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Protecting Employees Against Unfair Non-Compete Agreements

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Update On March 16, 2021, the "Ban on Non-Compete Agreements Amendment of 2020" took effect in Washington, D.C. The new law prohibits employers from requiring their employees to sign agreements that include non-compete provisions, and prohibits workplace policies that limit the ability for employees to work for other people, or start their own business. Read more about the D.C. law, and the federal equivalent being discussed in Congress here.

A recent survey by the Economic Policy Institute and the Survey Research Institute at Cornell University showed that millions of private-sector workers across the country have signed non-compete agreements, limiting their right to work after leaving their current jobs. With between 28 percent and 47 percent of the 129 million private-sector workers in the United States bound by non-compete agreements, more legislatures and courts around the country are recognizing the importance of protecting workers' rights to earn a living by limiting the scope of non-compete provisions unless the confidential or proprietary information of corporations is truly at risk. This post surveys current trends in the laws governing non-compete agreements.

Freedom to Compete Act

Although federal law does not currently regulate non-compete agreements, Congress is currently considering a bill that would provide important protections to many workers. On January 15, 2019, Senator Marco Rubio introduced Senate Bill S. 124, the "Freedom to Compete Act." While Democrats in the House and Senate had introduced similar bills in the previous Congress which failed to gain traction, Senator Rubio's backing of the Freedom to Compete Act shows promising bipartisan interest in protecting workers from onerous non-compete agreements.

If enacted into law, this bill would amend the Fair Labor Standards Act of 1938 to prohibit employers from enforcing or threatening to enforce any non-compete agreement against covered employees. It would also prohibit employers from renewing or entering into new non-compete agreements with employees in the

future. The bill provides for civil and criminal penalties against employers who violate the law. It also empowers impacted employees to bring lawsuits to stop employers from violating the law and recover damages caused by any violations.

Importantly, the Freedom to Compete Act would not apply to all workers. Specifically exempted from coverage would be all employees also exempted from the Fair Labor Standard Act's minimum wage and maximum hour requirement. Most notably, this includes all employees "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Thus, although the Freedom to Compete Act would protect many entry-level and low-wage workers from the constraints of non-compete agreements, the bill would not provide any protection for most white-collar workers. Since the recent survey suggests that employers are more likely to require non-compete agreements for highly paid, professional employees, the Freedom to Compete Act would leave many workers impacted by such agreements without federal protection.

State laws restricting non-competes

While the Freedom to Compete Act works its way through Congress, many workers throughout the country have similar or stronger protections against onerous non-compete agreements in their states' laws. Several states, such as Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, and Washington State prohibit non-compete agreements for certain low-wage workers or workers covered by the Fair Labor Standards Act's maximum hour and minimum wage laws. Similarly, other states, including Colorado, Idaho, and Oregon prohibit all non-compete agreements other than for employees in certain narrow categories, generally professional or managerial employees with high income and access to important confidential information. For instance, Idaho only allows non-compete agreements for "key employees" and "key independent contractors," defined as those who through the course of their employment "have gained a high level of inside knowledge, influence, credibility, notoriety, fame, reputation or public persona as a representative or spokesperson of the employer and, as a result, have the ability to harm or threaten an employer's legitimate business interests." Idaho Code § 44-2702(1).

Several state laws also impose other constraints on non-compete agreements. For instance, under the new Washington State law that went into effect on January 1, 2020, otherwise valid non-compete agreements cannot be enforced against an employee who is laid off unless the employer pays the employee's base salary throughout the non-compete period. Wash. Rev. Code § 49.62.020(1). Other state laws also specifically limit the permissible duration of non-competes (generally between one and two years), or render non-compete agreements unenforceable if the employee leaves after a short period of employment. Many of these new

restrictions on non-competes have been passed by state legislatures within the last five years, indicating a growing interest in protecting workers against onerous restrictions on their ability to work.

California has gone the furthest of any state, outright prohibiting non-compete agreements for all employees. Despite this clear prohibition, the EPI survey suggested that many California employers still require employees to sign non-compete agreements. Although these agreements are unenforceable, employees who do not know about the California law may refrain from seeking employment in order to avoid violating the terms of the agreement. In order for strong state laws like those in California to provide full protection for workers, states need to engage in stronger enforcement against employers and educate workers about their rights.

Many workers are still unprotected

Even though several states have taken steps to place concrete limits on employers' abilities to restrain their workers from finding new jobs, many state laws simply allow any non-compete agreements that are not "unreasonable" in geographic scope or duration. Such indeterminate standards, subject to varying interpretations by courts, create great uncertainty for workers faced with the choice of taking new employment and risking legal action from their former employers, or complying with the agreement and either changing their careers or going unemployed for months or years. To ensure that workers can leave their jobs without losing their livelihoods and ruining their careers, more legislatures should pass and enforce clear, broad prohibitions on non-compete agreements like the California law or the Freedom to Compete Act.

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