OCTOBER 02, 2019

EMPLOYERS BEWARE – STATES INCREASINGLY LIMIT THE ENFORCEABILITY OF NONCOMPETE AGREEMENTS

This fall, a string of state laws limiting the enforceability of noncompete agreements with low-wage workers are beginning to take effect. Six states have passed such laws this year, following a trend that started in Illinois and Massachusetts, including Maine (effective September 19, 2019), Maryland (effective October 1, 2019) and New Hampshire (effective September 8, 2019). Oregon, Rhode Island and Washington will see new laws effective January 2020.

NEW RESTRICTIONS ON NONCOMPETE AGREEMENTS

Illinois led the way when it passed the Illinois Freedom to Work Act, which prohibits an employer from entering into a covenant not to compete with any of its low-wage employees, where "low-wage employee" is one whose earnings do not exceed the greater of the required minimum hourly rate by applicable law or $13.00 per hour. Last year, **Massachusetts** revised its Noncompetition Agreement Act and made noncompetition agreements entered into as of October 1, 2018, unenforceable against certain workers, including nonexempt employees under the FLSA.

Under **New Hampshire's** new law, employers can't require low-wage employees to enter into a noncompete agreement (defined as employees who earn less than or equal to 200 percent of the federal minimum wage rate). In **Maine**, for all noncompete agreements entered into after Sept. 19, 2019, an employer can't require or permit an employee earning wages at or below 400 percent of the federal poverty level ("FPL") to enter into a noncompete agreement. Under **Maryland**'s law, effective October 1, 2019, noncompete provisions entered into with an employee who earns equal to or less than $15 per hour or $31,200 annually will be unenforceable.

Effective January 1, 2020, employers in **Oregon** are required to provide employees with a signed, written copy of the noncompetition agreement's terms within 30 days after the termination of employment. For Oregon contracts that were entered into before January 1, 2016, a noncompete provision cannot exceed two years from the date of employees' termination of employment and any remainder that exceed 2 years is unenforceable, unless the employee is compensated at a certain rate during the time they are restricted from working. For contracts that were entered into on or after January 1, 2016, similar restrictions apply except that the noncompete provision cannot exceed 18 months from the date of employees' termination of employment. Notwithstanding the new law, all noncompetition provisions in employment agreements are unenforceable against home care workers or personal support workers in Oregon.

The **Washington State** law, to be effective January 1, 2020, makes a noncompetition agreement unenforceable against an employee whose annualized earnings are less than or equal to $100,000 per year and against an independent contractor whose annualized earnings are less than or equal to $250,000 per year. Moreover, unless safety or reasonable scheduling issues apply and subject to the common law duty of loyalty, an employer may not restrict, restrain or prohibit an employee earning less than twice the applicable state minimum hourly wage from having an additional job, supplementing their income by working for another employer, working as an independent contractor or being self-employed. A noncompete in Washington will not be able to exceed 18 months in duration and the terms of the noncompete must be disclosed prior to acceptance of an offer of employment.

Under the **Rhode Island** Noncompetition Agreement Act, to be effective January 15, 2020, noncompetition agreements are unenforceable against employees who are nonexempt under the FLSA or low-wage employees (defined as an employee whose average annual earnings are not more than 250 percent of the FPL for individuals).

RESTRICTIONS ON NONCOMPETE AGREEMENTS WITH HEALTH CARE WORKERS

Keep in mind, some states have already prohibited noncompete agreements as they apply to physicians. For example, in **Colorado,** a noncompete provision of a physician employment agreement which restricts the right of a physician to practice medicine post-employment is unenforceable.[1] Under **Delaware** law, any noncompete provision of a physician employment agreement between and/or among physicians restricting the right of the physician to practice medicine is void upon the termination of the agreement.[2] Finally, under **Idaho** law, a noncompete clause that purports to limit a national interest waiver physician's or the J-1 visa waiver physician's ability to provide medical services in a designated shortage area after the term of employment is unenforceable. Under **Texas** law, noncompete agreements

related to the practice of medicine are permitted if they meet certain requirements, including that they must not deny physician access to lists of patients seen within the last year of employment. Under the **West Virginia** Physicians Freedom to Practice Act, a noncompete provision of a physician employment agreement entered into, modified, renewed or extended on or after July 1, 2017 may not be for more than a year, may not restrict the geographic area to more than 30 road miles from the physician's primary place of practice with the employer and is void and unenforceable upon the termination of the physician's employment by the employer.

Other states have enacted laws restricting the enforceability of noncompete agreements as they apply to other health care workers. For example, **Tennessee** law requires specific parameters, such as maximum time and geographic restrictions, for noncompete provisions signed by health care providers to be enforceable. **Massachusetts** limits the enforceability of any restriction on a physician's, nurse's, licensed social worker's and psychologist's right to practice after the termination of employment.

PRACTICAL TAKEAWAYS

- Under some of the new generally applicable state noncompete statutes, noncompete agreements are enforceable under limited circumstances, but not as applied to low-wage workers.
- Some of these statutes exclude confidentiality agreements from their ambit. Therefore, low-wage workers may still be required to agree to keep certain information confidential even after employment.
- Some states prohibit noncompete provisions with certain health care workers altogether, and some states explicitly limit the enforceability of noncompete provisions with certain health care workers under specific requirements.
- Please note: this article contains examples only and is not intended to be all-inclusive or a complete account of the various laws.

The information provided above is solely for educational purposes and does not constitute legal advice with respect to your particular situation. If you have questions about the restrictions on noncompete agreements, please don't hesitate to contact:

- Robin Sheridan at (414) 721-0469 or rsheridan@hallrender.com;
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- Your regular Hall Render attorney.

For a related article on this topic, click here.

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[references]

[1] Damages may be contracted and may be allowed, even if the non-compete itself is unenforceable.

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