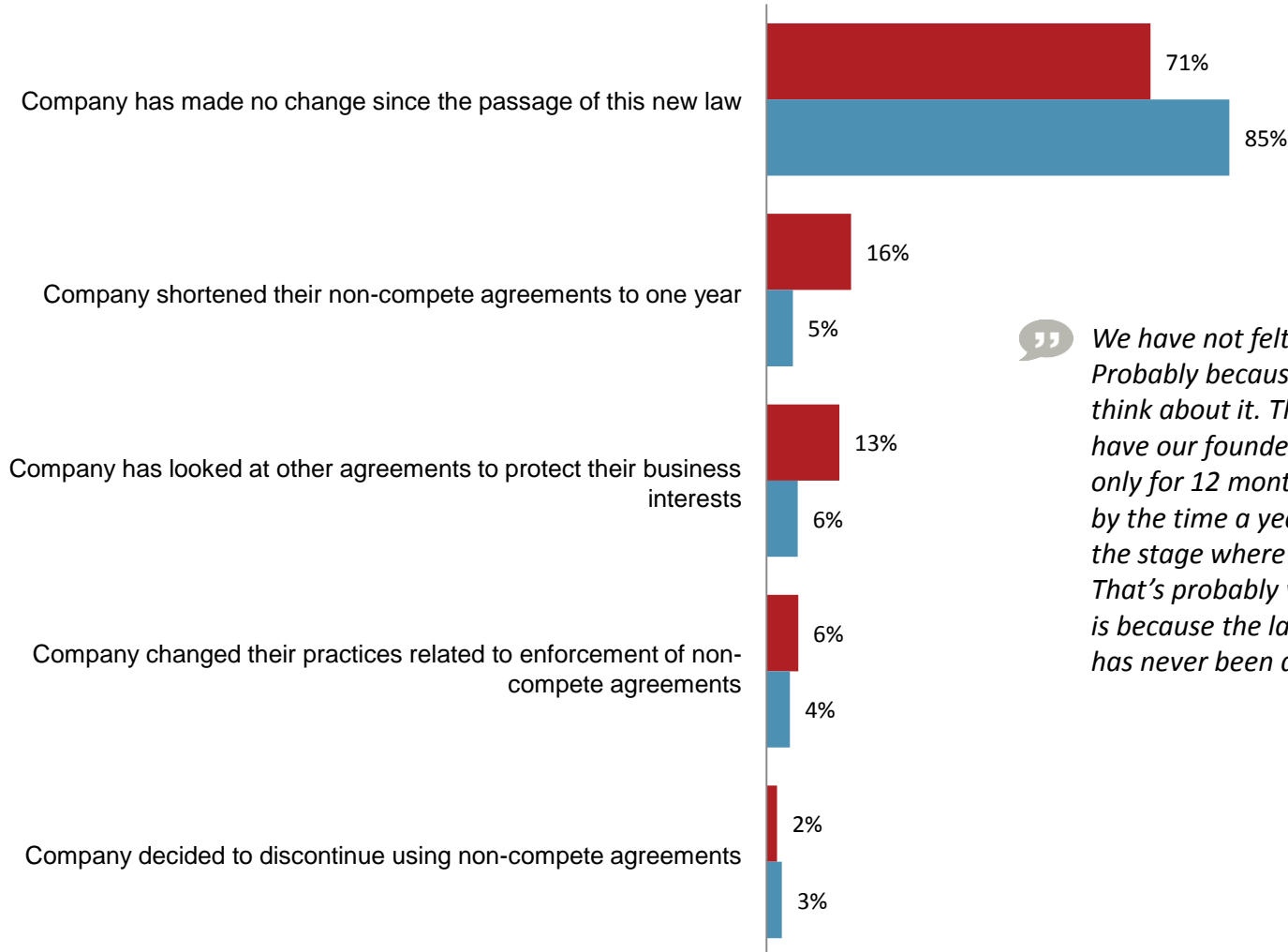
Most respondents have not made, nor noticed, any changes today in employment practices since the passage of H.B. 251.

Changes in Company's Employment Practices Post H.B. 251

n= 925 | 2000

Employer Employee

% Selected



” We have not felt an impact from H.B. 251. Probably because we don't even have to think about it. The terms of our NCA that we have our founder teams sign are generally only for 12 months. Tech moves so fast that by the time a year is up, we've moved past the stage where their knowledge is helpful. That's probably why we've seen zero impact is because the law didn't solve anything, it has never been an issue for us.

