Washington Just Turned Many Non-Solicitation Agreements into Illegal Non-Competes: Tips on How You Can Still Protect Your Business

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Washington state law just changed in a way that might have made your company's non-solicitation agreements unenforceable and illegal. Recent amendments to the state non-compete statute took effect on June 6 and significantly changed both the statute and existing case law when it comes to which non-solicitation agreements can be enforced by employers. The new law also broadens the definition of prohibited non-compete agreements. You will need to re-visit your employment agreements to ensure they are compliant with the amended statute.

Quick Background on the Washington Statute

Washington's non-compete statute has been in effect since 2020. To be valid and enforceable under the law, such an agreement must:

- Disclose the terms of the agreement before employment begins, or else be accompanied by independent consideration;
- Allow for adjudication of disputes in Washington (choice of law provisions for other states render the agreement void); and
- Involve an employee earning over compensation floor, adjusted annually (it is roughly $120,599.99 in 2024).

The statute allows for strict liability. Aggrieved employees may recover either a flat fee of $5,000 in penalties, or (more commonly) their actual damages, reasonable attorneys' fees, expenses, and costs.

Broadening The Prohibition on Unlawful Non-Compete Agreements

Washington's statute previously defined a non-compete as a:

> written or oral covenant, agreement, or contract by which an employee or independent contractor is prohibited or restrained from engaging in a lawful profession, trade, or business of any kind.

The new amendments, contained in SB 5935, provide that a non-compete *also* includes:

The new amendments, contained in SB 5793, provide that a non-compete *also* includes:

> an agreement that directly or indirectly prohibits **the acceptance or transaction of business with a customer**.

In other words, a prohibited non-compete agreement now also includes non-solicit agreements that purport to bar employees from not only soliciting but also serving their prior employer's customers.

Narrowing Lawful Non-Solicitation Agreements: Current Customers Only

The original statute allowed employers to require agreements prohibiting employees from soliciting their customers but did not further define "customer" for those purposes. As a result, disputes have arisen where an employer seeks to enforce an agreement barring solicitation of "prospective customers" and employees arguing that such a bar constitutes an illegal non-compete.

The amendment directly responds to this issue. It allows employers to only require and enforce agreements restricting solicitation of "**current** customers." The shift is substantial, transforming previously allowed non-solicits into prohibited non-compete agreements. In other words, a non-solicitation covenant that covers prospects will now be treated as a non-compete.

Broadening Liability in the Definition of Enforcement

The statute as previously enforced allowed employees to seek damages if their employer sought to enforce an illegal non-compete. As with "customers," ambiguity persisted over what constituted "enforcement."

Under the amended statute, an employer can be held liable if it "explicitly leveraged" the nonconforming agreement. This adds further ambiguity as to what would constitute "leveraging." A formal cease and desist letter? A verbal comment in offboarding? Asking the employee to sign the agreement in the first place? Courts will have to set definitional parameters to this new term introduced into the statute.

What About the FTC's Ban on Non-Competes? Does the FTC rule invalidate Washington Law?

As many employers know, the Federal Trade Commission (FTC) recently finalized a rule that will soon ban most non-competes nationwide. Business advocacy groups have already challenged the new rule and it may be blocked before it is scheduled to take effect on September 4. The Judge hearing the primary legal challenge has said that she will rule on a motion to stay the FTC rule by July 3.

Should it take effect, the FTC's rule will prohibit non-competes in ways Washington (even under its new rules) would allow. For example:

- The FTC's purported ban makes it unlawful to even *attempt* to enter into a non-compete agreement prohibited under the rules.

- There is only one exception for permissible non-competes (called the "Senior Executive" exception). It may apply if:
  - The worker's job description meets a rigorous and narrow duties test;
  - The worker earns at least $151,164 in the preceding year of employment; and
  - The agreement existed before the date the ban becomes effective (i.e., it only allows survival of existing agreements, not new agreements).

But in other ways, Washington's statute is still more restrictive. The FTC's proposed rule does not target non-solicit agreements – while Washington's new law invalidates many existing non-solicit agreements. The FTC rule would invalidate state laws that are more pro-enforcement but it does nothing with respect to state laws that make enforcement harder, such as California's ban on customer non-solicitation restrictions.

In other words, even if a non-solicit complies with the FTC rule, it may still not comply with Washington's new rules. This is a complex and evolving area, where advice of counsel is often warranted.

Not Without Options: Washington Non-Solicit Compliance

Employers that maintain non-solicitation agreements that have become non-competes under the amended Washington statute may still be able to enforce the agreements. However, to do so, you must:

- disclose the agreements to employees before they accept employment offers, and
- compensate the employees above the non-compete threshold.

Conclusion

Given all of these pitfalls and qualifications, you should consider contacting your Fisher Phillips counsel to review your options. If you have questions, please contact the authors of this Insight, your Fisher Phillips attorney, any attorney in our Employee Defection and Trade Secrets Practice Group, or any attorney in our Seattle office. We will continue to monitor developments in this area. Make sure you subscribe to Fisher Phillips' Insight System for the most up-to-date information sent directly in your inbox.

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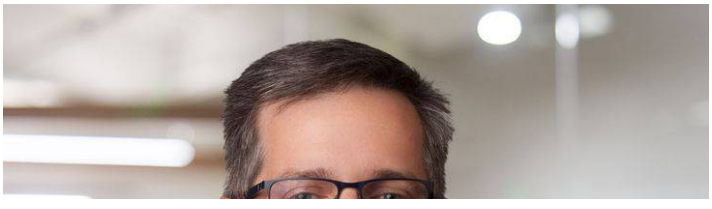

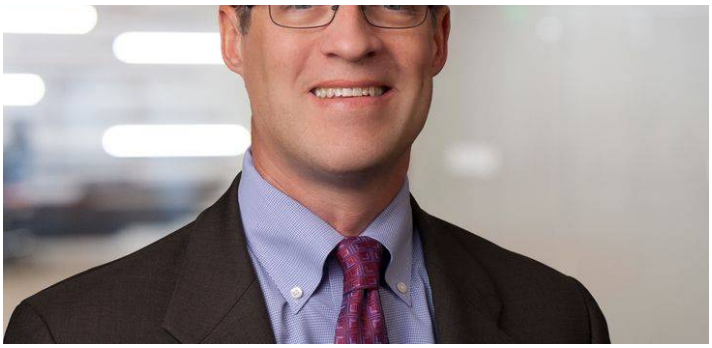

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