2019 NON-COMPETE STATUTES ARE OFFICIALLY IN EFFECT: ARE EMPLOYERS READY?

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Statutory restrictions on the enforceability of non-compete agreements have gained traction over the last few years, with an unprecedented surge in 2019. Last year, 6 states passed or amended legislation impacting when and how employers can impose and enforce non-compete obligations on their employees — Maine, Maryland, New Hampshire, Oregon, Rhode Island, and Washington. With each of these new or revised statutes now in effect, the beginning of 2020 marks a good time for employers to review their non-compete agreements and policies for compliance.

Summaries of the major provisions of each state's statute are set forth below. [1]

MAINE

- ME. REV. STAT. ANN. tit. 26 § 599-A (2020).
- Effective September 19, 2019.
- Non-compete agreements are prohibited for employees earning less than or equal to 400% of the federal poverty level based on the nonfarm income official poverty line for an individual. [2]
- Prior to making an offer of employment, an employer must disclose to a potential employee that he or she will be asked to sign a non-compete agreement if hired. [3]
- Employers must provide an employee or prospective employee with a copy of the relevant non-compete agreement not less than 3 business days before it must be signed. [4]
- Civil fines of not less than $5,000 may be imposed for statute violations, to be enforced by the Maine Department of Labor. [5]

MARYLAND

- MD. CODE ANN., LAB. & EMPL. § 3-716 (2020).
- Effective October 1, 2019.
- Non-compete agreements are prohibited for employees earning less than or equal to $15 per hour or $31,200 per year. [6]

NEW HAMPSHIRE

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- N.H. REV. STAT. ANN. § 275:70-a (2020).
- Effective September 8, 2019.
- Non-compete agreements are prohibited for employees earning less than or equal to 200% of the federal minimum wage. [7]

OREGON

- OR. REV. STAT. § 653.295 (2020).
- Effective January 1, 2020.
- Non-compete agreements are prohibited for employees who earn less than or equal to the median family income for a 4-person family according to the U.S. Census Bureau's latest reported data. [8]
- Non-compete agreements are only permitted for "white collar" employees, who are defined as: individuals engaged in administrative, executive, or professional work who (i) perform predominantly intellectual, managerial, or creative tasks; (ii) exercise discretion and independent judgment; and (iii) earn a salary and are paid on a salary basis. [9]
- Non-compete agreements that have a temporal scope of longer than 18 months from the end of employment are unenforceable. [10]
- An employer must provide an employee with notice that a non-compete agreement is required as a condition of employment in a written employment offer at least 2 weeks before the start of employment, unless the non-compete agreement is "entered into upon a subsequent bona fide advancement of the employee by the employer." [11]
- Within 30 days after separation from employment, an employer must provide the separating employee with a copy of the employee's non-compete agreement, if any. [12]

RHODE ISLAND

- R.I. GEN. LAWS §§ 28-59-1–3 (2020).
- Effective January 15, 2020.
- Non-compete agreements are prohibited for employees earning less than or equal to 250% of the federal poverty level for an individual. [13]
- Non-compete agreements are prohibited for (1) undergraduate or graduate students participating in internships or short-term paid or unpaid employment; (2) employees under the age of 18; and (3) employees classified as non-exempt under the Fair Labor Standards Act. [14]

WASHINGTON

- WASH. REV. CODE §§ 49.62.005–900 (2020).
- Effective January 1, 2020 (but with potential retroactive effect, in part). [15]

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- Non-compete agreements are prohibited for employees earning less than or equal to $100,000 and independent contractors earning less than or equal to $250,000 in total compensation, adjusted annually for inflation. [16] The statute sets out the methods for determining whether an employee meets these thresholds (based on reference to certain W-2 information), as well as methods for adjustment of the thresholds over time.
- Non-compete agreements are prohibited for employees terminated as the result of a layoff, unless enforcement includes compensation equivalent to the employee's base salary at the time of termination for the period of enforcement, less compensation earned through subsequent employment. [17]
- There is a rebuttable presumption that a non-compete agreement lasting for longer than 18 months after the end of employment is unenforceable. [18] An employer can rebut the presumption by proving with clear and convincing evidence that a duration longer than 18 months is necessary to protect its business or goodwill. [19]
- Employers must provide "independent consideration" for any non-compete agreements entered into after the commencement of employment, though the statute stops short of defining "independent consideration." [20]
- An employer must disclose the terms of a non-compete agreement in writing to prospective employees no later than the time of acceptance of the offer of employment. If the non-compete agreement becomes enforceable only at a later date due to changes in the employee's compensation, the employer must specifically disclose that the non-compete agreement may be enforceable against the employee in the future. [21]
- With limited exceptions, 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. [22]
- Employees have a private right of action for violations of the statute and are entitled to actual damages and/or a statutory penalty of $5,000, plus reasonable attorneys' fees, expenses, and costs if either (i) the agreement is held to violate the statute; or (ii) the agreement is "reform[ed], rewrit[ten], modifie[d], or only partially enforce[d]." [23] The latter is particularly important to note because employers counting on reformation or partial enforcement of an otherwise overly broad non-compete agreement may now be on the hook for an employees' legal fees under such circumstances.