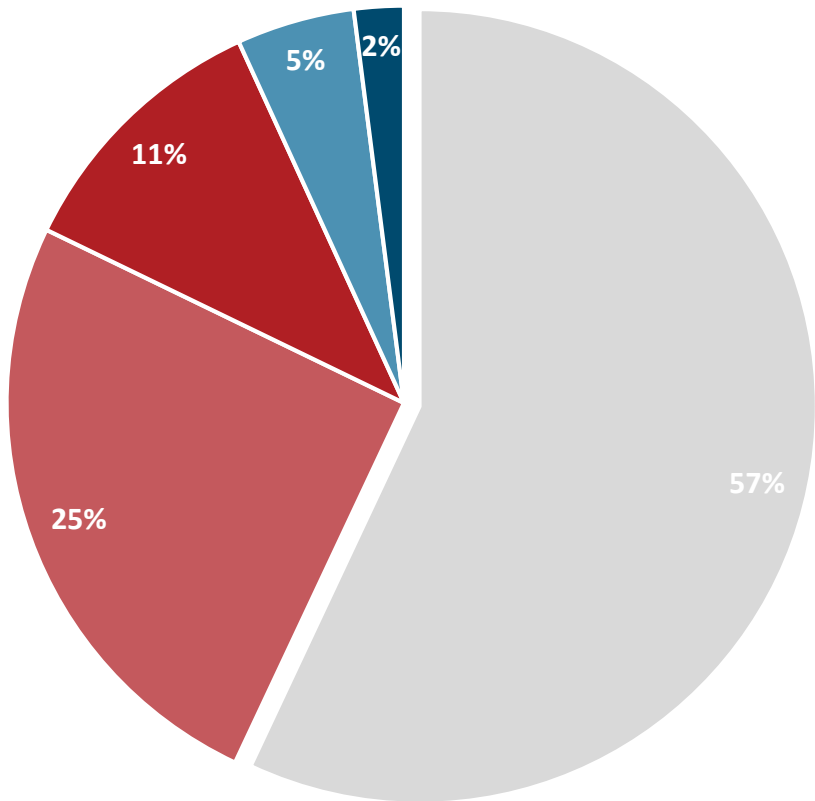
- Investor

57% of Employers and 70% of Employees say H.B. 251 will have little to no impact on their organization. 36% of Employers say it will have a negative impact.

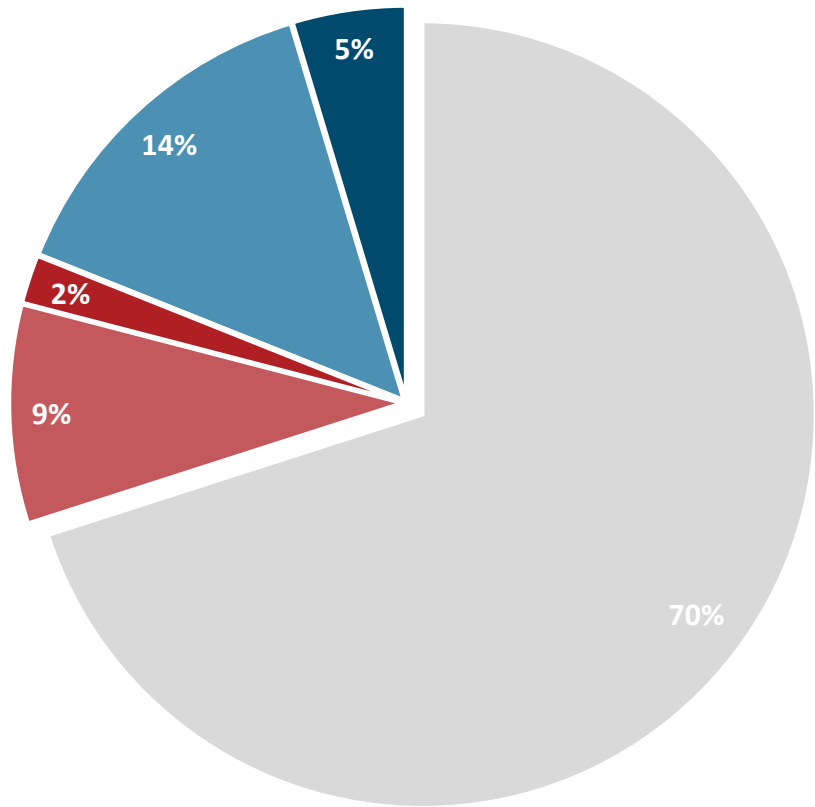
Opinions Regarding Impact of H.B. 251 on Individuals Organization

n= 937 | 2000

Employer



Employee



■ Significant Positive Impact ■ Somewhat Positive Impact ■ Little to No Impact ■ Somewhat Negative Impact ■ Significant Negative Impact

