

The Ever-Changing Landscape of Non-Compete Agreements – Recent Developments

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Recently, the federal government and various state governments have spoken out concerning new limits on non-compete agreements and other post-employment restrictions. Although the trend toward limiting non-compete agreements has been developing for the past couple of years, it is likely that the impact of the COVID-19 pandemic on both employers and employees has further influenced such limitations. With staffing shortages and increasing numbers of employees changing jobs, it appears that flexibility—and mobility—in employment are being enhanced.

Federal Initiatives

On July 9, 2021, President Biden issued his Executive Order on Promoting Competition in the American Economy, with a focus on increasing competition in the marketplace and so-called “economic freedom.” The Executive Order “encouraged” the Federal Trade Commission (FTC) to consider exercising its rulemaking authority to curtail the use of non-compete clauses and other agreements that may “unfairly limit worker mobility.” Because the Order encourages but does not require FTC action, it is unclear whether this Executive Order will result in the FTC taking any substantive actions to limit non-compete clauses. Nonetheless, the Order further clarifies the Biden Administration's view of such restrictions on competition.

Meanwhile, a bipartisan Workforce Mobility Act of 2021 was introduced in the House of Representatives and Senate in February 2021. It proposes to prohibit the use of non-compete agreements with some exceptions relating to the sale of a business, depending on the role of the employee. Additionally, the Freedom to Compete Act was reintroduced in the Senate in July 2021 and proposes to prohibit non-compete agreements for non-exempt employees under the Fair Labor Standards Act, which generally means employees earning less than \$50,000 annually.

State/City Initiatives – Recently Passed and Proposed

In addition to the recent attention by the federal government, various states have contemplated and/or passed legislation limiting the applicability and enforceability of non-compete agreements. This trend was arguably jump-started in Massachusetts with the Massachusetts

Noncompetition Agreement Act, passed in 2018. In fact, more than 10 states have enacted new legislation regarding non-compete laws since 2018. This trend is continuing with some recent changes and proposals described below:

Illinois

Effective January 1, 2022, the Illinois Freedom to Work Act will be amended to provide additional limitations to non-compete and non-solicit agreements. For example, non-compete agreements will be banned for employees earning less than \$75,000 annually, and that annual salary threshold is set to increase incrementally over time. Non-solicit agreements will similarly be banned for employees earning less than \$45,000 annually. In addition, as a sign of the times, non-compete or non-solicit agreements cannot be enforced when the employee is furloughed or laid off due to the COVID-19 pandemic or a similar circumstance, unless the employee receives compensation to bridge the gap between their base salary at the time of layoff and the salary earned through subsequent employment. If an employee prevails on a claim to enforce a non-compete or non-solicit clause, the employee is entitled to recover all reasonable attorneys' fees. The statute also imposes procedural requirements, including having 14 days to review the restrictions before agreeing to them.

Washington, D.C.

In January 2021, Washington, D.C. passed the Ban on Non-Compete Agreements Amendment Act which, once effective, will restrict non-compete agreements across a broad swath of employees working in D.C. and will be one of the more restrictive laws in the United States. Due to the procedural aspects of D.C. legislation, the law's effective date is not until April 1, 2022, at the earliest, and it is possible there will be further revisions and changes to the law before it is implemented. This is important as the Act is not retroactive.

New York

There are several proposed bills in New York concerning the restriction of non-compete clauses. One bill, proposed in April 2021, seeks to prohibit the use of non-compete clauses, does not provide for exceptions, and contemplates liquidated damages of up to \$10,000. This bill is currently in the State Senate Labor Committee.

New Jersey

A bill was proposed in May 2021 that limits non-compete agreements to terms not exceeding one year and provides touchstones for the reasonableness of a restrictive covenant, as well as procedural requirements. If passed, non-compete agreements would be prohibited against "low-wage employees" (not defined) and employees whose employment was terminated without cause. As with New York's proposed bill, this bill also contemplates liquidated damages of up to \$10,000.

Given the ever-changing landscape of the enforceability of non-compete agreements, companies may want to keep an eye on the legislative landscape to ensure that their businesses are adequately protected.

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