Florida Clinches Spot as Most Enforcement-Friendly State for Non-Competes: 3 Steps Employers Should Take Now

Insights
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Florida just enacted a new law that seals its status as the most enforcement-friendly state in the country for non-compete and garden leave agreements. The "Florida Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth (CHOICE) Act" passed both the Florida House and Senate in April, and Governor DeSantis allowed it to become law on July 3 by not vetoing the measure. The Act doesn't amend any current statutes, but instead provides more certainty to employers looking to enforce certain non-compete agreements and agreements offering "garden leave" (a period of time where an employee is not required to perform any work but is still paid their salary and benefits in return for not accepting employment elsewhere). Here is what employers should know about the CHOICE Act and three steps you can take to adjust to his new era.

Overview of the CHOICE Act

While many federal and state regulatory efforts seek to curb non-compete agreements, the CHOICE Act goes the other direction and creates a presumption that "covered" non-compete agreements and garden leave provisions are enforceable and do not violate public policy. Importantly, the law ***requires*** courts to issue an injunction unless the former employee or poaching employer can prove the new employment will not result in unfair competition.

Who is covered?

The Act defines a "covered employee" as any employee or contractor who works primarily in Florida or works for an employer with their principal place of business in Florida who earns or is reasonably expected to earn a salary greater than twice the annual mean wage (as determined by the DOL's Bureau of Statistics) of either:

- the county where the company has its principal place of business; or
- the county where the employee resides if the employer's principal place of business is not in the state.

Notably, "salary" does not include discretionary incentives or awards or anticipated but indeterminable compensation, like bonuses or commissions. The Act excludes from this definition any person classified as a "healthcare practitioner" under Florida law.

What Agreements Are Covered?

The new law covers two types of agreements:

Garden Leave Agreements

A garden leave agreement (those where an employer provides a worker their salary and benefits for a period of time without requiring them to perform any work in return for not accepting employment elsewhere) will be fully enforceable provided that:

1. The employee is advised, in writing, of the right to seek counsel prior to executing the agreement and has at least seven days to review the agreement before execution;

2. The employee and employer agree to provide up to four years advance, express notice before terminating employment (e.g., the "notice period");

3. The employer agrees to pay the employee their regular base salary and benefits for the duration of the notice period;

4. The employee acknowledges, in writing, that in the course of their employment, the employee will receive confidential information or information about customer relationships;

5. The garden leave provisions provide that:

    a. After the first 90 days of the notice period, the covered employee does not have to provide services to the covered employer;

    b. The covered employee may engage in nonwork activities at any time, including during normal business hours, during the remainder of the notice period; and

    c. The covered employee may, with the permission of the covered employer, work for another employer while still employed by the covered employer during the remainder of the notice period.

Non-Compete Agreements

Likewise, a non-compete agreement will be fully enforceable provided that:

1. The employee is advised, in writing, of the right to seek counsel prior to executing the agreement and has at least seven days to review the agreement before signing;

2. The employee acknowledges, in writing, that in the course of their employment, the employee will receive confidential information or information about customer relationships;

3. The employee agrees not to assume a role with or for another business in which the employee would provide services similar to the services provided to the covered employer during the three years preceding the non-compete period, or in which it is reasonably likely the employee would use confidential information or customer relationships;

4. The non-compete period does not exceed four years; and

5. The non-compete period is reduced day-for-day by any non-working portion of the notice period pursuant to a covered garden leave agreement, if applicable.

Notably, there are no restrictions on the geographic scope of a covered non-compete agreement.

What Else?

- Employers may introduce these agreements either at the beginning of employment or during the course of employment, provided that the employee still has seven days to consider signing the agreement before the offer of employment (or continued employment) expires.
- Employers may also elect to shorten a period of garden leave at their discretion by providing the employee with 30 days' advanced written notice.
- The new law also states that, if the covered employer has a principal place of business in Florida and uses a covered agreement expressly governed by Florida law, then "if any provision of this section is in conflict with any other law, the provisions of this section govern." What happens if the employee of such a covered employer lives in a state that bans non-compete agreements outright, like California? This situation is very likely to play out in the courts, and it may come down to where the first suit is filed.

Remedies Available

Of course, drafting and executing these agreements means very little if employers have to jump through hoops to enforce them. However, the CHOICE Act makes obtaining an injunction against a breaching employee a lot less burdensome because it ***requires*** courts to issue a preliminary injunction against a covered employee.

A judge may only modify or dissolve the injunction if the covered employee – or prospective employer – proves by clear and convincing evidence (which must be based on non-confidential information) that:

- the employee will not perform similar work during the restricted period or use confidential information or customer relationships;
- the employer failed to pay the salary or benefits required under a covered garden leave agreement, or failed to provide consideration for a non-compete agreement, after the employee provided a "reasonable opportunity" to cure the failure; or

- the prospective employer is not engaged in (or preparing to engage in) a similar business as the covered employer within the restricted territory.

If the employee engages in "gross misconduct" against the covered employer, the covered employer may reduce the salary or benefits of the covered employee or "take other appropriate action" during the notice period, which would not be considered a breach of the garden leave agreement.

3 Key Steps For Employers

Florida has cemented its reputation as the most enforcement-friendly state in the country for non-competes and garden leave provisions starting July 1. (Arguably, it already was, but this law goes substantially further than the current Florida restrictive covenants statute.) Employers should adapt to this new day by considering the following three steps:

- **Review existing agreements** and consider whether your agreements need to be modified to comply with the Act's definition of a "covered" garden leave or non-compete agreement.
- Understand that **restrictive covenants can still be used and enforced against employees who earn less than two times the mean salary** for the applicable county. However, employers will not have an entitlement to a preliminary injunction without proving a legitimate business interest and irreparable harm.
- It is always a good practice to **review your company's confidentiality protocols** and make sure your policies regarding trade secrets, customer information, and confidential information are comprehensive, up to date, and legally compliant. While the CHOICE Act only requires that the employee acknowledge access to confidential information, the more guardrails in place, the better.

Conclusion

If you have questions, please contact the authors of this Insight, your Fisher Phillips attorney, any attorney in our Florida offices, or any attorney in our Employee Defection and Trade Secrets Practice Group. Make sure you are subscribed to Fisher Phillips' Insight System to gather the most up-to-date information directly to your inbox. We constantly monitor new cases, legislation, and regulatory developments to keep you at the cutting edge of the law, so check out Blue Pencil Box for our daily updates on restrictive covenant law.

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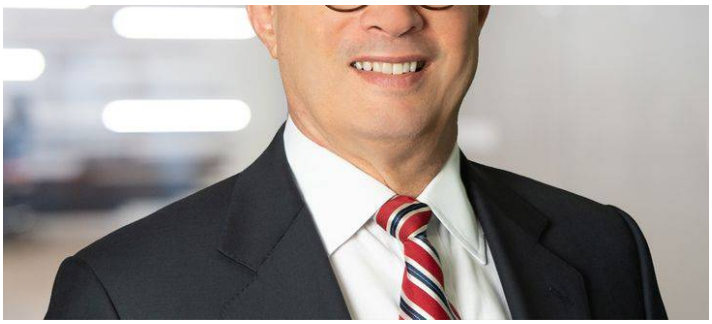

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