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Client Alert

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Jurisdictions Are Vying for the Most Restrictive Non-Compete Laws and Your State Could Be Next

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Non-compete agreements are coming under increased scrutiny across the United States with several states and municipalities implementing new restrictions on these agreements in the employment context. These changes have taken many forms all with an eye towards making non-competes harder (and in some cases illegal) to enforce especially against lower earning workers.

While one jurisdiction (the District of Columbia) imposed a total ban, others took on various changes to their laws concerning non-compete agreements that can be categorized as follows:

- Earnings thresholds;
- Additional compensation and enhanced consideration requirements;
- Required notice and time to review prior to execution; and
- Enhanced penalties for failed enforcement or so-called repeat offenses.

EARNINGS THRESHOLDS

Jurisdictions are increasingly adding minimum income thresholds for non-compete agreements or are finding other ways to restrict the use of non-competes with lower earning workers. The minimum income thresholds in place range from approximately $60,000 to $100,000.

In 2022, both Illinois and Oregon implemented specific earnings thresholds, joining Maine, Maryland, New Hampshire, Rhode Island, Virginia and Washington in prohibiting non-compete agreements with employees who earn under a specified dollar amount on a weekly, monthly or annual basis. In Illinois, employers are now prohibited from entering into a non-compete agreement with any employee earning less

than $75,000 annually; this threshold amount will increase by $5,000 annually every five years until 2037. In Oregon, the minimum annual earnings threshold is $100,533 for 2022 and is tied to inflation for subsequent years.

Notably, these income thresholds reflect a trend towards higher and higher minimum earnings requirements. For example, Virginia's minimum earning threshold, which became law in 2020, prohibited non-compete agreements with workers earning less than $1,137 per week (or $59,124 annually). Less than two years later, Oregon's earnings threshold is nearly twice that amount.

Other states are focused on hourly-earners altogether as opposed to just low-wage employees. Rather than setting a minimum earnings threshold, these jurisdictions have banned the execution of non-competes with employees who are paid on an hourly basis. In 2022, Nevada joined Massachusetts in prohibiting non-competes for non-exempt workers.

Colorado, on the other hand, does not focus on the manner or amount of compensation an employee earns, but instead bans non-competes with specific classes of employees. Under Colorado law, non-compete agreements are banned unless the employee is a manager, executive or professional staff to a manager or executive. However, it is unclear how strictly Colorado plans to enforce this provision.

This trend is gaining momentum with several other states considering similar restrictions on non-competes, including Connecticut, Iowa, New Jersey and West Virginia.

ADDITIONAL COMPENSATION AND SUFFICIENT CONSIDERATION

States are now making employers pay to enforce non-compete agreements. Such provisions sometimes take the form of "garden leave," a requirement that an employer pay the employee a specified sum during the restricted period. Massachusetts, for instance, requires employers to pay an employee garden leave "or other mutually-agreed upon consideration" during the enforcement period. Under Oregon's new law, an employer can execute a non-compete with an employee making less than the earnings threshold identified above, but only if the employer agrees in writing to pay the employee half of their annual base salary at the time of termination. A similar provision is currently being contemplated in the New Jersey legislature wherein employers would have to pay the employee an amount equivalent to their full salary plus fringe benefits during the restricted period.

Other jurisdictions are simply requiring additional consideration in non-compete agreements. While many jurisdictions find that the offer of employment or continued employment is sufficient consideration for a restrictive covenant, more states are passing legislation defining whether and under what circumstances "continued employment" will be sufficient consideration for a non-compete. For example, under Illinois' new law, for an agreement to have "adequate consideration" the employer can either employ the worker for at least two years following the execution of a restrictive covenant or provide "additional professional or financial benefits" at the time of execution.

REQUIRED NOTICE AND TIME TO REVIEW

Several states now have strict notice requirements in non-competes and mandatory "time to consider" periods. Oregon's and Illinois' recent changes require employers to (1) provide the employee 14 days to review and consider the non-compete agreement prior to beginning employment; and (2) separately advise and notify employees regarding their obligations in any restrictive covenant at termination. However, Illinois goes a step further and mandates that employers advise employees in writing to consult with an attorney before signing such an agreement.

The District of Columbia's total ban on non-competes also requires employers to provide and retain records regarding certain notices to employees. Beginning October 2022, D.C. employers must inform employees in writing and within seven calendar days of their start date that no employee can be asked to enter into a non-compete. Employers must keep, preserve and maintain records related to compliance for potential inspection by D.C. officials.

Other jurisdictions are looking to add even more mandatory language to such notices. For example, Connecticut is considering a provision that would mandate all non-competes include a statement that not all non-compete agreements

are legal and otherwise tells the employee to contact the State's Attorney General if they believe they are subject to an illegal agreement.

PENALTIES FOR NONCOMPLIANCE AND FEE-SHIFTING FOR UNSUCCESSFUL ENFORCEMENT

Employers must now deal with new kinds of penalties for allegedly noncompliant restrictive covenants, ranging from liquidated damages, fee-shifting and even criminal sanctions.

Colorado's recent changes makes any violation of its non-compete laws a class 2 misdemeanor punishable by up to 120 days in jail and/or a fine up to $750, though it is still unclear who will ultimately face liability for the employer (e.g., managers, executives, human resources personnel).

The District of Columbia imposes minimum penalties against employers who attempt to enforce invalid non-compete agreements. The first offense mandates a penalty of at least $1,500 and subsequent offenses increases the penalty to $3,000 per employee.

Illinois' new law grants the Illinois Attorney General the power to investigate and seek monetary damages against an employer that has engaged in a "pattern or practice" of non-compliance and likewise authorizes penalties of up to $5,000 for each violation and up to $10,000 for each "repeat violation" within a 5-year period.

Finally, it is becoming more common for jurisdictions to adopt fee and cost-shifting as a deterrent from enforcement. Under both Illinois and Nevada's new laws, employers that are unsuccessful in enforcing a non-compete must pay the employee's attorneys' fees and costs.

PRACTICAL STEPS

Change is very likely coming to your jurisdiction – or it already has. As such, employers should review any existing restrictive covenants they provide to their new or current employees to ensure compliance with the laws of their jurisdiction. Employers will also need to carefully consider litigation strategy and whether to enforce any existing non-compete or non-solicitation agreements. These considerations may also influence hiring decisions if prospective employees have non-competes or other restrictive covenant agreements with their former employer.

As always, King & Spalding lawyers are prepared to assist clients with these efforts.

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