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Washington State's New Restrictions on Noncompetition Agreements

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On May 8, Governor Jay Inslee of Washington State signed into law Engrossed Substitute House Bill 1450, which dramatically alters the state's law governing noncompetition agreements. It takes effect January 1, 2020, and covers both new and existing noncompete agreements signed with Washington employees and independent contractors. The law states that it does not, however, affect the treatment of other types of restrictive covenants including nonsolicitation, confidentiality and nondisclosure agreements to the extent those documents do not also contain a noncompete provision.

Employers with Washington-based employees or contractors should review their existing employment and restrictive covenant agreements and understand the following key restrictions imposed by the law.

Minimum compensation threshold

The law prohibits the enforcement of noncompete agreements or provisions against employees whose annualized cash compensation is lower than $100,000 and independent contractors earning less than $250,000 annually. These threshold amounts will be adjusted by Washington's Department of Labor and Industries for inflation each year beginning in 2021.

18-month limit on noncompetes

Under HB 1450, noncompete periods extending beyond 18 months after the termination of an individual's employment will be presumptively unreasonable and unenforceable. The law notes that employers can rebut this presumption, but only by proving through "clear and convincing evidence" that a longer restrictive period is necessary to protect the employer's business or goodwill.

Notice and consideration

Courts in Washington have long held that noncompete agreements must either be entered into at the start of the employment relationship or be supported by some form of additional consideration (e.g., promotion, pay raise, bonus). The new noncompete law codifies this requirement and requires that employers entering into a noncompete with an employee at the time of hire must disclose the terms of the noncompete to the employee no later than the employee's acceptance of an offer of employment.

Moonlighting and anti-poaching provisions

HB 1450 also restricts the use of moonlighting and anti-poaching policies and agreements. The law provides that employers may not "restrict, restrain, or prohibit" employees earning less than twice the state minimum hourly wage from working for another employer or otherwise supplementing their income as a contractor or through self-employment. Additionally, franchisors are prohibited from using anti-poaching provisions to prevent franchisees from soliciting or hiring away employees of the franchisor or other franchisees. HB 1450, however, does not alter obligations that employees may have under the common law duty of loyalty or

any laws or policies addressing conflicts of interest.

Compensation for laid off employees

Under HB 1450, employers seeking to enforce noncompete agreements against employees terminated as a result of a layoff must provide those employees with the equivalent of their base salary in effect at the time of the layoff for the entire noncompete period, minus any compensation earned through subsequent employment during this period. The new law does not define what constitutes a "layoff" but additional guidance on the issue may be released by the state before the law's effective date of January 1, 2020.

Venue and choice of law

HB 1450 also forbids employers from requiring that the adjudication of disputes regarding noncompetes with WA-based employees and independent contractors take place outside Washington. Additionally, employers are prohibited from using choice-of-law provisions to work around HB 1450 and "deprive the employee or independent contractor of the benefits" of the law.

Damages and enforcement penalties

The law imposes strict penalties on employers entering into noncompete agreements that are not compliant with the statute or are otherwise unenforceable under Washington law. If a noncompete agreement violates HB 1450 or a court or arbitrator reforms, modifies, or only partially enforces its restrictions, the employer is required to pay (a) actual damages or (b) a $5,000 penalty – whichever is greater – *plus* reasonable attorneys' fees and litigation costs.

Retroactive effect

HB 1450 officially takes effect on January 1, 2020 and its restrictions and penalties will apply to any proceedings commenced after that date, even if the applicable agreement was entered into before 2020. The statute's retroactive application, however, is limited to only those noncompete agreements being enforced by employers. The law does not provide for the filing of declaratory relief actions to invalidate pre-2020 agreements and impose HB 1450's statutory penalties on non-compliant employers. In contrast, for noncompete agreements signed after January 1, 2020, employees and contractors are permitted to bring actions against employers for declaratory relief and HB 1450's statutory penalties discussed above will apply.

In light of these new restrictions, you will need to modify your existing noncompete agreements with employees in Washington State. Your Cooley team has new forms available for your new and existing employees in the state and will continue to monitor developments in this area. Please contact us with any questions about the new law or the rollout of Washington-compliant forms in advance of January 1, 2020.

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