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Employment Law Note

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Your Noncompetition Agreements May Soon Be Unenforceable

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On April 17, 2019, the Washington Legislature passed a bill that would drastically alter the legal landscape for noncompetition agreements. Presently the bill is on the Governor's desk, awaiting his signature.

The new law, once enacted, will invalidate many (and perhaps most) existing noncompetition agreements in Washington, as of January 1, 2020.

The New Rules for Noncompetes

The new law imposes strict limitations on noncompetition agreements. For example, a covenant will be "void and unenforceable" if:

- The employer waited until after a candidate accepted its offer to disclose the covenant's terms.
- The employee in question does not earn at least $100,000 in W-2 earnings per year ($250,000 for independent contractors).
- The covenant lasts longer than 18 months (unless the employer can prove by "clear and convincing evidence" that a longer covenant is "necessary.")
- The employer attempts enforcement against an employee it laid off but does not pay them their *full salary* for the entire "period of enforcement."
- The covenant was entered into after employment began but the employer provided no "independent consideration" in exchange for the covenant.

The law will apply to all lawsuits begun on or after January 1, 2020, regardless of when the underlying events occurred and regardless of when the covenant was signed. In other words, existing covenants will be subject to the new law beginning on January 1 of next year.

The new law also prohibits any attempt to contractually waive the new restrictions, and invalidates forum selection clauses that purport to require "Washington-based" employees to litigate their covenants outside of Washington.

Steep Penalties

Employers who disregard the new rules will face steep consequences. The Attorney General is empowered to pursue "any and all relief" against employers who violate the law, without any evident boundary of what that relief might look like. Employees who are "aggrieved" by improper noncompetition covenants will also be able to sue for their actual damages, or for a statutory $500 penalty, and can also recover their attorneys' fees and costs--and they can bring this lawsuit even if the employer has not attempted to enforce the covenant (although, for covenants that were signed before January 1, 2020, the employee will not be able to sue so long as the covenant "is not being enforced"). Employees will also be able to recover damages and attorneys' fees if an employer attempts to enforce a covenant and is only partially

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successful--*i.e.*, if a court "reforms, rewrites, modifies, or only partially enforces" their covenant.

What is an employer to do?

Employers who need protection from unfair competition will still have tools in their toolboxes. The new law excludes from its reach contracts that merely prohibit the solicitation of a former employer's customers or employees, as well as confidentiality agreements and contracts restricting employees' use and disclosure of trade secrets and inventions. These types of contracts will remain viable options, subject to existing legal confines.

Even noncompetition agreements will still be viable after January 1, 2020. But they will need to be very carefully targeted. Employers will need to ensure that the restrictions are meticulously tailored to the employee's true competitive threat, that they are no longer in duration than absolutely necessary, and that they are certain to pass muster in light of the interest that the employer is attempting to protect. Guessing wrong on any of these fronts could lead to liability--especially if enforcement is attempted. The employer should also ensure that the employee's base wages are comfortably above $100,000 (or that the covenant expires if wages are reduced below the statutory threshold). One thing is certain: the days of blanketing an entire workforce from the C-suite to the mail room with noncompetition agreements are likely over. Employers who persist in doing this are exposing themselves to a new liability that appears destined for class action treatment.

As for what to do with existing covenants, many of them likely violate at least one of the new law's proscriptions, in which case they will become void on January 1, 2020, no matter how reasonable they might otherwise be. For example, if an employer did not disclose a covenant's terms to a new hire until after the employee had already accepted the offer of employment, but instead waited until the employee's first day of work to do that, that employee's covenant would violate the new law and will become void. So long as this type of offending covenant merely gathers dust in the employer's file room, and no enforcement is attempted, the employee cannot sue.

But at the same time, this employer will be without contractual protection. Fixing that omission would require the employer to use some combination of the tools noted above. But it may also require the employer to provide each affected employee with "independent consideration" in exchange for the new restrictions.

Employers have time to fix their agreements with current employees, as well as the agreements they use with new hires. A careful review and well-thought out plan for moving forward are essential to avoid costly missteps.

For more information about this month's Employment Law Note
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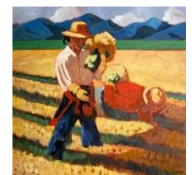

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