Employment Law Alert: Noncompete Reform

Round Up of Noncompete Reform Coming to New England

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Noncompete reform is sweeping the country with more and more states jumping on board to enact new laws restricting the use of noncompetition agreements by employers, including states such as Washington and Maryland. More locally, four states in New England also took steps forward into this arena: Maine, New Hampshire, and Rhode Island all recently passed legislation that is expected to take effect imminently, and a similar bill is pending in the Vermont legislature.

Maine

In June 2019, Maine's governor signed into law LD 733: An Act To Promote Keeping Workers in Maine. This new law took effect **September 18, 2019**. This new law:

- Prohibits noncompetition agreements with employees earning at or below 400 percent of the federal poverty level *(in 2019 dollars, $49,960 for an individual and $103,000 for a family of four)*.
- Defines a noncompete agreement as "a contract or contract provision that prohibits an employee or prospective employee from working in the same or a similar profession or in a specified geographic area for a certain period of time following termination of employment."
- The law distinguishes "noncompete agreements" from "a nonsolicitation agreement or a nondisclosure or confidentiality agreement," meaning employers are still free to make use of these other agreements to protect their business interests.
- Sets new notification requirementsfornoncompetition agreements for employees who are compensated in excess of the earnings thresholds listed above. For such employees:

  – The employer must (a) disclose the noncompete prior to an offer of employment, and (b) provide a copy of the noncompete three business days before the employee is required to sign the agreement.

  – The noncompetition agreement may not take effect until after the employee has been with the employer for a year, or a period of six months after the noncompete was signed, whichever is later.

- In addition to restricting noncompetes, the law prohibits no-poach agreements between employers. The law refers to them as "restrictive employment agreements" and defines them as an agreement "between two or more employers, including through a franchise agreement or a contractor and subcontractor agreement" that "prohibits or restricts one employer from soliciting or hiring another employer's employees or former employees."
- Any employer who violates the law is subject to civil penalties of not less than $5,000.

New Hampshire

On July 11, 2019, Governor Sununu signed S.B. 197 into law, which amends New Hampshire's previous statute governing the use of noncompetition agreements. The amended law took effect on **September 8, 2019**. The previous law set notice requirements for employers who intended to have their employees sign a noncompetition agreement. The amended law now also:

- Prohibits noncompete agreements with low-wage employees in New Hampshire. The law defines low-wage employees as those earning an hourly rate less than or equal to 200 percent of the federal minimum wage (i.e., $14.50 an hour or $30,160 annually).
- Sets out that a prohibited "noncompete agreement" is defined as "an agreement between an employer and a low-wage employee that restricts such low-wage employee from performing: (1) work for another employer for a specified period of time; (2) work in a specified geographical area; or (3) work for another employer that is similar to such low-wage employee's work for the employer who is a party to the agreement."

The New Hampshire law still requires employers to give notice to employees in advance if they will require a noncompetition agreement as a condition of employment.

Rhode Island

On July 15, 2019, Rhode Island's governor, Gina Raimondo, signed RI H6019 – the Rhode Island Noncompetition Agreement Act, which will go into effect **January 1, 2020**.

- The law would prohibit agreements with low-wage employees defined as employees with average annual earnings of not more than 250 percent of the federal poverty level (for 2019, $31,225 for an individual and $64,375 for a family of four).
- In addition to low-wage employees, the law would prohibit noncompetition agreements with (i) undergraduate/graduate students; and (ii) employees age 18 or younger.
- "Noncompetition agreement" is defined as "an agreement between an employer and an employee, or otherwise arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees that he or she will not engage in certain specified activities competitive with his or her employer, after the employment relationship has ended."
- The law specifically excludes customer and employee nonsolicitation agreements, nondisclosure and confidentiality agreements, noncompetition agreements entered into in connection with the sale of a business, noncompetition agreements entered into in connection with a separation of employment (i.e., severance agreements), agreements with independent contractors (defined as "noncompetition agreements originating outside of an employment relationship"), among others.

Vermont

In January 2019, H.1 was introduced in the Vermont legislature. The bill was referred to the Vermont House Committee on Commerce and Economic Development, where it remains as of today. The pending bill seeks to:

- Prohibit "agreement[s] not to compete or any other agreement that restrains an individual from engaging in a lawful profession, trade, or business."
- The bill makes exceptions for noncompetition agreements entered into in connection with the sale of a business, dissolution of a partnership, or termination of an interest in an LLC, as well as exempting agreements preventing the disclosure of trade secrets.

Noncompete reform is trending, with more states likely to join in soon. Similar legislation has been proposed on the federal level as well, although the current federal bill, the Federal Freedom to Compete Act, has not gained much traction yet and is currently sitting in the Senate Health, Education, Labor, and Pensions Committee.

For more information on noncompete reform, please contact **Matthew Mitchell**.