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Washington State passed a law related to non-competition agreements that became effective on January 1, 2020. Surprisingly, little guidance has been issued in the months following that date, in terms of caselaw or legislative updates. Here is what we currently know regarding how the law applies.

Q: Who is exempt from non-compete agreements?

A: Employees who make $107,301.04 or less annually, and independent contractors who make $268,252.59 or less during the course of a contract, cannot be required to sign a non-competition agreement as a condition of employment. The required pay amount is adjusted annually for inflation. If an employee makes the threshold amount initially, but the initial pay is not raised to continue to meet the threshold amount, the non-compete would no longer be enforceable.

Q: Are partners or owners of a practice exempt from non-compete agreements if they make less than the threshold amount?

A: No. The prohibition on non-competes applies only to employees who receive W-2s and independent contractors.

Q: When must the non-compete agreement be disclosed?

A: If a non-competition agreement is part of an initial offer of employment, it must be disclosed to the employee prior to the employee's acceptance of the offer. If a non-competition clause might become effective later in the employee's time with the employer due to foreseeable increases in income, the employee must be made aware of the clause at the time of initial employment.

Q: Can an employer create an enforceable covenant not to compete after an employee's initial employment?

A: Only if the employee is offered additional consideration – something of value to which the employee is not otherwise entitled. Continued employment is not sufficient consideration.

Q: How long can non-compete agreements prohibit competition?

A: The law created a presumption that a non-competition clause that lasts for a period of time longer than 18 months following the end of employment is invalid. The presumption can be rebutted by a showing that a longer period of time is necessary to protect business or goodwill.

Q: What if an employee is laid off?

A: If an employee is laid off and the employer chooses to enforce a non-competition clause, then the employee must be paid his/her normal wages during the period of enforcement (minus any income from employment during that time).

Q: If only part of a non-competition agreement is invalid, can an employer ask a court to enforce the parts that are valid?

A: The long-standing practice of "blue-lining" or "blue-penciling" an agreement is no longer cost-free. This practice consisted of including a statement in an agreement that if anything was found to be unlawful, the court or arbitrator would simply strike the offending language and the rest of the agreement would still stand. Now, however, if an employer includes a non-compete provision that is later found by a court or arbitrator to be too restrictive under the new law, the employer will be responsible to the employee for: 1) the higher amount of either actual damages or $5,000.00; 2) attorneys' fees; and 3) reasonable costs and expenses.

Q: Can an out-of-state employer have a provision that applies another state's law in order to get around Washington's law on non-competes?

A: No. Employers cannot choose a state law other than Washington's to apply to employment agreements.

Q: What if a non-competition agreement was entered into before the law changed?

A: The law applies to any non-competition agreement sought to be <u>enforced</u> after January 1, 2020. Therefore, even if it was legal at the time the parties entered into the agreement, an agreement that does not comply with the requirements of the new law will not be enforced. Additionally, the party seeking enforcement will have to pay damages, attorneys' fees and costs.

Q: Did the law change the enforceability of non-solicit and confidentiality provisions?

A: No. Those are still enforceable. However, a court or arbitrator would likely limit a non-solicit provision to a period of 18 months, unless proof of the necessity of a longer period could be shown.

Undoubtedly, the new law will continue to evolve as courts interpret its provisions. Additionally, passage of this law signaled the legislature's dislike of non-competition agreements. Washington may well follow in California's footsteps and continue to further restrict the use of non-competes. (Non-competes are not allowed and not enforceable in California).

If you have questions about the enforcement or continuing validity of your non-competition agreements, please contact Anne Wilson at 360.357.2852 or awilson@bgwp.net.

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