March 17, 2021

Status of Noncompete Agreements in 2021: Consider Alternatives to Protect Your Business Interests

Authored by Stephen W. Aronson, Natale V. DiNatale, Jean E. Tomasco, Abby M. Warren, Kayla N. West, and Emily A. Zaklukiewicz

Post-employment restrictions, including noncompete agreements, have become an increasingly popular tool for protecting business investments; confidential information; client, customer and employee relationships; and goodwill. At the same time, legislators increasingly have focused their attention on limiting an employer's ability to impose such restrictions, as has the new Biden administration.

State Legislation on Noncompete Agreements

Noncompete agreements are typically governed by state law. Most states try to balance employers' interests in protecting their business with employees' interests in earning a living. Recently, the trend has been for states to place restrictions on employers' ability to impose post-employment restrictions (most recently in the District of Columbia). New legislation prohibits the use of restrictive covenants for low-wage employees and other specific types of employees, as well as restricting use where it may not be reasonable. That said, development of state laws on noncompete agreements varies greatly; while Connecticut's noncompete laws stem mainly from court decisions, Rhode Island and Massachusetts have passed robust noncompete statutes in recent years, a summary of which is below.

Connecticut

Connecticut courts generally hold that post-employment restrictions must be reasonable in light of: (1) the length of time of the restriction; (2) the geographic scope; (3) the fairness of the protection provided to the employer; (4) the extent of the restraint on the employee's ability to pursue the employee's occupation; and (5) the extent of any interference with the public interest. In addition, state statutes govern noncompete agreements in certain industries, including security guards, lawyers, broadcasters and physicians, as well as home health care, companion, or homemaker service workers. Two proposed bills within Connecticut's current legislative session—S.B. No. 99 and H.B. No. 5572—aim to amend Connecticut General Statutes Section 20-14p to ban noncompete agreements involving physicians. Additionally, proposed bills H.B. No. 6285 and S.B. No. 906 seek to restrain the use of noncompete agreements by establishing statutory standards for reviewing noncompete agreements.

Rhode Island

In January 2020, Rhode Island passed the Rhode Island Noncompetition Agreement Act (RINAA), which places substantial limitations on an employer's ability to impose post-employment restrictions. RINAA

prohibits noncompete agreements involving non-exempt employees, college interns, employees under age 18, and low-wage employees. Additionally, Rhode Island courts generally only enforce a noncompete agreement if: (1) it is ancillary to an otherwise valid transaction or employment relationship; (2) adequate consideration was given; (3) it protects a legitimate interest; and (4) it is reasonable when comparing the restrictions with the employer's protectable interest. State law also places restrictions on noncompete agreements for lawyers and physicians.

Massachusetts

Similarly, in October 2018, Massachusetts passed a law substantially limiting the use of post-employment restrictions, entitled the Massachusetts Noncompetition Agreement Act (MNAA). The law contains an extensive list of requirements for a noncompete agreement to be valid and enforceable. One such requirement is that the agreement be supported by a "garden leave" clause, in which the employer continues to pay the departing employee a portion of the employee's base salary or provides other mutually agreed-upon consideration during the period the departing employee is barred from working for a competitor. Another requirement imposed by the MNAA is that the agreement must expressly state that the employee may consult with an attorney before signing the agreement. State law also specifically prohibits noncompete agreements for lawyers, physicians, nurses, social workers, and broadcasters.

Federal Legislation on Noncompete Agreements

Federal legislators also have focused on this issue, proposing legislation aimed at limiting the use of post-employment restrictions. President Biden's "Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions" states that he plans to "work with Congress to eliminate all noncompete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets." Several senators, including Connecticut's, have co-sponsored bills prohibiting noncompete agreements, which so far have not been presented for a vote.

Considerations for Employers

Regardless of the success in passing legislation limiting or even prohibiting noncompete agreements, employers should be aware of other protective measures and legal remedies that might be available to them.

