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?“Know What’s Below, Call Before You Dig”: New State-Law Non-Compete Traps May Lie ?Beneath the Surface

Labor & Employment Workforce Watch

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Just as homeowners are encouraged to reach out before digging in their yard to make sure there are no buried dangers, employers are also encouraged to do their due diligence before burrowing into the ground searching for a new restrictive covenant agreement. We have previously warned employers of the potential dangers of using a one-size-fits all non-competition or non-solicitation agreement with their employees. Since that time, state legislatures around the country have continued to pass new laws that affect the enforceability of certain non-compete agreements. Notably, not only are states limiting ?the enforceability of non-compete agreements with increasing frequency, but there is also a ?growing trend toward imposing penalties against employers who attempt to enforce such agreements where contrary to law. ?

- Illinois – In 2016, Illinois passed the Illinois Freedom to Work Act, which, among other things, prohibited the use of non-compete agreements with certain low wage earners (at the time defined as $13.00 per hour or less). On May 31, 2021, the Illinois legislature unanimously passed an amendment to the law, which is expected to be signed by Governor Pritzker. Here are some key takeaways, which would apply to restrictive covenant agreements entered into after January 1, 2022:
  - An employee must have a minimum expected earnings threshold of $75,000 to be subject to a non-compete agreement, or $45,000 to be subject to a non-solicitation agreement (including either solicitation of customers, employees, or both). These amounts will increase $5,000 (non-competes) and $2,500 (non-solicitation) each in the years 2027, 2032, and 2037;
  - Employers must provide an employee with fourteen days to consider the agreement;
  - New non-compete or non-solicitation agreements must be supported by “adequate consideration,” which is now codified to be either (1) two years of employment after entering into the agreement, or (2) a period of continued employment *plus* financial benefits or, in some circumstances, a financial benefit alone; and
  - Employees that prevail in non-compete or non-solicitation litigation may be entitled to an award of reasonable attorney’s fees, even if the underlying agreement does not contain a fee-shifting provision.
- Nevada – Nevada Assembly Bill 47, which amends Nevada’s non-competition statute, becomes effective October 1, 2021. The amendment bans non-compete agreements with employees “paid solely on an hourly wage basis, exclusive of any tips or gratuities.” The amendment also prohibits restrictive covenants if the agreement would operate to prohibit the employee from providing services to a customer of the employer if (1) the former employee did not solicit the customer, (2) the customer voluntarily chose to seek services from the former employee, and (3) the former employee is otherwise complying with the restrictive covenant. Notably, if an employer attempts to enforce a non-compete against a non-covered hourly worker or against a former employee that has complied with steps (1)-(3) listed above, the amendment would *require* a court to award the former employee his or her reasonable attorney’s fees and costs.
- Oregon – Oregon Senate Bill 169 becomes effective January 1, 2022, and will reduce the maximum length of a non-compete agreement to twelve months, which is down from a previous maximum of eighteen months. The new legislation also protects lower-wage earners by specifying a minimum annual gross salary and commission

threshold of $100,533, which will be adjusted annually for inflation. Any noncompliant agreements will be void and unenforceable. Like many similar statutes, this amendment will not be applied retroactively; thus, agreements in place that comply with the current law do not need to be replaced with agreements compliant with the new law.

- Washington D.C. – D.C's "Ban on Non-Compete Agreements Amendment Act of 2020" became effective March 16, 2021 (though the act's "applicability date" will likely not take place until the city's next fiscal budget is passed sometime this fall). With its passing, Washington D.C. joined the likes of Oklahoma and California, which broadly prohibit non-compete agreements in most circumstances. Notably, the act is not retroactive, and still allows for non-compete agreements connected with the sale of a business.

While enforceable non-competition and non-solicitation agreements remain useful and permissible in most jurisdictions, the landscape of restrictive covenants continues to change with each passing legislative session. On July 9, the Biden Administration issued an Executive Order that directs the Federal Trade Commission to ?"curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly ?limit worker mobility." ?Being aware of changes under both state and federal laws gives employers the best chance of protecting their intellectual property, their workforce, and their valuable customer relationships. Failure to do so, however, risks providing unintentionally unenforceable agreements to their workforce, with the additional possibility of financial blowback at the courthouse.

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