Types of Employees With NCAs

- Looking at types of employees for which NCAs are used, the largest group (37%) were for “C” level employees; then (35%) for senior executives, (32%) for sales roles, (32%) for salaried professional roles, and (28%) with salaried mid-level management positions (p. 15)
- Larger employers use NCAs at almost twice the rate (p.16)
- By Wage (p. 18): *8% of employees making >\$15,000*
 - 10% of employees making \$15k - \$24,999
 - 14% of employees making \$25k - \$49,999
 - 17% of employees making \$50k - \$74,999
 - 26% of employees making \$75k - \$99,999
 - 33% of employees making \$100k - \$149,999
 - 40% of employees making <\$150k

Employee Responses

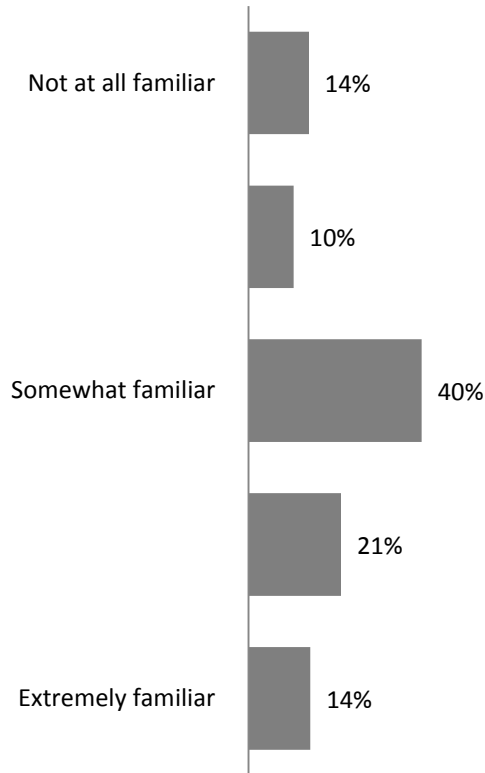
- **18% of employee respondents have a current NCA; 35% of employee respondents indicated they had been asked to sign an NCA at some point in their career (p. 12)**
- **51% of employee respondents indicated that they were ok signing NCAs if the terms were fair; only 5% said they would refuse a job if they were forced to sign an NCA**
- **Significantly, 96% of employee respondents stated that they were aware that they were signing an NCA at the time they signed the agreement**
- **40% of employees with current NCAs believed that their agreements were fair or moderately fair, while another 34% believed that their NCA was somewhat fair. 26% believed their current NCA was unfair**

Employees indicate a varying level of understanding towards the non-compete agreements they have signed.

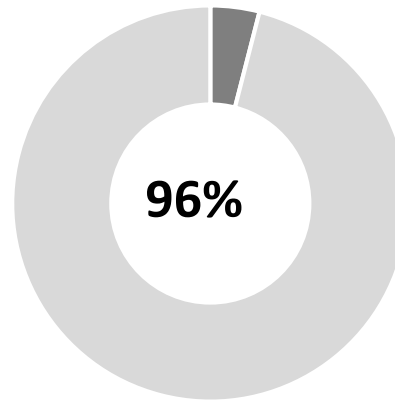
Awareness, Familiarity and Understanding of Non-Compete Agreement

n= 595

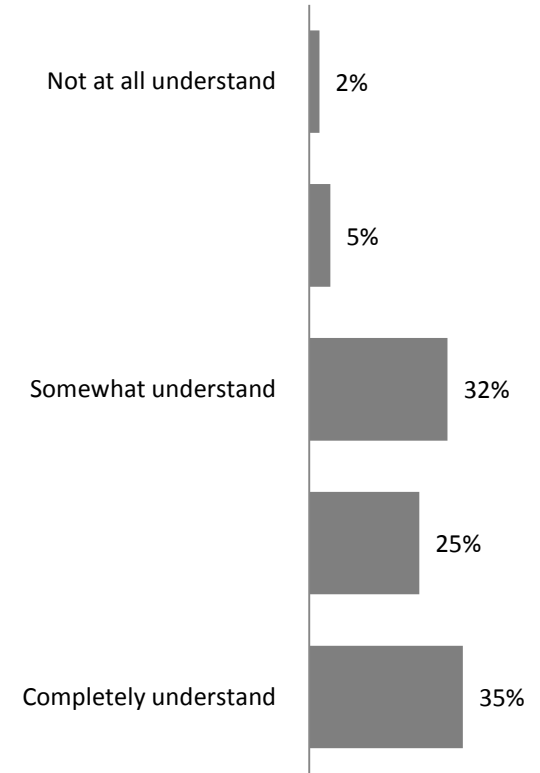
Familiarity Before Signing



Awareness of Signing



Level of Understanding of the Terms



Employee 4-9 With your most recent non-compete agreement, how familiar were you with the non-compete agreements before signing the agreement?
Employee 4-8 At the time you signed your most recent non-compete agreement, were you aware that you signed it?
Employee 4-4 With your most recent non-compete agreement, how well did you understand the terms of the agreement?