Confidentiality/Non-Disclosure Agreements

Confidentiality agreements and non-disclosure agreements may serve as reasonable alternatives for employers or may be used in addition to a noncompete agreement. If an employee violates the terms of such agreements, employers may, as an available remedy, assert a breach of contract claim against the employee. Employers generally can enforce such agreements with legal claims for money damages as well as for injunctive relief. With the discussion of new federal and state legislation prohibiting or restricting noncompete provisions, agreements that protect confidential information may provide employers with some comfort and become more standard with respect to new employees. To the extent that an employer's confidential information is a trade secret, the employer may benefit from pursuing claims under the federal Defend Trade Secrets Act (DTSA) or the state's version of the Uniform Trade Secrets Act (UTSA). To maximize reliance on these laws, employers are encouraged to discuss their trade-secret-protection processes with legal counsel to create an action plan for asserting employer rights.

Nonsolicitation Agreements

Nonsolicitation provisions may be included in employment agreements to state that workers who later work for a competitor may not solicit customers or employees or use confidential information related to their current job. Similar to confidentiality and non-disclosure agreements, nonsolicitation agreements (where not prohibited or limited by law) may provide some level of protection, particularly in retail businesses in which protecting the employer's relationship with clients or customers is important.

Return of Property Agreements/Device Agreements

With remote work becoming more common and employees using employer-assigned or their own devices for accessing an employer's information and communications systems, it is important for employers to implement written device agreements that govern employees' use, and return of, employer property. Employers may want to include a provision requiring employees to disclose any work-related passwords. Employers also should employ the latest technology to regulate employee behavior, such as blocking employees from downloading certain files, disabling ports that might allow for data transfers, and monitoring email traffic outside the employer's systems.

Fiduciary Duty Notices and Agreements

Managers and other high-level employees who may have access to sensitive information might owe a fiduciary duty to their employers, which is independent of any contractual obligations. Additionally, most states impose a duty of loyalty on all employees. Employers may sue for breach of fiduciary duty or breach of the duty of loyalty in situations in which an employee's actions are in conflict with the legal duty owed to the employer. Notifying employees of their legal duties and setting the stage for possible post-employment action may dissuade employees from working for competitors.

Reminder Letters to Departing Employees

Even if their state legislature enacts laws that further limit or prohibit the use of noncompete agreements, employers still have potent arrows in their legal quivers. First, employers may assert contract claims against their former employees for breach of any employment agreement, which can include the agreements described above. Second, employers might have statutory claims against their former employees under the DTSA, UTSA, the Computer Fraud and Abuse Act, the Unfair Trade Practices Act or similar laws. They also might have similar claims against their former employees' new employer. Third, employers still have potential common law claims against their former employees, including tortious interference with contractual or business relations if the employee is deemed to have wrongfully interfered with a contract or customer relationship, conversion for theft of the employer's property, breach of a fiduciary duty, or similar claims. Employers may wish to develop standard reminder letters that place their departing employees on notice of the existence of these types of claims and the expectations of the employee when working for a new employer.

Conclusion

We expect that there may be changes restraining the ability of employers to rely on noncompete agreements to protect their business interests. Employers that rely on post-employment restrictions may wish to review their current practices and protocols in light of the changing state, and potentially federal, legislation to ensure that adequate protections are in place. Our employment attorneys are ready to answer your questions and help guide you regarding the best practices for your business.

FOR MORE INFORMATION

Contact any member of Robinson+Cole's Labor, Employment, Benefits + Immigration Group listed below:

Bruce B. Barth | Stephen W. Aronson | Britt-Marie K. Cole-Johnson | Natale V. DiNatale

Rachel V. Kushel | Sandra Marin Lautier | Virginia E. McGarrity | Joshua S. Mirer

Megan R. Naughton | Nina B. Pelc-Faszcza | Jennifer L. Shanley | Lauren M. Sigg

Alisha N. Sullivan | Jean E. Tomasco | Abby M. Warren | Kayla N. West | Emily A. Zaklukiewicz

For insights on legal issues affecting various industries,
please visit our Thought Leadership page and subscribe to any of our newsletters or blogs