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Washington Expands Statute Covering Noncompetition Covenants

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In this article, the authors summarize the relevant portions of Washington's non-compete statute and new amendments to that law.

Washington State Governor Jay Inslee has signed into law a bill amending (and expanding) an existing Washington statute governing the enforceability of noncompetition covenants. The amendments took effect on June 6, 2024, but the law applies retroactively to all proceedings commenced on or after January 1, 2020.

At a high level, the amendment:

- Expands the statute's coverage by:
    - Including within the definition of "noncompetition covenant" covenants restricting an employee's ability to accept or transact business with a customer.
    - Limiting the statute's exemption of customer nonsolicitation covenants only to those nonsolicitation covenants restricting the solicitation of "current" customers.
    - Limiting the statute's exemption for noncompetition covenants entered into upon the sale of a business only to those covenants entered into when the restricted individual purchases, sells, acquires, or disposes of an interest representing 1% or more of the business.

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- Allows individuals "aggrieved" by a noncompetition covenant to which they were not a party (such as, potentially, a restricted employee's new employer) to assert a private right of action under the statute.

- Provides employees who signed a noncompetition covenant prior to the statute's effective date a private right of action if an employer attempts to enforce the covenant or even "explicitly leverage[s]" the covenant.

- Requires employers to provide new hires the terms of a noncompetition covenant in writing prior to an employee's written or verbal acceptance of an offer of employment.

- Strengthens choice of law and forum selection restrictions, closing loopholes that allowed for the application of non-Washington law or the laying of non-Washington venue in litigation between employers and Washington-based employees in certain circumstances.

This article summarizes the relevant portions of Washington's noncompete statute and the amendments.

OVERVIEW OF WASHINGTON'S EXISTING NON-COMPETE STATUTE

As relevant to the amendments, Revised Code of Washington Chapter 49.62 currently provides that a noncompetition covenant is void and unenforceable unless:

- An employee's compensation from the employer reflected on box one of the employee's W-2 from the year prior to termination of employment or enforcement (whichever is earlier) of a noncompetition covenant (Earnings) exceeds the statutory threshold. That threshold is currently $120,559.99, adjusted annually.

    - If the noncompetition covenant becomes enforceable only at a later date due to changes in the employee's compensation, the employer must specifically disclose that the agreement may be enforceable against the employee in the future.

- The employer discloses, for new hires, the terms of the noncompetition covenant in writing prior to the employee accepting an offer of employment.

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The law also provides that noncompetition covenants are void and unenforceable as to independent contractors unless the contractor's Earnings exceed a higher statutory threshold (currently $301,399.98).

WHAT IS CHANGING UNDER THE AMENDMENTS?

Liberal Interpretation of Coverage

The amended statute now specifically provides that "[t]he provisions in this chapter facilitating workforce mobility and protecting employees and independent contractors need to be liberally construed and exceptions narrowly construed." Therefore, the statute's ambiguities may be construed in favor of protecting workers and their mobility.

Expands Coverage of Noncompetition Covenants

The statute applies only to "noncompetition covenants," which expressly do not include (1) "nonsolicitation agreements," (2) confidentiality agreements, (3) covenants prohibiting use or disclosure of trade secrets or inventions, and (4) covenants entered into by a person purchasing or selling the goodwill of a business or otherwise acquiring or disposing of an ownership interest.

The amended statute, however, broadens the reach of its coverage in three ways:

- The statute now explicitly covers "an agreement that directly or indirectly prohibits the acceptance or transaction of business with a customer." Thus, while a covenant not to solicit customers is still exempted from coverage, a covenant that prohibits an individual from servicing a customer – even if the customer was not "solicited" by the employee – would fall within the statute's reach. The statute does not define the term "solicited."

- The statute's exemption for covenants not to solicit customers will now explicitly exempt only customer nonsolicitation agreements that prohibit the solicitation of current customers of the employer. A customer nonsolicitation agreement that prohibits

the solicitation of past or prospective customers therefore may now fall within the statute's reach.

