

May 21, 2019

New Washington Law Restricts Use and Enforcement of Noncompete Agreements

Employers in Washington state will soon be subject to significant new restrictions on noncompete agreements. On May 8, 2019, Governor Jay Inslee signed House Bill 1450, which substantially alters the landscape of noncompetition law, making it more difficult for employers to enforce noncompete agreements. The new law, which goes into effect January 1, 2020, limits the employees who can be bound by noncompete agreements, creates penalties for noncompliance, and invalidates existing noncompete agreements that do not comply with the new requirements. Employers should begin reviewing current noncompete agreements to evaluate compliance, and ensure that any new agreements follow the new legal requirements.

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Current Washington Law

Noncompete agreements have been generally enforced by Washington state courts if they are reasonable in scope, duration, and geographic restriction; narrowly drafted to protect a business need; and do not have a detrimental impact on the public interest. While years of court-made case law have provided some guidance, employers can rely on few firmly established standards to ensure that their noncompete agreements will be upheld.

New Noncompete Law Goes Into Effect January 1, 2020

The new noncompete law is a dramatic change for employers in Washington state, as it establishes strict criteria for enforcement of noncompete agreements. Below are several key takeaways from the law:

Who is covered: Only employees who make more than \$100,000 per year (adjusted annually for inflation) and independent contractors who make more than \$250,000 per year (adjusted annually for inflation) can be subject to a noncompete agreement.

Duration: Noncompete agreements that last longer than 18 months will be presumptively invalid.

Timing/Disclosure: Employers must disclose the terms of a noncompete agreement in writing before an employee accepts an offer of employment. To address this issue, employers can provide noncompete agreements along with an offer letter, rather than waiting until the first day of work.

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Enforcement Fees, Costs, and Penalties: Both the state attorney general and an individual employee can sue based on a violation of the new law. If an employer tries to enforce a noncompete agreement, and a court or arbitrator determines that the agreement violates the new law, the employer must pay the greater of the employee's actual damages or a \$5,000 penalty, as well as the employee's legal costs and attorney's fees. The same damages, penalty, costs and fees apply if the court reforms, rewrites or only partially enforces a noncompete agreement. Even if an employer does not try to enforce the noncompete agreement, if it was signed after January 1, 2020, an employee can sue to invalidate the noncompete agreement and recover the same damages, penalty, costs, and fees. However, if a noncompete agreement is signed before January 1, 2020, and an employer does not seek enforcement, an employee cannot recover any money in a lawsuit to invalidate the agreement under the new law.

Consideration: The law confirms an existing common law requirement that employees must receive independent consideration – some additional pay or benefit to which they are not already entitled – for any noncompete agreement signed after employment starts.

Layoffs: If an employer wishes to enforce a noncompete agreement against an employee who has been laid off, the employer must continue to pay the employee's base salary (minus compensation earned from later employment) during the enforcement period.

Washington-Only Dispute Resolution: The new law voids any provision of a noncompete agreement that requires Washington-based employees to litigate disputes outside of Washington state, or otherwise deprives employees of the protections of the new law.

Non-Solicitation, Confidentiality, Trade Secrets/Sale of Business/Franchise Exceptions: The new requirements do not apply to non-solicitation agreements (generally prohibiting poaching clients or other employees), confidentiality agreements, agreements by a person buying or selling goodwill or an ownership interest in a business, or agreements between franchisee and franchisors (as long as the sale complies with applicable law).

Moonlighting: Although not affecting post-employment noncompete agreements, the new law prevents the employer from prohibiting an employee from holding an additional job unless: (a) the employee earns at least twice the state minimum wage; or (b) the additional job raises safety issues, interferes with the employer's scheduling expectations, undermines the employee's duty of loyalty, or creates a conflict of interest.

Next Steps for Employers

Employers with Washington-based employees should carefully review existing noncompete agreements to evaluate whether they will comply with the new law. Employers may want to draft and implement new agreements, or consider other business protections that are not subject to the new law, such as non-solicitation or confidentiality requirements.

If you have questions about managing compliance with the new noncompete law, or any other employment or labor issues, please contact Foster Pepper's [Employment & Labor](#) group.

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