While each of the 6 state statutes passed or amended in 2019 differ in respects, certain trends appear to be developing:

- Rejection of the use of non-compete agreements for low-income employees.
- Rejection of the use of non-compete agreements for certain categories of employees, such as non-exempt employees and student interns.
- Codified limits on the permissible duration of non-compete agreements.

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- Administrative requirements for the disclosure of non-compete obligations.
- Civil fines and penalties for employer violations, as well as private rights of action.

We will be watching these trends and any new statutory developments, particularly as more states are looking into similar legislative action in 2020 and beyond. [24]

NOTES

[1] Given the novelty of these statutes, it may be some time before meaningful judicial decisions are issued offering guidance on how they will be interpreted and applied by the courts. We will be closely monitoring those developments. In the meantime, however, and to the extent not otherwise directly addressed by the new statutory changes, common law on the enforceability of non-compete agreements will continue to apply in each of these jurisdictions.

[2] ME. REV. STAT. ANN. tit. 26 § 599-A(3).

[3] ME. REV. STAT. ANN. tit. 26 § 599-A(4).

[4] ME. REV. STAT. ANN. tit. 26 § 599-A(4).

[5] ME. REV. STAT. ANN. tit. 26 § 599-A(6).

[6] MD. CODE ANN., LAB. & EMPL. § 3-716(a)(1).

[7] MD. CODE ANN., LAB. & EMPL. § 3-716(a)(1).

[8] OR. REV. STAT. § 653.295(1)(d).

[9] OR. REV. STAT. § 653.295(1)(b); OR. REV. STAT. § 653.020.

[10] OR. REV. STAT. § 653.295(2).

[11] OR. REV. STAT. § 653.295(1)(a). The statute does not define what constitutes a "subsequent bona fide advancement" and, as of yet, there is no legislative or judicial guidance on how such language will be interpreted.

[12] OR. REV. STAT. § 653.295(1)(e).

[13] R.I. GEN. LAWS § 28-59-2(7); R.I. GEN. LAWS § 28-59-3(a)(4).

[14] R.I. GEN. LAWS § 28-59-3(a)(1)–(3).

[15] WASH. REV. CODE § 49.62.080(4); WASH. REV. CODE § 49.62.100. The retroactive implications of this statute are yet to be determined.

[16] WASH. REV. CODE § 49.62.020(1)(b); WASH. REV. CODE § 49.62.030(1).

[17] WASH. REV. CODE § 49.62.020(1)(c).

[18] As stated in n.1 *supra*, common law will continue to govern in large part, including as to whether a non-compete agreement of 18 months or less is enforceable in Washington.

[19] WASH. REV. CODE § 49.62.020(2).

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[20] WASH. REV. CODE § 49.62.020(1)(a).

[21] WASH. REV. CODE § 49.62.020(1)(a).

[22] WASH. REV. CODE § 49.62.070(1)–(2).

[23] WASH. REV. CODE §§ 49.62.080(1)–(3). The Washington Attorney General can also bring suit on an employee's behalf.

[24] *See, e.g.* A Bill for an Act Relating to Fair Employment Practices, SB 328/HB 1059, 30th Leg. (Haw. 2019); An Act Limiting Certain Provisions in Restrictive Covenants and Supplementing Title 34 of the Revised Statutes, A.B. 1650, 219th Leg. (N.J. 2020); An Act to Amend the Labor Law, in Relation to Prohibiting Non-Compete Agreements and Certain Restrictive Covenants, S5790/A7193, 243rd Leg. (N.Y. 2019). In addition to these state measures, the Workforce Mobility Act of 2019 (S.2614) (the "Act") was introduced by Senators Chris Murphy (D-CT) and Todd Young (R-IN) on October 16, 2019. The Act, a bipartisan effort, would ban non-competition agreements other than in connection with partnership dissolutions and sales of a business as a matter of federal law. Employers imposing illegal non-competes would be subject to civil fines of up to $5,000 for each week that the illegal non-competes are in effect and impacted individual employees would have a private right of action to seek damages in federal court.

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