

NEW WASHINGTON LAW REQUIRES ACTION ON NON-COMPETITION AGREEMENTS

by: [Josephine B. Vestal](#)

On May 8, 2019, Washington’s Governor signed legislation which makes significant changes to the law on the enforceability of the non-competition covenants or agreements which employers require their employees to sign.¹ As a result, effective January 1, 2020 many of the non-competition agreements employers now have with their employees and others, which are governed by Washington law, will become unenforceable under this law. While there will likely be challenges to the enforceability of parts of the law, companies need to take action before the first of the year to protect their interests.

Many employers rely on non-competition agreements (“non-competes”) to prevent their employees from going to work for their competitors for some period of time after the employee leaves their employ so that the employee cannot use information they acquired from the employer regarding clients, contacts, strategy, etc. to compete with the employer. This new law changes the rules for non-competes. Key provisions of the new law include:

Non-Compete Agreements:

- Non-competes **are not** enforceable against any of the employer’s employees who make **\$100,000 or less** on an annual basis from that employer. This amount is to be adjusted annually for inflation. “Non-competition covenant” is defined broadly, but contains a number of exclusions – like non-solicitation agreements, confidentiality agreements and others;
- Non-competes **are not** enforceable against an independent contractor unless that party’s earnings from the party seeking enforcement exceed **\$250,000** per year. That amount also is to be adjusted annually for inflation;
- To be enforceable for employees earning greater than \$100,000 as adjusted, the employer must have disclosed the terms of the non-compete in writing prior to the employee’s acceptance of an offer of employment, and if the non-compete will become enforceable only in the future due to changes in the employee’s compensation, they must be advised that it may be enforceable in the future; or
- If a non-competition agreement is entered into after the beginning of employment, to be enforceable the employer must provide independent consideration for it;
- There is a legal presumption that any non-compete with a duration exceeding 18 months after termination is unreasonable and unenforceable; and
- If the employee is terminated as the result of a **layoff**, a non-compete which is otherwise allowed **is not** enforceable unless it provides for compensation for the non-compete period, which must be at least at the employee’s base salary minus earnings through subsequent employment during that period.

¹Chapter 299 of the 2019 Session Laws and ESHB 1450

Poaching:

- No franchisor may in any way prohibit or restrict a franchisee from hiring or soliciting any employee of another of their franchisees (poaching).

Moonlighting:

- No employer may restrict any of their employee's work for another employer, independent contractor or themselves if the employee earns less than twice the applicable state minimum wage (which will be \$13.50/hour on 1/1/2020) from that employer, subject to a few qualifications.

Relief/Damages:

There are multiple forms of relief for violation of this law including actual damages or a statutory penalty of \$5,000 whichever is greater, plus attorney fees, expenses and costs.

Applicability of Law:

This law applies to all actions commenced after the effective date of the law – January 1, 2020, regardless of when the agreement was signed or the cause of action arose, but an action cannot be brought regarding a non-competition covenant signed prior to the effective date of this law **if** the non-competition agreement is not being enforced.

These are all significant changes effective as of January 1, 2020. They apply both to employees earning both less and more than \$100,000 per year, and some non-employees. They require review with your legal counsel of all of your existing non-competes and other agreements restricting employee competitive action, confidentiality, solicitation, poaching, moonlighting, etc. to determine which agreements are impacted and will need to be changed or redone to be enforceable, and to consider how to accomplish that and what other options might be available to protect your interests. You will also need to consider the agreements you will enter into from now going forward which you anticipate will still be in effect after January 1, 2020, to make sure they will be in compliance after the first of the year, and possible alternatives to non-compete agreements where a non-compete will not be possible. We at Williams Kastner stand ready to help.◀

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