



## Employment Law Note

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# Updates to Washington's Non-Compete Law Place Further Restrictions on Employers



By **Amanda V. Masters**, [amasters@sbj.law](mailto:amasters@sbj.law)

In March 2024, Governor Jay Inslee signed into law a Substitute Senate Bill (SSB 5935) modifying Washington's 2019 non-compete statute, RCW 49.62. The amendment's purpose was to clarify the law, which the Washington Legislature believes the courts have misinterpreted. The changes further restrict employers' ability to protect their respective businesses through non-compete and non-solicitation agreements. The law goes into effect on June 6, 2024.

## Refresher on RCW 49.62 - Restrictions to Non-Compete Covenants

On January 1, 2020, a new law (RCW 49.62) was enacted. The law severely restricts an employer's ability to enter into non-compete agreements with employees and invalidated many existing agreements. Under the law, a non-compete covenant is "void and unenforceable" if:

- The employer waited until after a candidate accepted its offer to disclose the covenant's terms.
- The employee in question does not earn at least the minimum salary threshold set each year by the Department of Labor and Industries in W-2 earnings per year. For purposes of this statute, an employee's compensation is defined by what is on box 1 of an employee's W-2. Box 1 excludes pre-tax retirement and medical benefits, such as a 401(k) and medical insurance premiums. In other words, when contemplating whether an employee meets the salary threshold, determine whether 401(k) and medical premiums will be deducted from the employee's salary. The 2024 salary threshold is \$120,559.99 per year for employees and \$301,399.98 per year for independent contractors.

- The covenant lasts longer than 18 months (unless the employer can prove by "clear and convincing evidence" that a longer covenant is "necessary").
- The employer attempts enforcement against an employee it laid off but does not pay them their *full salary* for the entire "period of enforcement."
- The covenant was entered into after employment began, but the employer provided no "independent consideration" in exchange for the covenant.
- In case of a breach of the agreement signed by a "Washington-based" employee or independent contractor, the agreement requires adjudication outside of Washington and/or removes protections of the law.

In addition to creating restrictions on non-compete covenants, the law defines a non-solicitation agreement as "an agreement between an employer and employee that prohibits solicitation by an employee, upon termination of employment: (a) of any employee of the employer to leave the employer; or (b) of any customer of the employer to cease or reduce the extent to which it is doing business with the employer." In response, many employers drafted non-solicitation agreements that prevented employees from soliciting past, present, and prospective customers post-employment in any manner.

## Updated Restrictions on Non-Compete Covenants as of June 2024

As of June 6, 2024, when the newly signed law goes into effect, there will be further limitations on non-compete covenants as follows:

- **Change to definition of non-compete agreements.** The definition of what is considered a non-compete will be expanded to include

agreements that prohibit a former employee or independent contractor from accepting or transacting business with a customer.

- **Further limitations placed on the definition of Sale-of-Business Carve-out.** The updated law changes the definition of excluded agreements and covenants entered into during the purchase or sale of a business. Now, the exclusion applies to the purchase or sale of 1% or more of a business. This is presumably to prevent employers from including non-compete covenants in an employee's equity grant agreement.
- **Clarification on the timing of when a non-compete covenant must be provided to a prospective employee.** An employer must give a prospective employee notice of the non-compete covenant no later than the "initial verbal or written acceptance" of the employment offer. If an employer fails to provide notice at this stage, the covenant is void and unenforceable. For this reason, moving forward it is recommended that employers provide notice of the covenant simultaneously with any verbal offer of employment.
- **Expansion of Washington Venue and Choice of Law Provisions.** An agreement is "void and unenforceable" if it "allows or requires the application of choice of law principles or the substantive law of any jurisdiction other than Washington state." Employers can no longer attempt to litigate non-compete covenants with Washington-based employees in courts outside Washington, nor can parties choose to apply non-Washington law to a non-compete covenant.
- **Addition to restrictions on enforcement actions.** The updated law adds language that an employer cannot attempt to "explicitly leverage" an

unenforceable non-compete covenant dated prior to January 1, 2020. It is unclear what is meant by "explicitly leverage," but it is assumed that it is a way to prevent employers from threatening legal action, short of filing a lawsuit, if a non-compete covenant is void and unenforceable.

- **Potential for other parties to bring suit.** The updated law removes a previous limitation that only a party to the agreement could bring a cause of action that challenges a non-compete covenant. Now, any "person aggrieved by a noncompetition covenant" may bring a cause of action. It is not clear what non-party may challenge a non-compete, but it most likely refers to a former employee's new employer.
- **Updated limitations on non-solicitation covenants.** As of June 6, 2024, non-solicitation covenants can only encompass current clients of an employer. In other words, employers can no longer prevent employees from soliciting former or prospective clients when employees leave employment.

## Steps employers should take now

Employers should review all non-compete and non-solicitation agreements to ensure that they are in compliance with the newly enacted law as of June 4, 2024. Furthermore, employers should have a protocol in place for the timing of communication with potential employees regarding the existence of non-compete covenants. The attorneys at Sebris Busto James are here to help evaluate whether non-compete and non-solicitation agreements should be updated and to help update policies and procedures.

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