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Advanced Notice: Continuing Trends in State Restrictive Covenant Legislation

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In recent years, federal and state lawmakers have been increasingly eager to limit employers' ability to enter into restrictive covenant agreements with their employees. A growing trend is legislation requiring that employers give individuals advance notice (or a "consideration period") before the employee can sign a restrictive covenant agreement. Prior to 2022, only five states (Oregon, New Hampshire, Massachusetts, Maine, and Washington) had such laws on the books. That number almost doubled this past year, as Illinois, Colorado, and the District of Columbia enacted statutes requiring varying degrees of advance notice.

I. Illinois

Under the Freedom to Work Act, effective as of January 1, 2022, Illinois employers must advise prospective and current employees in writing to consult with an attorney before entering any agreement that contains either a covenant not to compete or a covenant not to solicit. 820 ILCS 90. Furthermore, the employer must provide the individual with at least fourteen calendar days to review the restrictive covenant before signing it. Although an employee may voluntarily elect to sign the restrictive covenant agreement before the expiration of the 14-day consideration period, the entire period must still be provided to the individual.

The Illinois Freedom to Work Act goes on to define "adequate consideration" for restrictive covenant provisions in such a way that, even if the employer follows all of these steps, the restrictive covenants will be rendered unenforceable unless the employee works for the employer for at least two years after signing the agreement containing the non-compete or non-solicit provision. Before this legislation, Illinois statute did not specify a set length of tenure as a precondition for non-compete agreements.

II. Colorado

Effective as of August 10, 2022, before entering into a non-compete agreement with either a prospective or current employee, Colorado employers must provide the individual with advance "notice of the covenant not to compete" and the "terms of the covenant not to compete." Colo. Rev. Stat. § 8-2-113(4).

For prospective employees, the employer must provide the individual with the notice, and the terms of the proposed non-compete beforethe prospective employee even accepts an offer of employment.

For current employees, the employer must provide the employee with the notice and the terms of the proposed non-compete at least fourteen days before the earlier of (a) the effective date of the covenant; or (b) the effective date of any additional compensation or change in terms and conditions of employment that would provide consideration for the covenant.

In both cases, the required notice of the non-compete must be provided to the employee or prospective employee in "clear and conspicuous terms" and must be signed by the worker. Although it appears that employees should be able to sign the notice and the non-compete agreement before the entire consideration period has elapsed, the non-compete would still not be effective until fourteen days from the date of the notice.

The statute's required notice must be presented in a separate document from the actual non-compete agreement and signed by the employee. This means that employers must obtain two signed documents to effectuate a non-compete – first, the notice document, followed by the agreement containing the non-compete provision itself.

III. Washington, D.C.

After years of delays and amendments, the District of Columbia Ban on Non-Compete Agreements Amendment Act of 2020 finally went into effect on October 1, 2022, as modified by the District of Columbia Non-Compete Clarification Amendment Act of 2022. D.C. Law 24-175. While the statute prohibits most non-compete agreements, unlike the prior iterations of the proposed legislation, the implemented version allows employers to continue to utilize such agreements for highly compensated individuals and some additional excluded categories of employees.

To make permissible non-compete agreements enforceable, employers are now required to provide a copy of the non-compete agreement, in writing, to a prospective employee at least fourteen days before the individual commences work for the employer. For employers seeking to bind current employees to a new non-compete agreement, the employer is also required to provide a copy of the non-compete, in writing, to that individual at least fourteen days before the employee is required to execute it.

Unlike other jurisdictions, the D.C. statute also delineates specific language that must be included in the notice to current and prospective employees, along with a copy of the non-compete agreement. The language that must be included in the notices is as follows:

The District of Columbia Ban on Non-Compete Agreements Amendment Act of 2020 limits the use of non-compete agreements. It allows employers to request non-compete agreements from "highly compensated employees" under certain conditions. [Name of employer] has determined that you are a highly compensated employee. For more information about the Ban on Non-Compete Agreements Amendment Act of 2020, contact the District of Columbia Department of Employment Services (DOES).

IV. Existing Advance Notice Requirements

Although the new statutory requirements enacted in 2022 continue, and build upon, the trend of making advance notice a prerequisite for the enforcement of non-compete agreements, the five states below were early adopters of such policies:

1. **Oregon (effective 2007)**: Prospective employees must be informed, in writing, at least two weeks before their first day of work that a non-compete is a requirement of employment. For existing employees, a new non-compete agreement will only be enforceable if accompanied by a bona fide promotion. ORS 653.295(1)(a).
2. **New Hampshire (effective July 14, 2012):** Under New Hampshire law, an employer must give prospective employees a copy of a non-compete agreement before acceptance of an offer of employment. NH RSA § 275:70.
3. **Massachusetts (effective October 1, 2018):** Non-compete agreements must be provided to prospective employees at least ten business days before the commencement of employment or before a formal offer is extended, whichever comes earlier. For existing employees, the employer must provide notice of the non-compete agreement at least ten business days before the agreement

becomes effective. MGL c.149, § 24L(b)(i)-(ii).

4. **Maine (effective September 18, 2019):** Employees must receive notice of the non-compete agreement before an offer of employment and a copy of the agreement at least three business days before the deadline to sign. 26 MRSA §599-A(4).
5. **Washington (effective January 1, 2020):** Employers must disclose the terms of a non-competition covenant to a prospective employee no later than the acceptance of an offer of employment. For existing employees, non-competition covenant is only enforceable due to a change in the employee's compensation and the employer must specifically disclose that the covenant may be enforceable against the employee in the future. RCW 49.62.020.

V. Pending Advance Notice Requirement Legislation

Looking ahead to 2023, another state is already considering adding an advance notice requirement for non-compete agreements: New Jersey. On May 19, 2022, the New Jersey General Assembly Labor Committee voted to advance Assembly Bill 3715 ("A3715") to the entire legislature.

If passed, A3715 would impose numerous harsh limitations on restrictive covenants, including a requirement that prospective employees must receive terms of any restrictive covenant agreement by the earlier of a formal offer of employment or 30 business days before the individual commences employment with the company. If the individual is already employed, the employer must provide the individual with the terms of the restrictive covenant at least 30 days before the agreement becomes effective.

Furthermore, the bill provides that an employer must notify a former employee, in writing, whether it intends to enforce the restrictive covenant agreement no later than ten days after the termination of the employment relationship.

Under the proposed legislation, restrictive covenants executed after adoption of A3715 would be deemed null and void if an employer fails to provide any of the above notices. At this stage, it is unclear whether A3715 – which has yet to receive a vote from the entire General Assembly – will advance further. Legislation of this nature, however, seems to be gaining steam and getting more common with each passing year.

As more and more states enact legislation requiring advance notice for restrictive covenant agreements, it would benefit employers to continually monitor legal developments in this area of law to ensure full compliance. To avoid costly and avoidable pitfalls, employers must be aware of the law in the states they operate in and give prospective and current employees the requisite advance notice to review and consider restrictive covenant agreements.

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