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Competition Just Got Stiffer: New Washington Law Changes Non-Compete Landscape

Labor & Employment Legal Update

Washington businesses who rely on non-compete agreements to prevent employees and consultants from working for a competitor will need to rethink their strategy, thanks to a new state law. The law considerably limits the scope and enforceability of non-compete covenants. It also imposes significant penalties on businesses who seek to enforce overly broad non-compete agreements. But wait, there's more! The law also restricts how businesses use moonlighting policies during employment. How should Washington businesses proceed? Very carefully. Read on to learn more.

How Far Does This Law Go?

First, some good news. The law excludes non-solicitation agreements, confidentiality agreements, inventions and trade secret covenants, and certain covenants by franchisees. Importantly, the law also excludes agreements with the seller or purchaser of the goodwill of a business and covenants with entities otherwise acquiring or disposing of an ownership interest.

What Are the Key Requirements of the New Law?

- **Covered workers.** The restrictions in the law apply to employees and independent contractors.

- **Early disclosure to new employees.** Businesses must disclose the terms of the non-compete agreement in writing *no later* than the time the candidate accepts the offer of employment. Businesses should provide candidates with a non-compete agreement no later than when they extend an offer of employment. As a best practice, businesses should allow sufficient time for the candidate to review the agreement and obtain legal advice.
- **Additional consideration to current employees.** Businesses must provide additional consideration if asking employees to sign a non-compete after employment begins. This is not a change in Washington law.
- **Limited enforcement.** Businesses may enforce non-competes only against employees whose reported earnings exceed **\$100,000**, and independent contractors whose reported earnings from the business exceed \$250,000. Whether the worker meets this annualized threshold is determined on the date of separation or the date of enforcement, whichever is earlier. While employees and contractors may sign the agreement before they reach these thresholds, businesses must state that the agreement is enforceable in the future.
- **Special considerations for laid-off employees.** Businesses seeking to enforce non-compete agreements against laid-off employees must pay compensation during the restricted period equal to the employee's base salary, but any amounts that the former employee earns through new employment may offset what is owed.
- **Limited duration.** Non-competes for periods *longer* than 18 months will be presumptively invalid. Non-compete agreements between performers and performing spaces (or related third parties) cannot exceed three days.
- **Prohibition on no poaching agreements.** Franchisors may not restrict franchisees from soliciting or hiring any employee from another franchisee or from the franchisor itself.
- **Moonlighting Policies.** These policies prohibit current employees from working additional jobs while employed. The law prohibits businesses

from applying moonlighting policies to employees earning less than twice the state minimum hourly wage (\$27 per hour for 2020). However, the law allows businesses to apply moonlighting policies to such employees *if* the additional job: (1) raises safety issues for the employee, co-worker or the public, or (2) interferes with the business's reasonable and normal scheduling expectations. In addition, the law does not alter employees' obligations under the common law duty of loyalty or other laws preventing conflicts of interest and corresponding policies.

- **Penalties, attorneys' fees and costs.** Businesses who have overreaching non-compete agreements may be penalized in two ways. First, and most significantly, *if a court determines that the non-compete agreement violates the law*, the business may be required to pay the worker's **attorneys' fees and costs, plus the greater of \$5,000 in statutory penalties or actual damages**. Second, if the business seeks to enforce the non-compete, and *the court reforms, rewrites or only partially enforces the agreement*, the business may be required to pay these same fees, costs, penalties and damages.
- **Effective Date.** This new law will take effect on January 1, 2020. It applies to all proceedings commenced on or after this date, regardless of when the cause of action arose. Otherwise, the law applies prospectively.

What Should Businesses Do Now?

Even though the law takes effect on January 1, 2020, it will affect agreements entered into before this effective date. Accordingly, businesses should take steps now to prepare for this change in the legal landscape.

- **Review non-compete agreements.** Businesses should review their existing employment and independent contractor agreements now so they are prepared for January 2020.
- **Pay attention to timing.** Businesses should provide the non-compete agreement when making job offers, and allow the candidate sufficient time to review its terms.

- **Review existing agreements.** Businesses should review their existing non-compete agreements to confirm: (1) whether they are being used for employees or independent contractors that are below the earnings threshold; and (2) whether the scope is overly broad. If so, businesses should bring their agreements into compliance, consistent with business needs. Keep in mind that new agreements for existing employees will require new consideration (such as a one-time bonus, equity grant or other benefit). Given the high earnings threshold for independent contractors, and the increasing regulatory and enforcement challenges in this arena, businesses should audit their practices.
- **Modify moonlighting policies.** Most moonlighting policies will need to be revised to comply with the new law's salary threshold.
- **Document terminations carefully.** Because the law requires that businesses compensate laid-off employees during the restricted period, businesses should carefully consider and document the reason for an employee's separation. In the case of a layoff subject to the law, businesses should consider whether they will enforce non-compete agreements for laid-off employees, and if so, they should comply with the law.
- **Enforce with caution.** Businesses should consult with counsel before attempting to enforce any agreement containing a non-compete covenant. The law imposes steep penalties for businesses who seek to enforce non-compete agreements that are even partially invalid under the new law.
- **Stay tuned!** This new law has sweeping changes that impact employment agreements, independent contractor agreements, handbooks, terminations and enforcement decisions. In addition, the salary and earnings thresholds will adjust for inflation. Lane Powell's Lawyers for Employers™ are available to help update your existing agreements and handbook policies, prepare new agreements, and advise on potential enforcement actions.