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WASHINGTON'S NEW NON-COMPETE BILL BRINGS CHALLENGES FOR EMPLOYERS

Insights
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Finding that "workforce mobility is important to economic growth and development," Washington just passed a new law that will significantly restrict noncompetition agreements with both employees and independent contractors. The governor signed the bill into effect on May 8, ushering in a new era for restrictive covenants in the state.

The new law also has provisions against moonlighting and no-poach agreements, and creates a brand new cause of action against employers who seek to enforce agreement that violate the new law. Washington employers who rely on noncompetition covenants to protect their companies must meet the new stringent conditions or face a cause of action from covered workers. What do you need to know about this new law?

NEW LIMITS FOR WASHINGTON NON-COMPETES

Under the existing common law, Washington courts enforce and uphold agreements that meet three reasonableness factors. This law scraps that analysis and replaces it with a restrictive structure.

SALARY THRESHOLD

First and foremost, non-compete clauses will be automatically unenforceable unless the employee earns $100,000. For independent contractors, a similar restriction will take effect but the salary threshold will be $250,000.

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These figures will be adjusted annually for inflation, meaning that employers will have a moving target for compliance purposes.

TIME LIMIT

Next, the law sets a presumption that a non-compete covenant longer than 18 months post-employment is unreasonable and unenforceable. For a longer duration, a party must prove by clear and convincing evidence that it is necessary to protect the party's business or goodwill.

TIMING OF AGREEMENT

Similar to existing common law, the new law makes it clear that employers must disclose the non-compete covenant in writing to a prospective employee no later than the time the employee accepts an offer of employment, even if the covenant will not take effect until a later date due to a foreseeable change in the employee's compensation. Existing employees must be provided new, independent consideration for agreeing not to compete. Under existing law, continued employment alone is generally insufficient consideration for such an agreement where the employee is "at will."

GARDEN LEAVE

For employees who are terminated as a result of a layoff, a noncompetition covenant will be considered void unless the employer provides compensation equivalent to the employee's base salary at the time of the termination for the entire noncompetition period, minus any compensation earned through subsequent employment.

OTHER PROVISIONS

- **Moonlighting:** An employer may not prohibit any employee who earns less than twice the state minimum wage from working a second job or supplementing their income as an independent contractor or self-employment. The law gives no express exception for work performed for a direct competitor.
- **Franchisee Poaching:** A franchisor may not restrict a franchisee from soliciting or hiring an employee of a

franchisee of the same franchisor or any employee of the franchisor.

- **Forum Selection/Waiver:** The law requires that all Washington employees and independent contractors be able to adjudicate a non-compete agreement in Washington. Any agreement that would deprive an employee or contractor of substantive protections of the new law is unenforceable.

ARE THERE EXCEPTIONS?

The new law applies only to "noncompetition covenants", which is defined as "every written or oral agreement by which an employee or independent contractor is prohibited or restrained from engaging in lawful profession, trade, or business of any kind." However, "non-solicitation" or confidentiality agreements to protect trade secrets are not included.

The law essentially defines non-solicitation as an agreement that prohibits an ex-employee's solicitation of any co-worker or customer to leave the employer. The new law also exempts non-compete covenants entered into in connection with the purchase or sale of a business or franchise.

NEW LIABILITY FOR EMPLOYERS

If an employer violates the new law – meaning a non-compete agreement is deemed to be entirely unenforceable or even partially unenforceable – the State Attorney General or the affected employee may sue the employer. Successful employees will be entitled to recover the greater of their actual damages or a statutory penalty of $5,000.00, plus their attorneys' fees and costs.

Similarly, an employer may bring an action to seek enforcement of the agreement, but keep in mind that if a court or arbitrator "blue pencils" or just partially enforces the agreement, the employee will still be entitled to damages and attorney's fees.

WHEN DOES IT TAKE EFFECT?

While the new law will not take effect until January 1, 2020, it will apply to all proceedings commenced after the

effective date, regardless of when the cause of action arose. Therefore, the law has a retroactive application to covenants entered into before January 2020. This may encourage suits to enforce current agreements before the end of the year. However, the law also specifies: "[a] cause of action may not be brought regarding a noncompetition agreement signed prior to the effective date of this section if the noncompetition covenant is not being enforced."

WHAT ARE YOUR NEXT STEPS?

You should take a look at existing non-compete agreements and develop a strategy for existing and new employees moving forward to ensure compliance with the law. Any non-compete should be narrowly and carefully drafted based on the new conditions to avoid issues of enforceability.

One crucial challenge will be to ensure pay increases keep up with the inflation adjustments to the average wage, which is adjusted each year. Thus, the enforceability of a non-compete could change from one year to the next.

For more information about how this new law could affect your workplace, please contact any attorney in our Seattle office at 206.682.2308 or your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.