Employer Responses

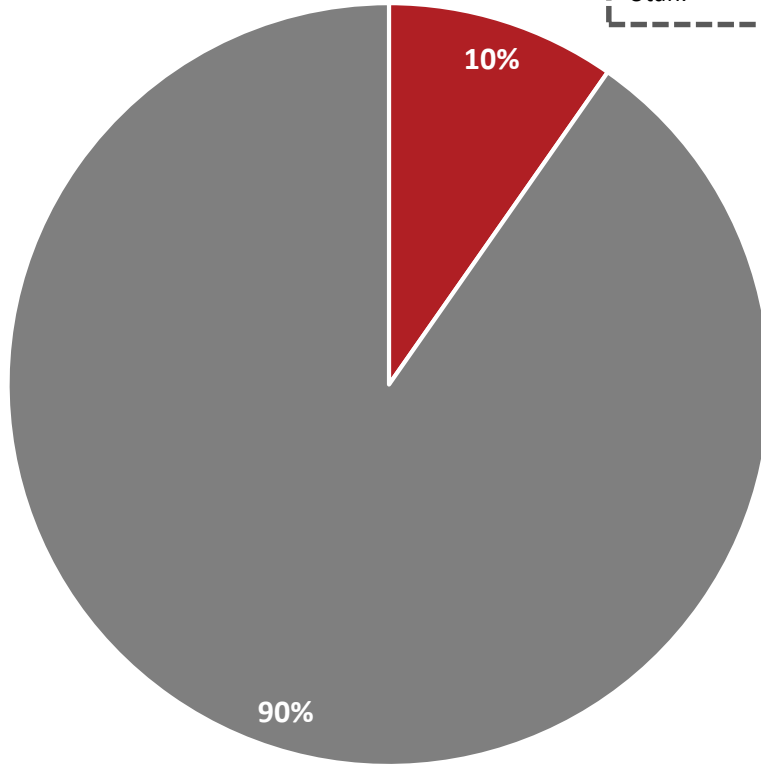
- 90% of employer respondents believe that NCAs should be allowed in Utah as long as they are reasonable, supported by consideration, and for a legitimate purpose; *surprisingly, 74% of employee respondents agreed*
- About half of employer respondents stated that they ask at least some of their employees to sign NCAs (and 82% of employer respondents who use NCAs indicated that signing the NCA was a condition of employment, p. 13)
 - 68% ask employees to sign nonsolicitation agreements
 - 38% ask employees to sign confidentiality/nondisclosure agreements
- With respect to duration, 29% of employer respondents favored one year or less; 22% answered 2 years; 11% answered 3 years; and 3% favored 5 years

90% of Employers and 74% of Employees agree that non-compete agreements should be allowed, so long as they are reasonable and for a legitimate purpose.

Opinion on Use of Non-Compete Agreements in Utah

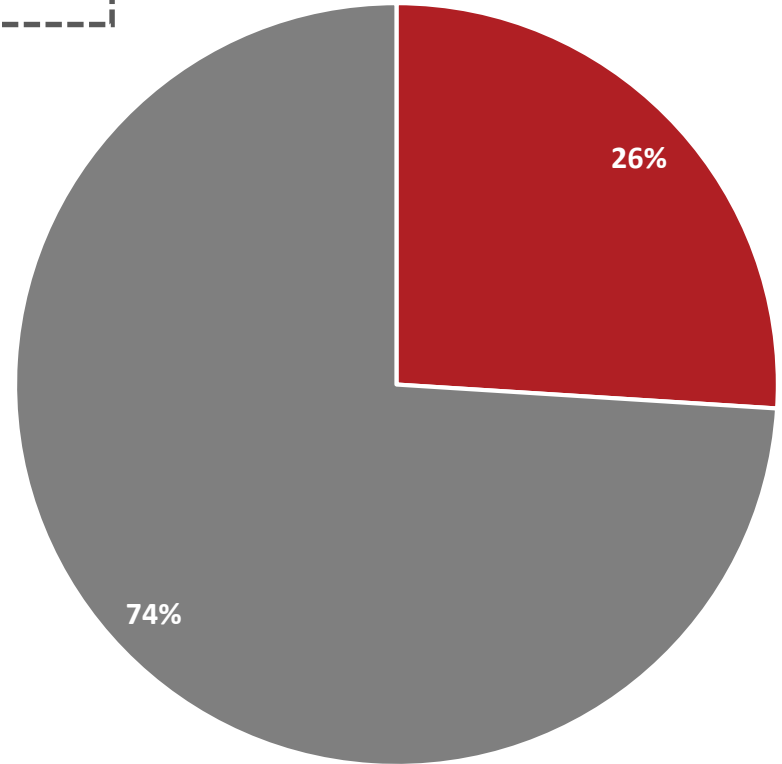
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Employer



18% of Information and Technology companies think that non-compete agreements should NOT be allowed in Utah.

