



Part III: State Legislatures' Initial Response to the Call to Action - Proposed Legislation

Insights

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In this final installment of our three-part series, we highlight restrictive covenant reform legislation that is currently pending before the state legislatures. The following states have proposed restrictive covenant reform:

- **Massachusetts:** House Bill 4419 is an amalgam of eight pending bills before the Massachusetts legislature. If enacted, the Bill would:
 - Limit the enforcement period of non-competes to 12 months or less (unless the employee is a “bad actor”);
 - Require non-competes to be signed by both the employer and the employee, and to state that the employee has the right to consult counsel;
 - Require the employer to provide the employee with the non-compete agreement the earlier of the time of the formal offer or ten business days before commencement of employment;
 - Make continued employment alone insufficient consideration for a binding non-compete agreement; and
 - Uphold existing aspects of Massachusetts non-compete law.
- **New Hampshire:** Senate Bill 423, “An Act relative to non-compete clauses for low-wage employees” would ban non-competes between employers and “low-wage employees.” The Bill defines “low-wage employees” as an employee who earns the greater of: “(1) the hourly rate equal to the minimum wage required by the applicable federal minimum wage law; or (2) \$15.00.”
- **New Jersey:** Senate Bill 3518 proposes new limitations on the enforcement of restrictive covenants. Specifically, if the Bill is passed, employers would need to do the following to enforce their restrictive covenants: (1) disclose the terms of the non-compete in writing to a prospective employee by the formal offer of employment or 30 business days before the commencement of employment, whichever is earlier; (2) limit the non-compete so that it only protects the legitimate business interests of the employer, including trade secret information; (3) limit the duration to 12 months or shorter; (4) limit the geographical reach to areas in which the employee provided services or had a material presence or influence during the two years preceding the date of termination; (5) limit the scope of activities in relation to only the specific types of services

provided by the employee at any time during the last two years of employment; and (6) not restrict an employee from providing a service to a customer or client of the employer, if the employee does not initiate or solicit the customer or client. The Bill also prohibits enforcement against certain types of employees, including low-wage employees.

Further, the Bill puts an economic burden on employers seeking to enforce their restrictive covenants. During the enforcement period, the employer would be required to “pay the employee an amount equal to 100 percent of the pay which the employee would have been entitled for work that would have been performed during the period prescribed under this section,” including benefits contributions and fringe benefits.

Finally, the Bill requires the former employer seeking to enforce its non-compete to act quickly. Indeed, the Bill requires employers to notify former employees in writing of its intent to enforce the agreement no later than 10 days after termination, or the agreement becomes void. This quick turnaround, when combined with the commitment to paying 100 percent pay and benefits, could easily lead to under-enforcement.

- **Pennsylvania:** House Bill 1938, the “Pennsylvania Freedom to Work Act,” would ban non-competes in Pennsylvania. The proposed ban would only ban non-competes and would not apply retroactively. This Bill also prohibits forum-shopping and other workarounds by requiring any “dispute arising out of or related to a covenant not to compete involving a resident of [the] Commonwealth” to be “[e]xclusively decided by a State court within [the] Commonwealth” and governed by Pennsylvania law.
- **Vermont:** House Bill 566 would ban employee non-competes. The Bill itself does not define “noncompetes.” Rather it prohibits “agreement[s] not to compete or any other agreement that restrains an individual from engaging in the lawful profession, trade, or business.

It remains unclear whether the foregoing proposed bills will make their way into law. If they do, employers who have employees in those states should review their agreements to ensure compliance and consider protecting their goodwill and trade secret information through other means, such as non-solicitation or confidentiality agreements.