# Employers and Franchisors Beware: Washington Enacts New Non-Compete Law Aimed at Protecting "Low Wage" Employees While Targeting Employers and Franchisors with Penalties

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The State of Washington recently adopted a new law restricting the use of non-compete agreements against "low wage" workers. Specifically, on May 8, 2019, Governor Jay Inslee (also a 2020 Democrat Presidential Candidate) signed HB 1450, scheduled to go into effect on January 1, 2020. The new law still allows employers to use and enforce "reasonable" non-compete agreements, but adds the following restrictions (among others):

- Non-competes will not be enforceable against employees who earn less than $100,000/year in total annualized compensation or independent contractors who earn less than $250,000/year. The purported purpose behind these numbers is to protect low-level and low-wage employees.
- Non-competes longer than 18 months are presumed unreasonable and unenforceable.
- Employers must disclose the terms of the non-compete agreement in writing to prospective employees. If the employer wants an existing/current employee to sign a non-compete agreement (after employment begins), there must be separate and "independent consideration." Such "independent consideration" is not defined in the law, but that typically means something beyond continued employment. It will be interesting to see how the Washington courts interpret this provision going forward.
- If an employee is terminated by the employer (as a result of a lay-off), the employer must pay the employee the equivalent of his or her base salary at the time of termination for the period of the non-compete agreement (if the employer seeks to enforce the non-compete). For example, if Company X fires Employee A (who makes $120,000/year) and seeks to enforce a 12 month non-compete agreement, Company X will be required to pay Employee A $120,000 to sit on the sidelines for

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the 12 month post-termination term (if it wants to enforce the non-compete).

- There are limits on the use of out-of-state venue and choice of law provisions.
- Franchise restriction. The new law also restricts franchisors from restricting a franchisee from soliciting or hiring an employee of another franchisee of the same franchisor or any employee of the franchisor. Such restrictions are very common in franchise agreements and proactively seek to address potential internal disputes and conflicts between franchisees and the entire franchise system. It will be interesting to see how these restrictions impact franchisors' operations in Washington.
- If a court blue pencils an otherwise "unreasonable" agreement (e.g. rewrites), the employer/franchisor MUST reimburse the employee for reasonable attorneys' fees, costs and other expenses, plus damages or a statutory penalty of $5,000.

Notably, this new law does not address the use of non-solicit agreements (of employees or customers) or confidentiality agreements. Such provisions are arguably exempt under a plain reading of the statute and the case law, but this will likely be addressed in the Washington courts.

Washington's new law is also consistent with recent trends around the country, including new legislation being proposed at the federal level, along with nearly 20 states proposing legislation, to restrict the use of non-competes against "low wage" employees. Only three states have recently introduced legislation to make it easier to enforce non-competes (e.g. Texas). A number of other Presidential Candidates have proposed outright bans on non-competes (like California), so this will surely be a hot topic through the 2020 election.

**In light of Washington's new law, what should you do as an employer and/or franchisor?**

First, if you are conducting business in Washington and/or have employees that reside in Washington, you should immediately review your existing non-compete agreements and analyze whether they comply with the new law and if any revisions should be made.

Second, given the proposed legislation across the country and recently enacted legislation in other states, you should have a non-compete and trade secret expert proactively audit and analyze your existing non-compete agreements (or create new non-compete agreements) to make sure that you are in compliance in the state or states that you currently conduct business in and/or are seeking to do business in.

Third, as to franchisors, you will likely need to audit/revise your franchise agreements with existing franchisees (and prospective franchisees) and also update your franchise disclosure documents, among other things.

Please contact the author of this alert or any of Butzel Long's Non-Compete and Trade Secret attorneys regarding the changes in Washington and/or proposed legislation in other states.

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