Client Insight: Washington Employers Face New Restrictions on Non-Competition and Customer Non-Solicitation Agreements, Effective June 6, 2024

Insights
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Washington employers may need to revise their post-termination non-competition and customer non-solicitation agreements to comply with an amendment to Washington law that narrows the validity and enforceability of certain restrictive covenants in employment agreements, including when the "sale of business" exception applies. The amendment takes effect **June 6, 2024,** and applies **retroactively to agreements executed as of January 1, 2020**, so employers should take immediate steps to update their agreements and templates.

Note: Employee Proprietary Information and Inventions Agreements (PIIAs) created with your company's Gunderson Contract Generator already comply with the amendment requirements. If you are not yet using the Gunderson Contract Generator, follow this link for more information.

What is changing?

Effective June 6, 2024, post-termination non-competition and customer non-solicitation provisions in Washington are subject to these changes (which apply retroactively to January 1, 2020):

- **Expanded Definition of Non-Competition Agreements Includes Former and Prospective Customer Non-Solicitation Agreements.** The amended definition

of “noncompetition covenant” has been expanded to cover any agreement “that directly or indirectly prohibits the acceptance or transaction of business with a customer.” The amendment clarifies that “noncompetition covenants” do not include post-termination customer non-solicitation agreements that apply to **“current” customers only**.

- **Non-Competition Laws Shall Be “Liberally Construed.”** The amendment states that provisions “facilitating workforce mobility and protecting employees and independent contractors need to be liberally construed and exceptions narrowly construed.”

- **Prohibition of Non-Washington Choice of Law Provisions.** Any provisions in a non-competition agreement that require the application of the law of any jurisdiction other than Washington are void.

- **Notice Requirement.** The terms of a non-competition agreement must be disclosed to prospective employees before the initial oral or written acceptance of an employment offer.

- **Narrowed “Sale of Business” Exception.** Washington’s “sale of business” exception to non-competition enforceability will apply only when the person signing the covenant purchases, sells, acquires, or disposes of an interest representing **one percent (1%) or more** of the business.

- **Third Party Standing to Sue.** The new amendment expands the ability to challenge non-competition agreements to include third parties, not just the direct signatories. For example: (1) aggrieved employers who are unable to hire talent because of existing non-competition agreements can now take legal action; (2) entities affected by “no-hire” clauses that limit their ability to recruit may also pursue remedies; and (3) customers who wish to continue working with an individual but are barred by a “non-handling” agreement can pursue claims under the amendment.

What stays the same?

In addition to the amended laws above, Washington already imposes these restrictions on post-termination non-competition agreements, which will now apply to agreements barring the solicitation of former or prospective customers:

- **Earnings thresholds apply.** Only employees or independent contractors who earn more than specific thresholds can be bound by non-competition agreements or non-solicitation agreements applicable to former or prospective

clients. For 2024, the threshold salaries are $120,559.99 per/year for employees, and $301,399.98 per/year for independent contractors.

- **New agreements with existing employees require independent consideration.** Employers must provide independent consideration (such as money or a promotion) when requiring an existing employee to sign a new non-competition agreement or a new customer non-solicitation agreement applicable to former or prospective clients. Continued employment alone is not sufficient. **For new hires**, there is no need for independent consideration if the terms of the post-termination restrictive covenants are disclosed before initial oral or written acceptance of the employment offer.

- **Layoffs may render non-competition agreements and non-solicitation agreements applicable to former or prospective clients unenforceable.** Such provisions cannot be enforced if an employee is laid off, unless the employer pays the employee's base salary minus any compensation earned elsewhere.

- **Duration is limited to 18 months**. There is a rebuttable presumption that post-termination non-competition agreements and non-solicitation agreements applicable to former or prospective clients are unreasonable and unenforceable if their duration exceeds **18 months**.

Penalties for non-compliance with Washington's non-competition laws remain largely the same, and may include:

- **Invalidation of Agreements**. If an employer's non-competition or customer non-solicitation agreements do not comply with the amended statute, they may be rendered invalid and unenforceable.

- **Actual damages.** If a court determines an agreement violates state law, the violator may be required to pay the greater of actual damages or statutory civil penalties.

- **Civil Penalties**. Employers who violate the statute may be subject to a $5,000 civil penalty.

- **Attorney's Fees and Costs**. If an employee successfully challenges a non-competition or customer non-solicitation agreement in court, the employer may have to pay the employee's reasonable attorney's fees and costs.

- **Additional Remedies**. Non-parties may now sue for alleged harms resulting from non-compliant non-competition agreements and customer non-solicitation

agreements.

- **No Liability for Pre-2020 Agreements.** An employee may not bring a cause of action to invalidate a non-competition or customer non-solicitation agreement signed prior to January 1, 2020, provided that the agreement is not being enforced or "explicitly leveraged." An agreement is being "explicitly leveraged" when a former employer uses the threat of enforcement (against the employee or other employers) to prevent an employee from accepting a new job.

Next Steps

Ensure your organization remains compliant with Washington's amended non-competition statute by taking the following proactive steps:

- **Audit Existing Agreements**. Thoroughly review all existing non-competition and customer non-solicitation agreements within your organization. Identify and list those that require modifications to meet the new legal standards.
    - As noted above, PIIAs created with your company's Gunderson Contract Generator already comply with the Washington amendment requirements.
- **Update Templates**. Adjust your standard non-competition and customer non-solicitation agreement templates to comply with the recent legal amendment. Post-termination customer non-solicitation agreements applicable to former or prospective clients are now classified as non-competition agreements. Your Gunderson attorney can assist with updating any non-compliant agreements.
- **Enhance Notice Procedures**. Update your onboarding processes to ensure advance notification of non-competition and customer non-solicitation terms is given before any initial oral or written acceptance of an employment offer.
- **Seek Legal Advice Regarding Enforcement Strategies**. Consult with your Gunderson attorney before enforcing, or threatening to enforce, any post-termination non-competition agreements in Washington.

For further inquiries about Washington's restrictive covenant laws or the Gunderson Contract Generator, please contact your Gunderson attorney.

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