Addressing additional restrictions on noncompetition agreements

As the workforce becomes more mobile and the pool of talented workers in certain industries shrinks, many states are placing new restrictions that make enforcement of noncompetition agreements more difficult.

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Washington's new law

Effective Jan. 1, 2020, noncompetition agreements in Washington are void and unenforceable against an employee unless the employer discloses the terms of the covenant in writing no later than the time of acceptance of the offer. In addition, the employee's annualized earnings must exceed $100,000 per year, adjusted annually for inflation. If the employee's employment is terminated by layoff, the covenant is void and unenforceable unless the employer pays compensation equivalent to the employee's base salary (minus other earnings) for the time the employee is restricted. The restriction is also void and unenforceable if the employee is required to bring or defend a lawsuit or arbitration outside of the state of Washington.

Washington's new law also provides that a noncompetition covenant is void and unenforceable against an independent contractor unless the contractor's earnings from the party seeking enforcement exceed $250,000 per year.

Washington's noncompetition restrictions may not exceed 18 months unless there is proof by clear and convincing evidence that a longer time is necessary to protect the business or its goodwill.

If a court or arbitrator determines that an agreement violates the new law, it will be costly: the greater of actual damages or a statutory penalty of $5,000, plus reasonable attorney fees, expenses and costs. It will also be costly if the court or arbitrator decides to reform, rewrite, modify or partially enforce a covenant. The party seeking enforcement will be assessed the same damages and fees.

It appears that broader restrictions from existing agreements will not be grandfathered in when the new law takes effect Jan. 1, 2020. The new law will apply to all legal proceedings commenced on or after Jan. 1, 2020. However, there is no provision to allow a lawsuit or arbitration to challenge a pre-2020 covenant that is not being enforced.

Oregon's restrictions

In Oregon, a noncompetition agreement may be enforced as to new employees only if the prospective employee is notified at least two weeks before the first day of employment in a written offer. It also may be entered into upon a subsequent bona fide advancement, which requires a change in compensation, a change in title, and most importantly, a significant increase of responsibilities and duties.

Additionally, unless the employer pays the former employee additional compensation, the agreement may only be enforced against certain exempt employees (executive, administrative or professional employees) and the employee's annual gross salary must exceed an amount measured by the four-person family as determined by the United States Census Bureau. That level fluctuates but generally has increased over the years. Currently, this salary requirement is approximately $90,000.

In Oregon, an employer must show that it has a protectable interest. This may be shown if the employee who is subject to the noncompetition restriction has access to trade secrets or access to competitively sensitive confidential business or professional information or where the employee presents a substantial risk of diverting some or all of the company's business.

Finally, Oregon's noncompetition restrictions may not exceed 18 months and must be reasonable as to scope.

In order to enforce noncompetition agreements entered into on or after Jan. 1, 2020, employers will need to send employees a copy of the agreement within 30 days after their departure.

Protection without agreements

In spite of the restrictions of Washington and Oregon laws, businesses still have tools to protect themselves against departing employees who do not respect the proprietary information of their employer. Oregon and Washington laws do this by a "carve out." The restrictions on noncompetition agreements do not apply to:

- a restriction on departing employees forbidding them from soliciting other employees to leave the employer;
- a restriction on departing employees forbidding them from soliciting customers to cease or reduce their business with the employer;
- a confidentiality agreement;
- a covenant prohibiting use or disclosure of trade secrets or inventions; or
- enforcement of the common law duty of loyalty, laws preventing conflicts of interest and any corresponding policies.

In summary, many employers can protect themselves effectively without having to meet the statutory requirements or enforcement of a noncompetition agreement.

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