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VIRGINIA COURT EXPANDS NON-COMPETE BAN TO INCLUDE SOME NON-SOLICITATION AGREEMENTS: 5 STEPS FOR EMPLOYERS

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Virginia Court Expands Non-Compete Ban to Include Some Non-Solicitation Agreements: 5 Steps for Employers

The Court of Appeals of Virginia just issued a surprising ruling that expands the state's statute banning non-competes for low-wage employees to also include some non-solicitation agreements. The January 27 decision in *Sentry Force Security, LLC v. Barrera* should cause employers in Virginia to revisit their restrictive covenant strategy. Here is what employers need to know and a list of action items you should consider.

Enforceability of Non-Solicitation Agreements Against Low-Wage Employees

In 2020, the Virginia legislature enacted a law prohibiting employers from entering into or enforcing a post-employment "covenant not to compete" against "low-wage" employees, defined as any employee earning less than the average weekly wage in the Commonwealth ($1507.01 per week in 2026), with limited exceptions. Lawmakers amended the statute in 2025 to expand the prohibition to cover any employee who is non-exempt under the Fair Labor Standards Act. You can read more about that change here.

The statute defines "covenant not to compete" as "a covenant or agreement, including a provision of a contract of employment, between an employer and employee that restrains, prohibits, or otherwise restricts an individual's

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ability, following the termination of the individual's employment, to compete with his former employer." The next line in the statute says, "[a] 'covenant not to compete' shall 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."

This language has puzzled employers since its enactment, because unlike in many other states, the law does not explicitly distinguish true "non-competes" from less onerous customer and employee non-solicitation provisions. The recent *Sentry Force Security* decision is the first significant appellate decision to tackle the meaning of the statute head-on.

What Happened in This Case?

Sentry Force hired James Barrera as an account manager in 2021, and later demoted him to office manager with reduced pay. Barrera allegedly formed a competing security business while still employed with Sentry Force. The employer alleged Barrera diverted business and employees to his new company, used confidential information and company resources for his benefit, and breached duties of loyalty. It filed a lawsuit against him alleging a breach of the customer and employee non-solicitation provisions in his agreement.

Barrera responded that, as a "low-wage employee," the restrictive covenants in his employment agreement were unenforceable under the state statute, and he filed a counterclaim.

In ruling partially in Barrera's favor, the Court analyzed customer and employee non-solicitation provisions to determine whether they are "covenants not to compete" prohibited by the statute for "low-wage" employees:

- **Non-Solicitation of Customers** - Holding: **ALLOWED.** Provisions restricting the post-employment solicitation of an employer's customers or clients is not a "covenant no to compete" according to the court – provided the restriction is limited to solicitation (*i.e.*, the employee is only barred from initiating contact or soliciting the employer's customers, but not from providing services to the employer's customer if the customer initiates contact). Such post-employment customer non-solicitation agreements are enforceable even against low-wage employees in Virginia. The court reasoned that the second

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line after the definition of "covenant not to compete" in the statute had to be interpreted to provide for this exception, even if not explicitly stated.

- **Non-Solicitation of Employees –** Holding: **PROHIBITED.** The court held a post-employment agreement restricting solicitation of the employer's employees is a "covenant not to compete" and is unenforceable against low-wage employees under the statute. The court reasoned that because the implied exception to the statute for the solicitation of customers does not mention employees, no such exception exists, and the expansive definition of "covenant not to compete" includes employee non-solicitation covenants because soliciting employees is a form of "competing."

Employer Action Items

This is a significant departure from traditional understanding of what type of restrictions constitute "covenants not to compete." Most states that regulate restrictive covenants distinguish non-solicitation provisions from true "non-competes," and subject the former to less stringent regulatory requirements.

Even those employers who have updated their agreements to comply with the amended law may now be out of compliance, and potentially subject to serious penalties. Given this decision, employers should consider taking the following steps to ensure compliance with the expanded ban on non-competes:

1. Identify Low-Wage Employees

Determine if the employee qualifies as a "low-wage employee" under Virginia law. Generally, this includes employees earning less than around $78,364.52 per year (the 2026 threshold, which will increase annually) or those who are classified as non-exempt under the FLSA. But note that the definition excludes employees "whose earnings are derived, in whole or in predominant part, from sales commissions, incentives, or bonuses paid to the employee by the employer."

2. Review All Restrictive Covenant Agreements for Low-Wage Employees

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Audit all employment agreements, offer letters, and standalone restrictive covenant documents for provisions that may restrict post-employment activities for low-wage employees. Specifically identify any non-compete and non-solicitation clauses.

3. Remove Infringing Covenants for Low-Wage Employees

Ensure that no agreement with a low-wage employee contains a "covenant not to compete" as defined by the statute and as interpreted by the *Sentry Force Security* court. This now includes employee non-solicitation provisions, unlike in other states. If including a non-solicitation of customers or clients provision, ensure it is narrowly tailored and enforceable under common law principles.

4. Training and Policy Updates

Update internal policies and templates to ensure ongoing compliance with the ban on non-competes *and* agreements prohibiting solicitation of employees for low-wage employees.

5. Curtail Unlawful Enforcement Actions

Do not threaten to enforce, attempt to enforce, or actually enforce a prohibited non-compete or employee non-solicitation provision against a low-wage or non-exempt employee.

Conclusion

We will continue to monitor developments in Virginia throughout 2026, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. If you have questions about this decision, please contact your Fisher Phillips attorney, the authors of this Insight, or any of our Virginia-licensed attorneys or attorneys in our Employee Defection and Trade Secrets Practice Group.

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