Employee



Should be allowed in Utah, if value is given to the employee in exchange and if non-compete agreements are reasonable in time duration and geographic scope and are for a legitimate business purpose

Should not be allowed in Utah

Employer Enforcement

- **37% of employer respondents state that they have never had to address a violation of an NCA; 50% responded that they address violations less than once per year**
- **The top actions taken to enforce an NCA were making a verbal compliance demand, sending the employee a cease and desist letter, and sending the new or future employer a cease and desist letter; only 17% indicated that they had filed a lawsuit over an NCA**
- **When it comes to hiring individuals subject to NCAs, 35% of employer respondents stated they would not hire an individual who has an NCA with a competitor and another 42% stated that they will only hire them if the competitor provides a release**

65% of Employers say they have never taken an employee to court or arbitration regarding their non-compete agreement.

Before Signing NCA

While Signing NCA

After Signing NCA

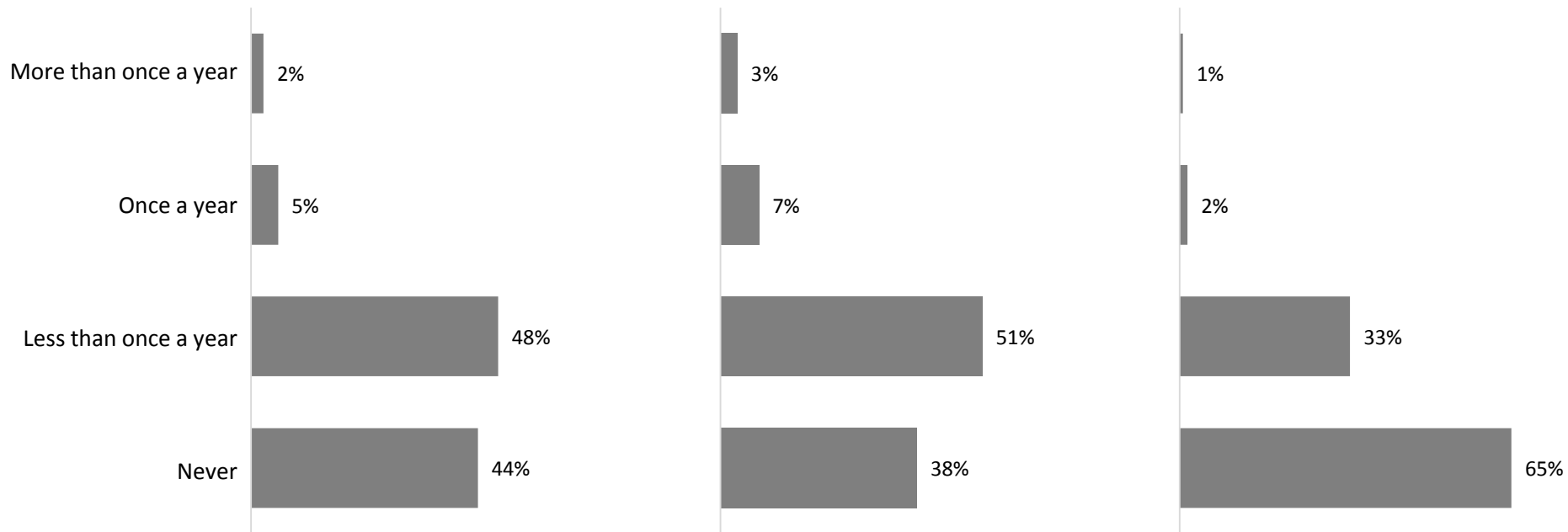
Employer Enforcement of Non-Compete Agreements

n=937

Verbally Suggest Action

Send Cease and Desist Letter

Court or Arbitration



I had to switch industries because of my non-compete. I didn't even consider looking in the same industry because I didn't want a conflict. The company had threatened to go after people before...I was told they would enforce it if I went somewhere else.
- Employee

Employer 6-6 How often does your company verbally suggest the prospect of filing a court action against a former employee as a way to address violations?

Employer 6-7 How often does your company enforce their non-compete agreements by sending a cease and desist letter to former employees that your company suspects are violating, or may violate, their non-compete?

Employer 6-8 How often does your company enforce non-compete agreements by taking an employee to court or arbitration?

Communicating verbal demands and sending cease-and-desist letters are the most frequently used methods of enforcing non-compete agreements.

