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Non-Competes in Washington – Over-Reaching Could Cost Employers

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Washington is the most recent state to adopt a law restricting the use of noncompetition agreements. The new law (HB 1450), which was signed by Governor Jay Inslee on May 8, 2019 and is scheduled to go into effect on January 1, 2020, will add unique challenges for employers and further complicate the restrictive covenant landscape across the country. Perhaps the most significant takeaway for employers (particularly those with national workforces) relates to damages in the form of "reasonable attorneys' fees" and statutory penalties for partial enforcement of the noncompetition covenant. As people in Washington will tell you, this provision could turn a "win" into a "loss" faster than an ill-fated pass by the Seahawks against the Patriots in Super Bowl XLIX.

Prior Notice and Consideration:

- A noncompetition covenant is void and unenforceable unless the employer discloses the terms in writing to a prospective employee. If the covenant becomes enforceable only at a later date due to changes in the employee's compensation (see below for compensation thresholds), then the employer must specifically disclose that the covenant may be enforceable in the future.
- "Independent consideration" must be provided to the employee if the noncompetition covenant is entered into after employment commences. However, the scope of "independent consideration" is not defined in the law.

Compensation Threshold:

- Like many other states, Washington seeks to limit the use of noncompetition clauses for low-level/low-wage employees. In Washington, noncompetition clauses will be unenforceable against employees earning less than $100,000 in total annualized compensation (not just base salary) or independent contractors earning less than $250,000/year. This arbitrary threshold (which will increase on an annual basis at the rate of inflation), will create enforceability challenges in circumstances involving sales and other employees whose compensation is often tied to incentive

compensation and where overall annual compensation fluctuates around the threshold.

- Employees earning less than two-times the state minimum wage may not be restricted from working an additional job (*i.e.,* for a competitor) so long as the additional job does not raise issues of safety or interfere with the employer's normal scheduling expectations. The law notes that the ability to hold an additional job "does not alter the obligations" of the employee to the employer, "including the common law duty of loyalty and laws preventing conflicts of interest and any corresponding policies addressing such obligations." It remains to be seen how courts will interpret this carve-out and the limiting restrictions, and whether, for example, an employee may simultaneously work for competitors so long as they claim to maintain their "loyalty" to both employers.

Termination and Pay to Enforce/Garden Leave:

- If an employee is terminated as the result of a layoff, the noncompetition covenant is void unless enforcement includes compensation equivalent to the employee's base salary (not overall compensation) at the time of termination for the period of enforcement less compensation earned through subsequent employment.

Time Period:

- Noncompetition covenants longer than 18 months are presumptively unreasonable and unenforceable.

Choice of Law and Venue:

- The new law purports to limit the use of out-of-state venue and choice of law provisions. However, in line with similar restrictions codified around the country, the strength of this provision outside of Washington state courts is questionable in light of the Supreme Court's decision in *Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas*, 571 U.S. 49 (2013), which recognized the presumptive enforceability of choice of law and venue provisions.

Penalties, Enforcement and Other Salient Points:

- If a court or arbitrator reforms, rewrites, modifies, or partially enforces a non-compete clause, then it must require the employer to reimburse the employee for reasonable attorneys' fees, costs and other expenses, plus damages or a statutory penalty of $5,000. This mandatory penalty provision raises the question of how judges will react in circumstances of clearly bad behavior (*e.g.*, a departing

employee misappropriating the former employer's confidential information) coupled with a non-compete clause that is only slightly overbroad given the facts and circumstances of that one employee. Rather than reward a bad actor, perhaps judges sitting in equity will enforce slightly overbroad covenants as written.

- For all actions or proceedings commenced after January 1, 2020, regardless of when the noncompetition covenant between the parties was entered, the requirements of the new law apply. So, unlike "new laws" passed elsewhere (like Massachusetts), there is no "free pass" given to agreements executed before the new law goes into effect.
- A cause of action may not be brought regarding a noncompetition covenant signed prior to January 1, 2020 if the noncompetition covenant is not being enforced. This should hopefully prevent a cottage industry of declaratory judgment actions seeking to challenge overbroad restrictions and trigger payment under the law's penalty provisions.
- Consistent with news headlines about non-competes across the country, 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.
- Notably, the new law does not address the use of employee or customer nonsolicitation agreements, or related restrictive covenants.