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Proposed Michigan Legislation Would Ban Non-Compete Agreements for Low Income Employees

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Michigan House Bill 4755, quietly introduced this past June by State Representative Lucido (R-Washington Township), seeks to (i) require notice of the requirement of a noncompete to job applicants, and (ii) outright ban noncompetes for “low-wage” employees. This latest bill introduced by Rep. Lucido appears to be a water downed version of a bill he introduced in 2015 (Michigan House Bill 4198) wherein he sought to ban virtually every type of restrictive covenant agreement (from noncompetes all the way down to standard confidentiality agreements). Had it passed, that 2015 bill would have overturned in just a few short paragraphs nearly three (3) decades of Michigan law that businesses in Michigan have relied on in order to protect their legitimate business interests in protecting their trade secrets and customer relationships. The 2015 bill died in committee and received heavy criticism from the business community, including the Michigan Chamber of Commerce.

On its face, this new bill is not seeking to ban all noncompetes, but rather only ban them for “low wage” employees, as well as impose strict notice requirements relative to job applicants. The proposed legislation defines a “low wage” employee as someone whose income is less than (i) \$15.00 per hour, (ii) 150% of the minimum wage, or (iii) annual compensation of \$31,200. A noncompete agreement that violated the notice or “low wage” requirements would be void and unenforceable. It would allow the attorney general to potentially go after an employer who violates the law. Further, even assuming an employer met the notice and “low wage” requirements, the proposed legislation would impose extreme mandatory penalties on employers who sought to enforce non-competes that were ultimately deemed unreasonable by a court. Specifically, if a noncompete agreement was found by a court to be unreasonable as to its duration, geographical area, and type of employment or line of business, the proposed legislation would require the court to

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award the employee both (i) his or her actual costs (including reasonable attorneys' fees) in defending the action, and (ii) all lost income as a result of actual or threatened enforcement of the noncompete.

Despite the posture of the proposed legislation, many argue that this is really a backdoor attempt to effectively ban all noncompetes in practice in the State of Michigan. The penalty provision by itself would likely have a chilling effect on employers seeking to enforce noncompete agreements in general, especially given the subjective nature of reasonableness depending on the Judge deciding the case. Further, there appears to be an implicit assumption in this legislation that a "low wage" employee does not have access to confidential information or trade secrets. That is simply not true as a general matter. There are countless lower level employees who likely have access to their respective employer's confidential information and trade secrets (e.g. maintenance of important data and/or proprietary information, security personnel, and/or observation positions in plants and/or invention environments). An employer needs to be able to adequately and properly protect their confidential information and trade secrets. This legislation, while well intentioned on its face, could adversely impact an employer's ability to do that.

This bill is still sitting in committee, but if you own a business in Michigan and have relied on restrictive covenant agreements for protection of your most valuable assets, this bill should have your attention. Butzel Long's Trade Secret and Non-Compete Specialty Team attorneys have been at the forefront of this issue for some time and have both written and spoken on this very type of legislative threat. That specialty team looks to be involved in this legislative discussion and would like to hear your concerns on the proposed bill. Feel free to contact a Butzel Long Trade Secret and Non-Compete Specialty Team member listed below or your other Butzel Long attorney to get involved.

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