Is This the End of Non-Compete Clauses in America?

By Janet A. Hendrick and Angela M. Buchanan

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For decades, non-compete clauses and other restrictive covenants have protected American businesses from unfair competition by preventing departing employees from working for a direct competitor for a specified time and within a specified geographical area. Today, non-competes are still a useful tool, but their effectiveness depends on whether the covenant is narrowly tailored to legitimate business interests and, because state law governs enforceability, whether the relevant jurisdiction allows employers to enforce the covenants.

Although most states allow enforcement of reasonable non-competes, the increasing trend is to limit or ban their use. In California, North Dakota, the District of Columbia, and

Oklahoma, non-competes are either entirely or largely unenforceable as against public policy. Other states, including Maine, Maryland, New Hampshire, Rhode Island, and Washington, have banned non-compete agreements for low-wage workers.

This year, non-compete agreements have faced new obstacles in several jurisdictions. In May, Oregon passed legislation to curtail the use of non-competes so that they may only be enforced if the employee earns more than $100,533/year, the restricted period does not exceed 12 months, and the employer agrees in writing to provide the greater of (i) 50% of the employee's compensation at the time of termination or (ii) $100,533 annually during the restricted period. Nevada passed Assembly Bill 47 in May, which significantly increases Nevada's restrictions on non-compete agreements. The new Nevada law, which is effective October 1, 2021, voids non-compete agreements for hourly employees. The Nevada law also prevents employers from restricting employees from working for a customer if the employee did not solicit the customers for the former employer, the customer voluntarily left the employer, and the employee generally complies with the non-compete agreement. To give the new law teeth, it allows an employee who successfully challenges a non-compete to recover attorneys' fees and costs. Following on the heels of Oregon and Nevada, Illinois passed legislation in June that prohibits non-compete clauses for employees earning less than $75,000/year and bans non-solicitation agreements, which restrict which customers an employee can call on, for employees earning less than $45,000/year. Both of these salary thresholds will increase annually. The governor of Illinois is expected to sign the new prohibitive legislation so that the law will go into effect on January 1, 2022.

Like these states, the federal government has also taken steps to limit the use of non-competes. In July, President Biden issued the Promoting Competition in the American Economy

Order, which asks the Federal Trade Commission to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility." Although the Order does not change current law, it is a clear sign that non-competes will face extra scrutiny and may eventually be limited under federal law.

Considering the continuing wave of non-compete reform, employers, particularly those that operate in multiple states, should monitor developments in the relevant states and carefully consider choice of law and forum selection clauses for agreements. The Labor & Employment attorneys of Phillips Murrah have substantial experience in negotiating, drafting, and litigating issues relating to employment agreements and restrictive covenants. If you would like additional information, please reach out to the firm.

Phillips Murrah's labor and employment attorneys continue to monitor developments to provide up-to-date advice to our clients regarding new rules that affect employers.

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