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U.S. Employment Law

Another Non-Compete and Non-Solicitation Agreement Bites the Dust

In American employment law, the majority of non-compete and non-solicitation covenants have traditionally been governed by state common law. Many states have set the bar low for when a non-compete or non-solicitation covenant is enforceable. Generally, a non-compete or non-solicitation agreement is enforceable if the employee receives "something of value" in return for accepting restrictions on the employees' rights after the employment relationship has come to an end (non-compete or non-solicitation). This concept of value in return for the non-compete covenant is generally known as "adequate consideration". In many states, often the mere offer of employment, or even just the offer of continuing an existing employment relationship, is considered "adequate consideration".

Now, the tide seems to be changing, and in the past several years, state and federal legislatures have enacted statutes to restrict or limit the use or enforceability of non-compete and non-solicitation covenants in employment relationships. One of the factors contributing to this trend was President Biden's executive order on "*Promoting Competition in the American Economy*"[1]. The order, among other things, encouraged the Chair of the Federal Trade Commission to exercise its statutory rulemaking authority to constrain unfair use of non-compete and non-solicitation clauses in employment.

In 2021 and 2022, the trend continued, with non-compete and non-solicitation related rule changes in multiple states. Most recently, changes to Illinois' and Oregon's legal framework for non-compete and non-solicitation clauses came into effect in the beginning of 2022.

In Illinois, amendments were made to the Illinois Freedom to Work Act (IFWA). Prior to these amendments, IFWA prohibited employers from entering into non-compete agreements with an employee whose salary is less than the minimum wage or $13 per hour. Now, after the latest amendments, an employer is prohibited from entering into a non-compete agreement with an employee whose annual salary is less than $75,000 (the salary limit will be increased by $5,000 every five years until it reaches $90,000). In addition to further restraining non-compete agreements, the amendments also tightened the grip on non-solicitation agreements. Under the tightened grip, an employer is also prohibited from entering into non-solicitation agreements with an employee earning less than $45,000 per year (the salary limit will be increased by $2,500 every five years until it reaches $52,500). These amendments came into effect on January 1, 2022, and apply to all non-compete and non-solicitation covenants entered into on and after the effective date.

Similar changes were made in Oregon to the Oregon Revised Statutes. Previously, Oregon's laws prohibited an employer from entering into non-compete covenants with employees whose earnings were less than the minimum wage (determined by the U.S. Census Bureau), and to non-compete covenants exceeding 18 months. Under the revised version, the enforceability period for non-compete covenants has been reduced to 12 months post-termination, and the wage threshold has been significantly increased to $100,533 annually (adjusted annually for inflation). In addition to the foregoing, the revised version of the Oregon statute also now requires that the employee be either an

[1] Executive Order 14036 of July 9, 2021

administrative, executive, or professional, who is an exempt employee under Oregon's wage and hour laws. The foregoing changes came into effect on January 1, 2022 and apply to all non-compete covenants entered into on and after the effective date.

There is no sign of the trend slowing down. Nearly 20 states have, to date, proposed some kind of legislation which would further restrict the use of non-compete and non-solicit covenants.

To name a few:

Proposed Rules	States
Restrictions to non-competes in specific types of employment	Connecticut, Hawaii, Indiana, Iowa, Louisiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Rhode Island, Vermont, West Virginia
Restriction on the duration of non-competes	Connecticut, Iowa, Louisiana, New Jersey, New York, Oklahoma, Vermont
Retroactive application of new restrictions on non-competes	Indiana, Oklahoma, Vermont
Restrictions on the scope/effect of confidentiality agreements	New Hampshire, Oklahoma, Vermont

Clearly, the new trend of restricting the use of non-compete and non-solicitation covenants is not slowing down, and more states have raised the bar for what is considered "adequate consideration" for these covenants.

Therefore, now more than ever, Danish companies operating in the U.S. should be careful when trying to implement non-compete or non-solicitation clauses for U.S. employees. In particular, using standard Danish / International employment agreements for employment across the U.S. is likely to run into challenges in several states. With the use of a standard Danish / International employment agreement, companies run the risk of not being able to protect itself against unfair competition from former employees (or their future employers), or to protect their proprietary information, because the non-compete/non-solicitation/confidentiality clauses that the companies rely on may be unenforceable under various state laws, or even federal law. Instead, companies with employees in several U.S. states should draft such clauses individually for each jurisdiction, such that they comply with the applicable new substantive and procedural requirements.

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