VOLUME 79 ◆ NUMBER 5

Employee Benefit Plan Review

Washington Supreme Court Significantly Limits Moonlighting Restrictions for Low Wage Employees: A 4-Step Plan for Compliance

By Jonathan Crook, Catharine Morisset and Scott Oberlander

In a first-of-its-kind decision, the Washington Supreme Court has taken aim at the ability of employers to prevent low wage employees in the state from "moonlighting" or otherwise supplementing their income during their employment, even when doing so would constitute competition. Duty of loyalty and anti-moonlighting provisions will be heavily scrutinized by Washington courts going forward, and employers may need to take swift action to ensure that company policies and employment agreements applicable to low wage employees are enforceable and do not expose the employer to liability.

This article explains everything employers need to know and provides four steps employers can take now to help them comply.

Washington State Law on Non-Competes, Moonlighting, and More

Washington has severely restricted non-competition agreements since 2020 when a new state law took effect.[1] This law includes rules on anti-moonlighting policies and provisions:

- *No Moonlighting Restrictions for Low Wage Workers, Unless an Exception Applies*. In addition to regulating post-employment non-competes, the statute, RCW 49.62,[2] prohibits employers from restricting low wage employees – defined as those making less than twice the minimum hourly wage (which, as of 2025, is $33.32 per hour or $69,305 per year) – from "having an additional job, supplementing their income by working for another employer, working as an independent contractor, or being self-employed."
- *Exception for Restrictions Based on Common Law Duty of Loyalty*. The same statute, however, explicitly preserves employees' common law duty of loyalty to their employers. The duty of loyalty traditionally requires employees to act in their employers' best interest and avoid conflicts of interest. Employers therefore have justifiably continued to include anti-moonlighting and other duty of loyalty provisions in their policies and agreements to limit competition during employment. Prior to a recent Washington Supreme Court decision, no appellate court had ever suggested that these provisions were unenforceable.

Washington Supreme Court Weighs In: Limited Duty of Loyalty for Low Wage Employees

The Supreme Court of Washington delivered a blow to employers in a ruling that makes it harder for employers to restrict low wage workers from obtaining additional employment – even if it is with a competitor.

- *Factual Background*. In *David v. Freedom Vans LLC*,[3] two former employees sued Freedom Vans on behalf of a class of employees subject to in-term non-compete agreements prohibiting them from "directly or indirectly engaging in any business that competes" with Freedom Vans during their employment. The plaintiffs had allegedly declined to accept offers for "side jobs" while working for Freedom Vans because they were concerned that doing so would result in their termination and potentially even getting sued.
- *Lower Courts Rule in Favor of Employer*. The lower courts found that Freedom Vans could lawfully prohibit low wage employees from engaging in "any kind of assistance" to competitors due to the exception for the common law duty of loyalty under RCW 49.62.070.[4]
- *Washington Supreme Court Reverses*. The Washington Supreme Court firmly rejected the position taken by the lower courts and stated that such a blanket prohibition would undermine the legislature's intent to permit low wage employees to supplement their income and unreasonably broaden their duty of loyalty.
- *Key Takeaways*. The court did reiterate that trial courts should continue to evaluate the reasonableness of duty of loyalty or anti-moonlighting provisions for low wage employees on a case-by-case basis (to that end, it declined to specifically invalidate the provisions at issue in *David* and instead remanded the case to the trial court). The court's message, however, was clear: anti-moonlighting and duty of loyalty provisions must be narrowly drafted and will be strictly construed when applicable to low wage employees in Washington.

Consequences of Noncompliance

Employers who violate Washington's non-compete law by imposing moonlighting or other restrictions that are too broad could be required to pay at least $5,000 in statutory damages and attorneys' fees to each aggrieved employee. So, the consequences of noncompliance are significant, especially considering the potential for class-action lawsuits.

What Should Employers Do Now?

- *Take Inventory of Current Washington*

  First, you should work with your company's payroll and/or human resources department to determine which Washington-based employees make less than $33.32 per hour or $69,305 annually. If no such employees exist, no immediate actions are necessary.
- *Review Applicable Washington Employees' Restrictive Covenants*

  If your company employs low wage Washington employees, review their employment agreements to determine whether they contain anti-moonlighting, "no outside employment," duty of loyalty, or other in-term non-competition provisions.
- *Review Handbook and Other Company-Wide Policies*

  Even if low wage employees do not individually have agreements containing these restrictions, they could appear in your company's handbook and/or other company policies. Review all policies that could contain these provisions.
- *Make Necessary Updates to Ensure Enforceability*

  If Washington low wage employees are subject to broad, and thus potentially unenforceable, duty of loyalty/moonlighting restrictions, work with outside counsel to formulate a plan for current and future employees to ensure that sufficient, but enforceable, protections are in place going forward.

Notes

1. https://app.leg.wa.gov/billsummary?BillNumber=1450&Year=2019.
2. RCW 49.62, available at https://app.leg.wa.gov/RCW/default.aspx?cite=49.62.
3. https://www.courts.wa.gov/opinions/pdf/1025661.pdf.
4. https://app.leg.wa.gov/RCW/default.aspx?cite=49.62.070&pdf=true.

The authors, attorneys with Fisher Phillips, may be contacted at jcrook@fisherphillips.com, cmorisset@fisherphillips.com and soberlander@fisherphillips.com, respectively.