Before Signing NCA

While Signing NCA

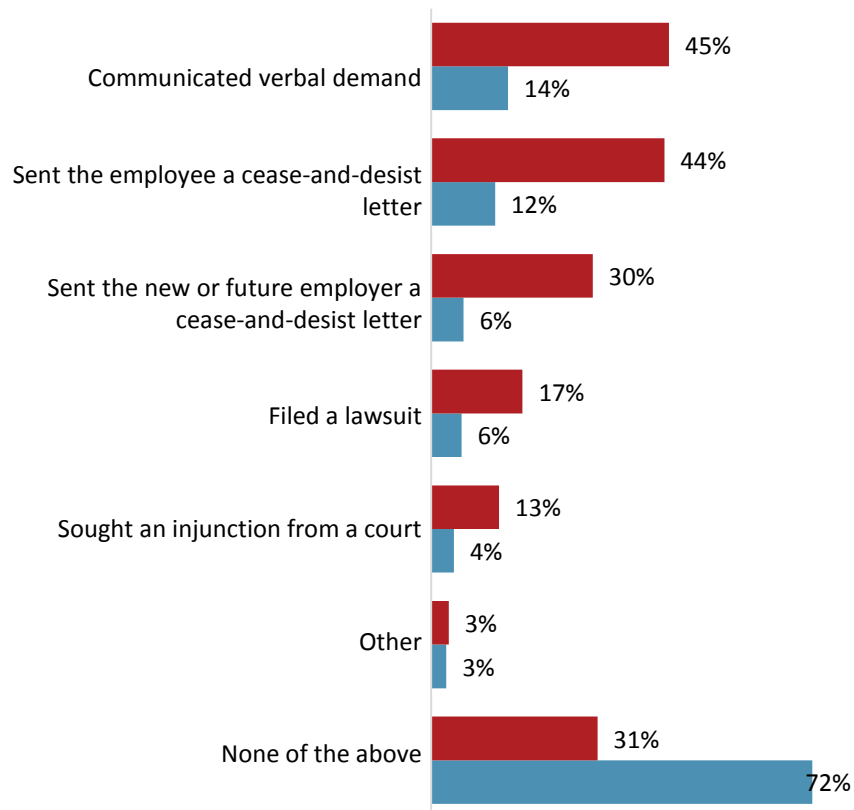
After Signing NCA

Employer Enforcement of Non-Compete Agreements

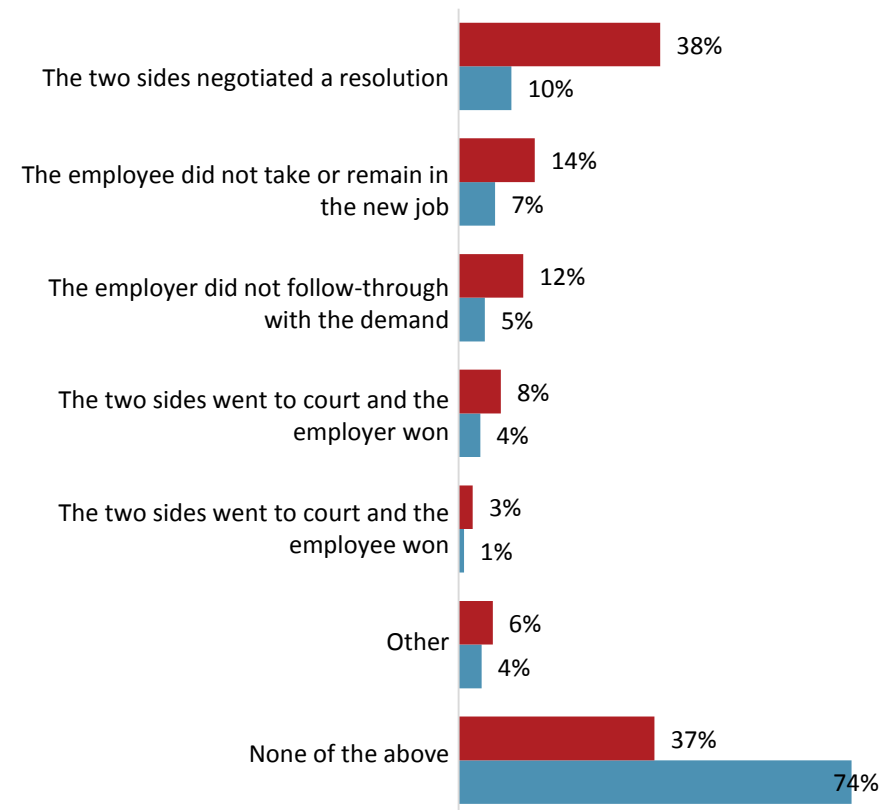
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Employer Employee

Actions Taken



Results of Actions



Employer 6-3 Which of the following, if any, has your company taken in order to enforce a non-compete agreement?

Employee 6-3 To the best of your knowledge, which of the following actions, if any, has your employer taken in order to enforce a non-compete agreement?

