Updates
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Washington State Tightens Noncompete Restrictions

Washington state businesses that have noncompetition agreements with employees or independent contractors will be subject to new requirements under the latest amendment to the state's noncompetition law beginning June 6, 2024.

Washington has restricted noncompete agreements since 2020 by prohibiting their use unless the following apply:

- The worker earns more than a minimum compensation amount, which is adjusted annually. For 2024, the threshold is $120,559.99 for employees and $301,399.98 for independent contractors.
- The noncompete is effective for no more than 18 months, or the business can show by clear and convincing evidence that a longer duration is necessary to protect the business or goodwill.
- The noncompete is disclosed in writing at the time of hire or is supported by additional consideration such as a pay raise or bonus. It is not enough to exchange continuing employment for an employee's signature on a noncompete after they are hired.
- If the employer lays off the employee, at the time of termination, the employer must pay the employee the equivalent of their base salary for the duration of the noncompete enforcement period.

The new amendment strengthens these protections and emphasizes that Washington's noncompete law "need[s] to be liberally construed and exceptions narrowly construed."

Broadened Definition of Noncompetes

Previously, Washington defined a noncompete as "every written or oral covenant, agreement, or contract by which an employee or independent contractor is prohibited or restrained from engaging in a lawful profession, trade, or business of any kind," with some delineated exceptions. The amendment expands this definition to

include "an agreement that directly or indirectly prohibits the acceptance or transaction of business with a customer."

Narrowed Customer Nonsolicitation Agreement Exception

Washington's law applies only to noncompetes as defined and clearly states that certain nonsolicitation agreements are *not* noncompetes. But the amendment narrows the definition of a customer nonsolicitation agreement and, in doing so, broadens the range of agreements potentially subject to the law's requirements. Previously, the law defined "nonsolicitation agreement" to include any agreement between an employee and employer that prohibits the employee from soliciting *any* customer. Effective June 6, customer nonsolicitation agreements are only those that prohibit soliciting *current* customers. This means an agreement that prohibits employees from soliciting former customers may qualify as a noncompete subject to the requirements of the law. Notably, the amendment does not address how the customer nonsolicitation exclusion will be reconciled with the new prohibition against clauses that "directly or indirectly prohibit ... business with a customer."

Agreements that prohibit employees from soliciting other employees to leave the employer remain exempt from the noncompete restrictions. The amendment also does not alter exceptions for confidentiality agreements, covenants prohibiting the use or disclosure of trade secrets or inventions, or covenants entered by a franchise when the franchise sale complies with RCW 19.100.020(1).

Narrowed Sale of Business Exception

Previously, Washington excluded noncompetes entered into by a person purchasing or selling the goodwill of a business or otherwise acquiring or disposing of an ownership interest. The amendment clarifies that this exemption only applies "if the person signing the covenant purchases, sells, acquires, or disposes of an interest representing one percent or more of the business."

Revised Procedural Requirements

The new amendment imposes more specific procedural requirements that must be followed for a noncompete to be enforceable, including:

- **Earlier notice.** Businesses must now confirm that workers have notice of the noncompete no later than the initial oral or written acceptance of employment. Previously, businesses were required to present a noncompete no later than the time employment was accepted, but the statute did not define "acceptance" to specifically include "initial oral or written acceptance." Now, if an employer extends an oral offer (*i.e.*, over the phone), and the employee orally accepts, subsequent notice of the noncompete may be untimely.
- **Choice of law.** Businesses are now forbidden from including a choice of law provision that selects any law other than Washington law, in addition to the prior prohibition against requiring a dispute be adjudicated outside of Washington.

Non-Party Enforcement

Non-parties to noncompetes may now have standing to bring actions to invalidate agreements. Although the provision is unclear, this could be interpreted to allow a new or prospective employer to sue a former employer and seek damages. As with the prior version of the law, a successful plaintiff can recover the greater of actual damages or a statutory penalty of $5,000, plus reasonable attorneys' fees, expenses, and costs.

The amendment also clarifies that while an action may not be brought for a noncompete entered into before January 1, 2020, a party may sue if such an agreement is being enforced or "explicitly leveraged."

Effect of the FTC's Final Rule on Washington's Noncompete Law

The Federal Trade Commission (FTC) voted in April 2024 to ban the use of virtually all noncompetes. Specifically, the FTC rule prohibits employers from enforcing or entering new noncompetes, except under very limited circumstances. Most notably, noncompetes are not enforceable unless entered into with a "senior executive" before the rule's effective date or with other employees in connection with the sale of their business. The rule goes into effect 120 days from its publication in the *Federal Register* and will likely be in effect by the fall of 2024 absent an injunction. Almost immediately after the FTC vote on the ban, the U.S. Chamber of Commerce filed a lawsuit in federal court challenging the FTC's authority to issue such a rule.

Although the fate of the nationwide ban on noncompetes remains uncertain, employers with Washington employees must comply with the state's new law by June 6, 2024, regardless. While the FTC rule's provisions would largely supplant the state's new law if they take effect, Washington's definition of what constitutes a noncompete agreement is arguably broader than the FTC's definition. Under the final FTC rule, a "non-compete clause" is a term or condition of employment that "prohibits," "penalizes," or "functions to prevent" a worker from seeking employment elsewhere or operating a business. The application of the FTC's proverbial functional test remains untested, including with respect to nonsolicitation agreements. However, Washington's definition of noncompetes is relatively more detailed and might apply to broad agreements not to solicit former customers. Similarly, there may be some variances between the FTC rule and Washington law, with respect to the application of the business sale exception, to the extent Washington's 1% sale threshold differs from the FTC's bona fide sale exception.

Key Takeaways

Businesses should take action now to ensure their agreements and processes are ready by June 6, 2024. They should consider taking the following steps:

- Review current employment and independent contractor agreements to confirm restrictive covenants fall outside the scope of the Washington law (including with respect to customer nonsolicitation provisions) or that the agreement otherwise satisfies the law's requirements, such as with respect to the choice of law clause.
- Review hiring processes to make certain that noncompetes are disclosed in writing to prospective employees before an initial oral or written acceptance and that relevant management and human resources personnel are trained on the notice requirements.
- Train relevant personnel to prevent noncompliant noncompetes entered into before January 1, 2020 (or agreements entered into with workers who make below the current income thresholds), from being explicitly or implicitly leveraged against workers.

Perkins Coie will stay updated on noncompete developments to help our clients promptly adapt.

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