

Employer Restraints on Employee Competition Under Attack

July 14, 2021
By John Orrick

In many employment relationships, particularly those involving employees with management roles, customer contacts or specialized knowledge, employers have sought to restrain the employee from competing with the employer's business after terminating employment. These so-called "Covenants Not to Compete" have always been subject to court-imposed restraints in order to be enforceable – the covenant may not last for an unreasonable length of time following termination of employment, and the geographic scope of the covenant must be reasonably related to the potential harm to the employer's business.

In recent years, however, an increasing number of states have enacted statutory limitations and, in some cases, bans on Covenants Not to Compete on employees. In 2019, Maryland enacted a law that prohibits the enforcement of Covenants Not to Compete against workers earning less than \$15 per hour, or \$31,200 annually. This year, Virginia enacted a similar ban on enforcement of such covenants for workers earning less than the average weekly wage of workers in Virginia, \$1,204 per week, or \$62,608 annually. Similar laws exist in other states, including Colorado, Idaho, Illinois, New Hampshire, Oregon, Rhode Island, and Washington.

Significantly, in 2021, the District of Columbia enacted a very broad law that will take effect this fall that will render unenforceable Covenants Not to Compete in all employment agreements entered into by private employers operating in the District of Columbia (with limited exceptions for certain categories including religious or nonprofit organizations and casual babysitters). The law will, therefore, effectively ban employers from requiring employees to enter into agreements that "prohibit the employee from being simultaneously or subsequently employed by another person, performing work or providing services for pay for another person, or operating the employee's own business." The effect of this law, therefore, is broader than that of the typical Covenant Not to Compete in that it also would render unenforceable so-called "anti-moonlighting" prohibitions that are often contained in employment agreements or employment handbooks.

The law is prospective in effect, so existing Covenants Not to Compete are not impacted. Further, the law specifically carves out Covenants Not to Compete executed in the context of the sale of a business. The law also affirms that other restraints against employees from "disclosing the employer's confidential, proprietary, or sensitive information, client list, customer list, or a trade secret" are not included within the scope of the law.

Employers should consult with legal counsel knowledgeable in the laws of the local jurisdiction where they operate before entering into employment agreements that contain Covenants Not to Compete in order to ensure that such agreements are enforceable.