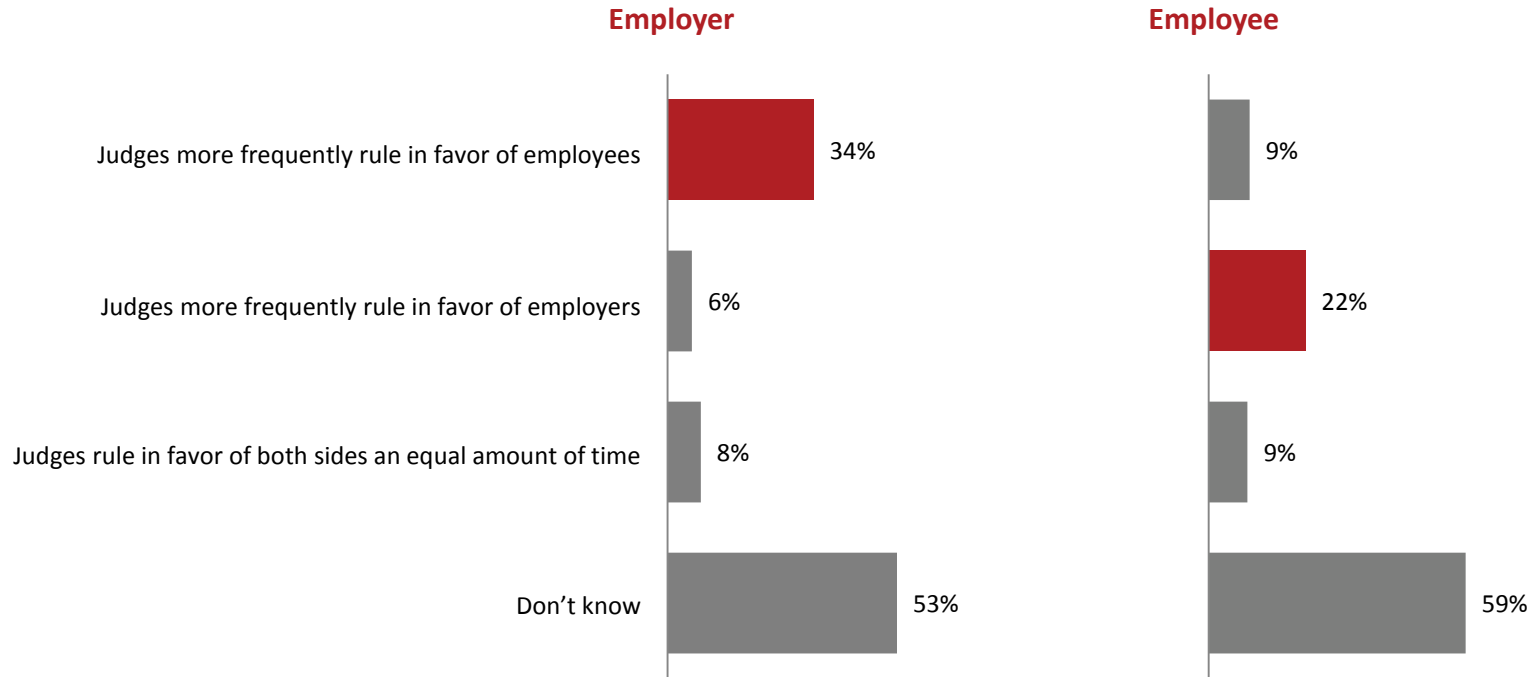
Employer 6-4 What have been the result(s) of your action(s)

Employee 6-4 To the best of your knowledge, what have been the results of your employer's actions

Of those with an opinion, both employers and employees think the courts rule in favor of the other party.

Opinions Regarding Utah Court Rulings

n= 937 | 2000



” I think the courts are pretty favorable to employees or err on the sides of employees. - Employee

” It's my understanding that they are relatively hard to enforce and that if the duration is unreasonable it will be struck down. They are hard to enforce if they're too broad.

- Employee

” Whoever has the most experienced, expensive lawyer will win. It makes way for the biggest wallet to win, which will obviously be favorable to companies with teams of lawyers.

- Employee

Employers and Employees mostly agree that an employer should pay an employee's attorney fees if the employer loses in court.

