



New Limitations on Restrictive Covenants in Virginia

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A new Virginia Code section 40.1-28.7:7, which goes into effect on July 1, 2020, greatly reduces the scope of non-competes and even non-solicitation agreements in Virginia.

For any proposed employment agreements effective July 1 or later, an employer may not enter into, enforce or threaten to enforce a non-compete against a low-wage employee.

A low-wage employee is defined as:

1. An employee, intern, student, apprentice or trainee whose average weekly earnings are less than the average weekly wage of the Commonwealth, or who is employed without pay effective July 1, 2020, that rate is \$1,137 per week or \$59,124 per year (and adjusted annually).
2. An independent contractor who is compensated at an hourly rate less than the median hourly wage for the Commonwealth currently, that rate is \$20.30.

A low-wage employee, however, does not include any employee whose earnings are derived, in whole or predominant part, from sales commissions, incentives, or bonuses paid to the employee by the employer. The low-wage thresholds listed above apply to any contract or agreement entered into after July 1, 2020 that restricts an employee's ability to compete with his or her former employer.

The new law also prohibits any attempt to prevent a low-wage employee from providing services to a customer or client of the employer if the employee does not initiate contact or make the solicitation.

Non-disclosure agreements (NDAs) are excluded from the new law. NDAs are intended to prohibit the taking, misappropriating, threatening to misappropriate, or

sharing of certain information, including trade secrets and proprietary or confidential information.

Extensive Penalties

The penalties for violating the new law can be extensive. An adversely affected low-wage employee can bring a civil action against any former employer or other person who attempts to enforce a non-compete agreement against that employee. The employee has two years to file such an action.

A prevailing plaintiff-employee can obtain injunctive relief, liquidated damages, lost compensation, and other damages, and shall receive reasonable costs, including expert witness fees and attorney fees. Additionally, any employer who violates this law is subject to a civil penalty of \$10,000 for each violation.

Finally, the law also requires every employer in the Commonwealth to post a copy of the new law or a summary approved by the Virginia Department of Labor and Industry. Failure to make the required posting could result in civil penalties of up to \$1,000.

What Employers Can Do

So, what should an employer do?

- First, to the extent you are currently negotiating or plan to offer employment agreements or contracts to any employees or contractors, make sure they are executed fully by June 30, 2020. This new law only applies to covenants not to compete that are entered into on or after July 1, 2020.
- Second, review your current protocols for non-compete and non-solicitation provisions and determine which employee positions fall below the current thresholds: \$59,124/year for employees and \$20.30/hour for independent contractors.
- Third, consult with employment counsel to determine appropriate next steps, including making necessary changes to non-compete and non-solicitation agreements.
- Fourth and finally, make sure you post a copy of this new law (or the summary once it becomes available), with your other required employment-related postings in the workplace.

If you have questions about how the law affects your company's non-competes and non-solicitation agreements, contact us for a consultation.

Related People

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