Noncompete Reform Continues in New England: Maine, New Hampshire, and Rhode Island All Pass New Laws

Insights
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Noncompete reform continues to crop up in New England. We previously wrote about comprehensive reform in Massachusetts late last year, and now three more states have passed legislation in recent weeks. All three states – Maine, New Hampshire, and Rhode Island – now prohibit employers from entering noncompetition agreements with low-wage employees, though the definition of "low wage" varies by state.

The bills in Maine and New Hampshire will soon become law, and the bill in Rhode Island has passed the legislature and is awaiting signature by the governor.

Maine
Effective September 18, 2019, those with employees in Maine will be prohibited from entering into noncompetition agreements with employees earning at or below 400 percent of the federal poverty level (in 2019 dollars, $49,960 for an individual and $103,000 for a family of four). The new state law defines a noncompete agreement as "a contract or contract provision that prohibits an employee or prospective employee from working in the same or a similar profession or in a specified geographic area for a certain period of time following termination of employment." The law distinguishes "noncompete agreements" from "a nonsolicitation agreement or a nondisclosure or confidentiality agreement."

There are also new notice requirements for employers seeking to enforce noncompete agreements that exceed the salary threshold. The employer must (a) disclose the noncompete prior to an offer of employment, and (b) provide a copy of the noncompete three business days before the employee is required to sign the agreement.

The noncompete also cannot take effect right away. Under the new law, noncompete agreements do not take effect until after the employee has been with the employer for a year, or a period of six (6) months after the noncompete was signed, whichever is later.

In addition to restricting noncompetes, the law prohibits no-poach agreements between employers. The law refers to them as "restrictive employment agreements" and defines them as an agreement "between 2 or more employers, including through a franchise agreement or a contractor and subcontractor agreement" that "prohibits or restricts one employer from soliciting or hiring another employer's employees or former employees."

Any employer who violates the law is subject to a fine not less than $5,000.

New Hampshire

Effective September 8, 2019, employers will not be able to enter into noncompete agreements with low-wage employees in New Hampshire. The law defines low-wage employees as those earning an hourly rate less than or equal to 200 percent of the federal minimum wage (i.e., $14.50 per hour or $30,160 annually). A "noncompete agreement" is defined as "an agreement between an employer and a low-wage employee that restricts such low-wage employee from performing: (1) work for another employer for a specified period of time; (2) work in a specified geographical area; or (3) work for another employer that is similar to such low-wage employee's work for the employer who is a party to the agreement." The law amends New Hampshire's prior noncompete statute, which created minimal notice requirements for employers.

Rhode Island

Finally, Rhode Island passed noncompete reform on July 11, 2019 that is awaiting the governor's signature. The law would prohibit agreements with low-wage employees defined as employees with average annual earnings of not more than 250 percent of the federal poverty level (for 2019, $31,225 for an individual and $64,375 for a family of four). In addition to low-wage employees, the law would prohibit noncompetition agreements with (1) undergraduate/graduate students and (2) employees age eighteen (18) or younger.

"Noncompetition agreement" is defined as "an agreement between an employer and an employee, or otherwise arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees that he or she will not engage in certain specified activities competitive with his or her employer, after the employment relationship has ended." It specifically excludes customer and employee nonsolicits, nondisclosure/confidentiality agreements, noncompetition agreements entered into in connection with the sale of a business, noncompetition agreements entered into in connection with a separation of employment (i.e., severance agreements), agreements with independent contractors (defined as "noncompetition agreements originating outside of an employment relationship"), among others.

Notably, the law would not render void the remainder of the contract, or preclude an employer from seeking an injunction for a breach of another agreement, a statutory obligation, or a common law duty (e.g., a breach of a confidentiality agreement, misappropriation of trade secrets, or breach of fiduciary duty).

Conclusion

Employers that use noncompetition agreements with their workers should continue to closely monitor developments in the states where they have employees. State legislatures continue to add challenges and requirements for employers making noncompetition agreements increasing difficult to enforce. Employers that use noncompetition agreements with low-wage employees in particular need to be aware of these changes as the prohibition of these types of agreements has been a common area of reform in many states and likely will be in the future.

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