- The statute's exemption for sale of business restrictive covenants now applies "only if the person signing the covenant purchases, sells, acquires, or disposes of an interest representing one percent or more of the business." A noncompetition agreement with an employee who buys or sells less than 1% of a business would now fall within the statute.

Expanded Private Right of Action

Previously, the statute provided a private right of action only to parties to noncompetition covenants aggrieved by those covenants. A party aggrieved by a noncompetition covenant that violates the statute could seek to collect actual damages or a $5,000 statutory penalty, plus attorneys' fees, expenses, and costs incurred in such proceeding.

As amended, any individual or entity aggrieved by a noncompetition agreement that violates the statute has such private right of action. This means prospective employers may sue prospective employees' former employers to challenge a noncompetition covenant, and seek to collect damages.

Additionally, prior to its amendment, the statute did not provide a private right of action for aggrieved individuals who entered into noncompetition covenants prior to January 1, 2020, unless an employer was seeking to enforce the covenant. As amended, an individual aggrieved by a noncompetition covenant signed prior to January 1, 2020, can take advantage of the statute's private right of action if an employer is seeking to enforce or "leverage" the noncompetition covenant. The statute does not define the term "leverage."

Notice Requirement

The original statute required an employer to disclose the terms of a noncompetition covenant to a prospective employee before acceptance of an offer of employment. The amended statute clarifies that such written disclosure must occur before the prospective employee's "initial oral or written" acceptance of the offer. If not, the noncompetition covenant is void and unenforceable. Practically, this means that an employer that anticipates calling a candidate by phone or on videoconference to extend a job offer may consider disclosing the terms of a noncompetition covenant early on in the hiring process,

or asking a candidate not to accept an offer orally until the candidate reviews the noncompetition covenant.

Choice of Law and Forum Selection Loopholes Closed

The statute previously provided that a provision in a noncompetition covenant signed by a Washington-based employee or independent contractor is void an unenforceable if the covenant "requires" adjudication of a noncompetition covenant outside of Washington and "to the extent" such provision deprived the employee or independent contractor "of the protections or benefits of" the law. The "and" has now been replaced with an "or," and further provides that a provision in a noncompetition covenant is void and unenforceable "[i]f it allows or requires the application of choice of law principles or the substantive law of any jurisdiction other than Washington state."

Retroactivity

The statute has always provided that, except for limits on the availability of the private right of action discussed above, it "applies to all proceedings commenced on or after January 1, 2020, regardless of when the cause of action arose." It is unclear whether the Washington legislature intended to retroactively invalidate restrictive covenants that did not satisfy the statute's requirements at the time they were executed. For instance, if, prior to the effective date of the amendments, a prospective employee orally accepted a job but the employer did not disclose in writing the terms of the non-competition covenant, is the noncompetition covenant the employee signs invalid? At least one Washington district court has answered "yes."[1]

This ambiguous retroactivity issue raises practical questions for employers, such as whether they should now enter into new restrictive covenants with employees that comply with the amended statute – even though the existing covenants were valid at the time they were originally executed.

ACTION ITEMS FOR EMPLOYERS

Employers should take note of the statute's broadened coverage and make necessary adjustments to their form restrictive covenant agreements.

Additionally, employers should consider training recruitment, human resources, and other managers or supervisors potentially tasked with extending employment offers to candidate to ensure that – prior to a candidate's oral or written acceptance of an offer – the terms of noncompetition agreements are disclosed to the individual in writing.

NOTE

1. See Robins v. NuVasive, Inc. 2020 WL 7081588 at *4 (E.D. Wash. Dec. 3, 2020) (invalidating noncompetition covenants signed prior to the original passage of the statute, in part, because the employees did not earn over the salary threshold at the time of signing and the employer did not specifically disclose that the covenant would only become enforceable at a later date due to changes in their compensation).