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Legislative Update

Washington Announces New Noncompete Law

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On March 23, Washington Gov. Bob Ferguson signed into law Engrossed Substitute House Bill (ESHB) 1155, which the governor said "builds on previous legislation passed in 2019 limiting noncompete agreements to workers earning more than $100,000," and purports to "ban noncompetition covenants for all Washington-based workers and businesses." The statute is intended to "facilitat[e] workforce mobility," which is "important to economic growth and development," and to prevent "[a]greements limiting competition or hiring [which] restrain trade and commerce." The law goes into effect on June 30, 2027, after which "all noncompetition covenants," as that term is defined by the statute "are void and unenforceable regardless of when the parties entered into the noncompetition covenant." The new law represents a shift in the state's policy in several ways.

First, the law defines a noncompetition covenant to include any provision in a contract that "threatens, demands, requires or otherwise effectuates that an individual return, repay or forfeit any right, benefit or compensation, as a consequence of the individual engaging in a lawful profession, trade, or business of any kind." But the law also expands what qualifies as a noncompetition covenant to include (1) contracts between "a performer and a performance space" (or third party scheduling intermediaries) "that prohibits or restrains the performer from engaging in a lawful performance" and (2) an "agreement that directly or indirectly prohibits the acceptance or transaction of business with a customer."

Second, the law imposes requirements on employers to "make reasonable efforts to provide written notice . . . to any current employee, former employee, . . . [and] independent contractor, . . ." who were "required to enter into a noncompetition covenant or whose contract included a noncompetition covenant, . . . a written notice that an applicable noncompetition covenant is void and unenforceable" by October 1, 2027. Employers will also be in violation of the new law if they "enforce, attempt to enforce, [] threaten to enforce" or "enter into or attempt to enter into" an agreement prohibited by this law, or "represent that the employee or worker is subject to a noncompetition covenant" prohibited by this statute.

Third, the law creates an expansive private right of action that permits any person "aggrieved by a violation of this chapter" to seek either "the greater of his or her actual damages or a statutory penalty of [$5,000], plus reasonable attorneys' fees, expenses, and costs." The statute applies to "all proceedings commenced on or after the effective date of [the statute] regardless of when the cause of action arose."

However, while the new law prohibits the use of nearly all noncompete agreements, it has retained carveouts for certain types of agreements, including "(i) [a] nonsolicitation agreement; (ii) a confidentiality agreement; (iii) a covenant prohibiting use or disclosure of trade secrets or inventions; (iv) a covenant entered into by a person purchasing or selling the goodwill of a business or otherwise acquiring or disposing of an ownership interest" where the seller "purchases, sells, acquires, or disposes of an

ownership interest representing one percent or more of the business [and] (v) a covenant entered into by a franchisee when the franchise sale complies with" Washington law. Under the new law, permissible post-termination nonsolicitation agreements are limited to 18 months and can only prohibit solicitation of "any employee of the employer to leave the employer; or [] of any current customer of the employer to cease or reduce the extent to which it is doing business with the employer." The statute specifies that an agreement that "directly or indirectly prohibits the acceptance or transaction of business with a customer" is not a permissible nonsolicit under the law.

Many employers have already begun to scrutinize the use and enforceability of noncompete agreements. Many states besides Washington — including California, Colorado, Minnesota, North Dakota and Oklahoma — already have similar restrictions. Companies with operations, employees or independent contractors in Washington should review, and if necessary, revise their agreements and internal policies with respect to restrictive covenants. Employers should be prepared to use other tools beyond noncompete provisions to protect their legitimate business interests and intellectual property.

Paul Hastings' Employee Mobility & Trade Secrets practice has particular experience in this area and is here to assist.

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