Opinions Regarding Non-Compete Agreements in Utah

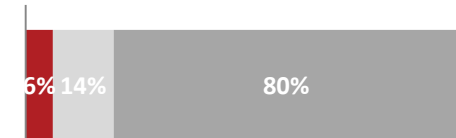
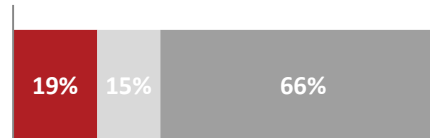
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Agree Neutral Disagree

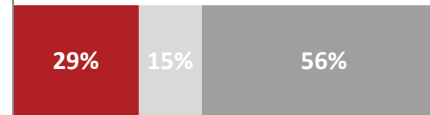
Employer

Employee

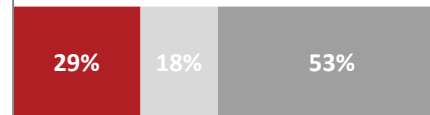
If an employer in Utah sues an employee to enforce a non-compete agreement and the employer loses, the employer should be required to pay the employee's attorneys' fees and costs



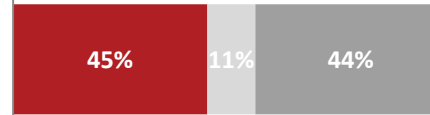
Employers in Utah should be allowed to enforce non-compete agreements that last longer than one year



If an employer in Utah sues an employee to enforce a non-compete agreement and the employee loses, the employee should be required to pay the employer's attorney fees and costs



Employers in Utah should NOT be allowed to enforce non-compete agreements against employees they terminate without cause



“ The one year limitation is too restrictive. I would like to see something that allows more flexibility in duration because situations differ by industry.
- Employer

“ I like that the employer has to pay the court costs if they lose. If the employer has to pay it will dissuade employers from going after employees to bully them or for vengeance. It ensures employers will only put money into pursuing instances that are causing them material harm.
- Employee

“ I think it is a reasonable compromise that if an employee is terminated without cause the non-compete agreement should be void. If the employer terminated the employment, it should terminate the agreement.
- Employee

- Employee

2017 Legislative Response

- **HB81: Representative Greene's non-compete bill (not part of Working Group or coordinated with the Speaker/Sponsors)**
 - Required additional consideration
 - Invalidated NCA's if termination without cause
 - Allowed for treble damages

2017 Legislative Response

- **The Proponents Agreed Not to Proceed with Legislation stating:**
Several of us in the Capitol spent hours tonight pouring through the results of the non-compete agreement research study. To our knowledge, the study was exhaustive in nature and an unprecedented approach by any state in researching non-compete agreements.

We are heartened that the data confirms the merit of our attention to this important issue for Utah's economy. The results of the study demonstrate that last year's bill is working well, addresses important concerns from both sides of the issue, and strikes a balance between protecting the interests of both employees and employers.

We have worked hard to build a consensus-based approach. We are dedicated to continuing this collaborative process. The research results are comprehensive and showed areas of overlapping interests. This issue matters to many. Rather than running legislation on non-compete agreements this year, myself and Rep. Hawkes remain committed to working with our group and other stakeholders to utilize this research and to build the optimal solution for Utah's long-term economic health.

Working Group Meetings Leading to 2018

- Have had 3 meetings in 2017
- Digesting information and Seeking Open Dialogue rather than Unilateral Legislation
- The Speaker and Representative Schultz seem to have 3 main issues:
 - Eliminating or at least better defining goodwill as a legitimate reason to support an NCA
 - Whether to prohibit NCAs for low wage earners and/or when employees are terminated without cause by an employer
 - Whether to require notice, and how much notice, before signing an NCA
- Likely to have draft language in the fall and seek input

Thank you!

QUESTIONS?

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05/18/2016

New Overtime Rule: \$47,476 Annual Salary Required For White Collar Exemptions

By [Jude Biggs](#)



Exempt white collar workers must be paid an annual salary of at least \$47,476 under the Department of Labor's (DOL's) just-released final overtime rule. That salary threshold is more than twice the current salary requirement for the white collar exemptions under the Fair Labor Standards Act (FLSA). Highly compensated employees must be paid at least \$134,004 per year (increased from \$100,000) to meet that exemption. The new rule is effective December 1, 2016, so employers have about six months to decide what to do with current exempt white collar workers who do not meet the new thresholds.

Salary Level Will Automatically Adjust Every Three Years

In a change from its proposed rule, the DOL will now automatically update the salary levels once every three years. Originally proposed as an annual update, the final rule will raise the standard threshold to the 40th percentile of full-time salaried workers in the lowest-wage Census region. The first adjustment will be posted August 1, 2019, 150 days in advance of its effective date on January 1, 2020.

Duties Tests Are Unchanged

Since 2004, the duties tests for the white collar exemptions have not included a limit on the amount of time that an employee can spend on nonexempt duties before the exemption is lost. Believing that a rise in the salary level will provide an initial bright-line test for the exemptions, the DOL refrained from changing the duties tests.

Nondiscretionary Bonuses, Incentive Payments, and Commissions

In the past, the DOL has not included nondiscretionary bonuses, incentive pay, or commissions when determining whether an employee's salary meets the white collar exemption threshold; it looked only at payments made to employees. In its final rule, the DOL will allow up to 10 percent of

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