

# Electronic Alert

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## Washington Rewrites the Law on Enforcement of Non-Competition Agreements

By Richard Hunt

New Washington legislation takes effect on January 1, 2020 and provides that a non-competition covenant is void and unenforceable against an employee **unless** the employer discloses the terms of the covenant in writing no later than the time of acceptance of the offer, **and** the employee's annualized earnings exceed \$100,000 per year, adjusted annually for inflation. If the employee is terminated by layoff, the covenant is void and unenforceable **unless** the employer pays compensation equivalent to the employee's base salary (minus other earnings) for the time the employee is restricted. The restriction is also void and unenforceable **if** the employee is required to bring or defend a lawsuit or arbitration outside of the state of Washington.

The new law also applies to independent contractors. A non-competition covenant is void and unenforceable against an independent contractor unless the contractor's earnings (from the party seeking enforcement) exceed \$250,000 per year.

Regardless, non-competition restrictions may not exceed 18 months, **unless** there is proof by clear and convincing evidence that a longer time is necessary to protect the business or its goodwill.

It appears that broader restrictions from existing agreements will not be grandfathered in when the new law takes effect January 1, 2020. The new law will apply to all legal proceedings commenced on or after January 1, 2020.

If a court or arbitrator determines that an agreement violates the new law, it will be costly: the greater of actual damages or a statutory penalty of \$5,000, plus reasonable attorney fees, expenses, and costs. It will also be costly if the court or arbitrator decides to reform, rewrite, modify, or partially enforce a covenant. The party seeking enforcement will be assessed the same damages and fees. On a more positive note, there is not a provision to allow a lawsuit or arbitration to challenge a pre-2020 covenant that is not being enforced.

In spite of the restrictions of the new law, businesses still have tools to protect themselves against departing employees who do not respect their proprietary information or relationships. The new law does this by a "carve out": a "non-competition covenant" does **not** include:

- a restriction on departing employees forbidding them from soliciting other employees to leave the employer;
- a restriction on departing employees forbidding them from soliciting customers to cease or reduce their business with the employer;
- a confidentiality agreement;
- a covenant prohibiting use or disclosure of trade secrets or inventions;

- a restrictive covenant entered into in connection with the purchase or sale of the goodwill of a business or in connection with the acquisition or disposal of an ownership interest;
- a covenant entered into by a franchisee, **if** the franchisee sale complies with RCW 19.100.020(1);
- enforcement of the common law duty of loyalty and laws preventing conflicts of interest and any corresponding policies.

Businesses can still enforce their agreement up to December 31, 2019, even if they don't meet the requirements of the new law. Once the New Year rings in, so does the new law. That leaves several months to figure out whether to revise existing agreements or to determine how to use the protections to be found in the "carve outs."

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