akerman

Blog Post

Emerging Trend: Curbing Non-Compete Agreements

September 19, 2022
By Paige S. Newman

Employers may find it increasingly difficult to protect customer relationships built on their dime as more states enact enhanced restrictions on non-compete agreements, or even bar them altogether. While employers may want to protect their investment by having employees sign agreements that restrict them from working for competitors or servicing the same customers once the employment relationship ends, such agreements are governed by state law and enforcing them is increasingly challenging. Employers seeking to use the same agreement for employees in multiple states face added challenges because of significant differences among state laws.

Several states, including but not limited to California, North Dakota, and Oklahoma, generally will not enforce non-competes. Many states, including but not limited to Arizona, Connecticut, Florida, Georgia, Indiana, Iowa, Massachusetts, Minnesota, Nebraska, New Hampshire, New York, Ohio, and Pennsylvania, allow non-compete agreements as long as they are no broader than necessary to protect the employer's legitimate business interests. Still, even these states have specific, particularized requirements for enforcing non-compete agreements.

For instance, in Massachusetts, to be valid and enforceable, a non-compete agreement must be

Related People

Paige S. Newman

Related Work

Labor and Employment
Trade Secrets, Restrictive Covenants, and Unfair Competition

Related Offices

West Palm Beach

HR Defense

Akerman Perspectives on the Latest Developments in Labor and Employment Law

Visit this Akerman blog

supported by a “garden leave clause” or other mutually-agreed upon consideration between the employer and the employee. The Massachusetts law defines “garden leave clause” to mean a provision within a non-compete by which an employer agrees to pay the employee during the restricted period. Similarly, the New Jersey Legislature recently introduced a bill that has not yet been passed, but would require garden leave, in the form of full pay plus benefits, for former employees whenever a non-compete or other restrictive covenant is in effect. In Minnesota, while non-compete agreements are permitted, they are disfavored and carefully scrutinized, with courts balancing the employer’s interest in protection from unfair competition against the employee’s right to earn a livelihood.

In the middle of the spectrum are states prohibiting non-compete agreements for only certain employees. For example, Washington state prohibits non-compete agreements with employees who earn less than $100,000 per year and with independent contractors who earn less than $250,000 per year. The dollar amounts specified in the statutes are adjusted annually for inflation, on September 30th each year. Similarly, under Colorado law, most non-compete agreements are unenforceable, except for those accompanying the sale of a business, and those signed by a “highly compensated employee,” which is currently defined to mean those employees earning $101,250 per year or more. The District of Columbia will join this group of states in October of this year, when D.C.’s Ban on Non-Compete Agreements Amendment Act of 2020 is expected to go into effect. The law, as currently written, prohibits D.C. employers from requiring or requesting that an employee earning $150,000 or less in compensation annually (or $250,000 or less for medical specialists, excluding veterinarians) sign an agreement that includes a non-compete provision. The threshold will increase annually based on the consumer price index in D.C.

Even in states that generally allow non-competes, employers should carefully tailor their non-compete agreements so that they are not overly broad in geographic scope, temporal scope, or the activity that is limited by the agreement. In some states, a restriction on serving the same customers can be substituted for a geographic restriction; in others, it cannot. If a non-compete agreement prevents an employee from competing with the employer more broadly than necessary, or for a period of time that is longer than necessary, in some states the court is permitted to "blue pencil" or reform the agreement so that it is only as broad as necessary to protect the employer's business interests. In others, if it is too broad, the court will simply strike the non-compete entirely.

Some states allow continued employment to serve as consideration for entering into a non-compete after employment has started; others do not. Some states will honor a contract's choice of which state law should govern the interpretation of the contract, while others may not.

Given the variation in states' non-compete laws, it is critical that an employer with employees working in multiple states carefully review their non-compete agreements. Depending on the states involved, employers may not be able to use the same non-compete agreement for all employees and may need to have different versions for employees in different states. For example, if the employer has employees in both California and Arizona, they could not use a restrictive covenant agreement containing a non-compete provision for all employees, and if they did, the non-compete provision would not be enforceable for the California employees.

Employers should also note that the same restrictions on non-competes do not necessarily apply to non-solicitation or confidentiality provisions. Thus, even if a state will not allow a non-compete agreement in certain circumstances, a non-solicit or confidentiality agreement may be

permitted in a given state. And even in the absence of a confidentiality agreement, employers may have the ability to protect their confidential business information under state trade secrets laws.

If you need assistance preparing or enforcing non-compete agreements or protecting business relationships or confidential information, please contact your Akerman attorney.
