Does Erosion of Noncompetes in the DMV Herald a National Trend?

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Noncompetition agreements are common tools used by employers to prevent former employees from unfairly competing against them. Traditionally, many states have allowed employers to require employees to sign noncompetes as long as they were reasonable in scope and protected an employer's legitimate business interests. In turn, employers often required every employee to sign a noncompete even when it was unlikely that certain employees, particularly those in lower-wage positions, really posed much of a future competitive threat. In recent years, in response to the overuse of noncompetes by employers, several states have passed legislation limiting their use – with the trend most acutely taking hold in the area surrounding Washington, D.C. Is the activity in the DMV an anomaly, or does it demonstrate the larger national picture?

Noncompetition Law Hits Wall in DMV

The District of Columbia, Maryland, and Virginia – colloquially known as "the DMV" – have all passed noncompete legislation in the last two years. The first state in the D.C. metro area to jump on this bandwagon was **Maryland**, where noncompetes for lower-wage employees are now void as a matter of public policy. In 2019, the state adopted legislation imposing restrictions on the use of noncompete agreements in the employment relationship. Under Maryland's law, a noncompete or conflict-of-interest provision in an employment contract or agreement that restricts an employee's ability to enter into an employment relationship with a new employer or become self-employed in the same business or trade is null and void. Maryland's law only applies to employees who earn equal to or less than $15 per hour or $31,200 annually. The Maryland law only applies to noncompetes or conflict-of-interest provisions and explicitly exempts any employment contract or agreement that prohibits the taking or use of client lists or other proprietary client-related information.

In April 2020, **Virginia** followed suit with a similar law banning the use of noncompetes against employees who earn less than the annual average weekly wage in the Commonwealth. The current average weekly wage in Virginia is approximately $1,204, or $62,600 per year. Accordingly, the law covers a large number of Virginia employees. Notably, the law also provides that employers may not "restrict an employee from providing a service to a customer or client of the employer if the employee does not initiate contact with or solicit the customer or client." In the context of the new law, this provision appears to apply only to low-wage earners. Moreover, Virginia employers can still

ban their departing low-wage employees from actively soliciting the employer's clients or customers.

Not to be outdone, this past December, the **District of Columbia** Council passed the Ban on Non-Compete Agreements Amendment Act of 2020. The Act prohibits employers from requiring almost all D.C. employees to sign agreements with noncompete provisions or maintaining noncompete policies in an employment handbook or otherwise. Notably, however, the Act specifically provides that employers may continue to restrict employees from disclosing confidential, proprietary, or sensitive information, client lists, customer lists, or trade secrets. The definition of covered employees under the Act is broad, and, with some limited exceptions, includes any person "who performs work in the District on behalf of an employer and any prospective employee who an employer reasonably anticipates will perform work on behalf of the employer in the District." The effective date of the Act is still unclear, as it must be funded by the DC Council, but it will likely go into effect in the fall of 2021 (you can read more about the D.C. legislation here).

The Bigger Picture

Maryland, Virginia, and D.C. follow in the footsteps of many other states that have enacted restrictions on the use of noncompetes in the employment context in the last several years. Those states include Idaho, Illinois, Louisiana, Maine, Massachusetts, Nevada, New Hampshire, New Mexico, Rhode Island, and Washington state. Similar to Maryland and Virginia, some of these states ban noncompete agreements for lower-wage workers, and each state has its own definition of "low wage" earners. Still others impose varying limits on noncompetes, including limiting the duration of a noncompete or prohibiting employers from enforcing noncompetes against employees who were terminated without cause.

Like D.C., a handful of states have gone even further and barred the use of noncompete agreements entirely or almost entirely. Those states include California, North Dakota, and Oklahoma.

Several states currently have bills pending that would limit or bar the use of noncompetes. Like the Maryland, Virginia and D.C. laws, in many instances the proposed legislation explicitly carves out confidentiality, trade secret, and/or nonsolicitation provisions from any proposed bans. For example, proposed legislation in Iowa, which would prohibit an employer from requiring a low-wage employee (one who earns less than or equal to $14.50 per hour) to enter a noncompete agreement, explicitly excludes from the definition of "noncompete agreement" other types of restrictive covenants or agreements, including nonsolicitation agreements, confidentiality agreements, and any agreements prohibiting the use of disclosure of trade secrets. Similarly, proposed noncompete legislation in Oregon includes a carveout for agreements protecting trade secrets or other proprietary information and a partial carveout for nonsolicitation covenants. New York state also has a pending bill prohibiting covenants not to compete for low wage employees. The bill includes a detailed definition of a covenant not to compete that implicitly excludes other kinds of agreements or

covenants such as confidentiality provisions, nonsolicitation agreements, and protections for trade secrets.

What Will See From the Biden Administration?

On the federal level, Congress has also shown an interest in limiting the use of noncompetes in the workplace. Under the "Federal Freedom to Compete Act," introduced two years ago as a proposed amendment to the Fair Labor Standards Act, employers would have been prohibited from entering into noncompete agreements with any employees except for those classified as exempt in certain categories under the FLSA. Also in 2019, Democratic and Republican senators introduced a bill entitled the Workforce Mobility Act, which aimed to ban noncompete agreements other than when used in the sale of a business or dissolution of a partnership. Neither piece of legislation passed.

It is likely, however, that federal legislation on this issue will be introduced again given President Biden's proposal in his *Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions* to "eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets, and outright ban all no-poaching agreements." A brief summary of what you should expect in the area of restrictive covenants under the Biden administration can be found here.

Takeaways for Employers

The number of laws banning or restricting the use of noncompetes in the workplace will undoubtedly only continue to grow. This should lead you to take stock of your current practices and determine whether you need to make adjustments.

Many employers have traditionally used noncompetes as part of their standard new hire documents on a blanket basis. It may be time to rethink that strategy. Even in states where the use of noncompetes is currently unrestricted, you should consider whether you are overusing noncompete agreements for employees to whom they may not be applicable. Rather than using a one-size-fits-all approach, you may consider differentiating between employees when it comes to developing your restrictive covenant strategy. You should consider whether using more targeted agreements – including non-solicitation, non-piracy, confidentiality and non-disclosure provisions – would best meet your business needs.

In certain instances, you may need to revisit existing agreements. Some newer state laws contain retroactivity provisions that could render previously compliant laws unenforceable. In sum, you should review your agreements and practices as a whole, and consult with counsel to understand the applicable laws and tailor your agreements and policies accordingly.

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