New England IN-HOUSE
July 2012
newenglandinhouse.com
THE DOLAN COMPANY

SPECIAL FEATURE

Law could invalidate non-competes of unwary employers

New Hampshire has enacted legislation requiring employers to provide applicants and employees with any required "non-compete" or "non-piracy" agreement before or at the time an offer of employment, or an offer of change in job classification, is made to the individual.

If such an agreement is not provided to the applicant or employee prior to or in conjunction with the offer, the agreement will be deemed "void and unenforceable" by operation of law. The legislation took effect on July 14.

The new statute is brief and does not define any of its terms. As a result, it raises a host of issues that likely will need to be resolved by the New Hampshire courts. Until then, employers should interpret the law broadly to maximize the chances that their future non-compete, non-solicit and similar agreements will be upheld.


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Language of statute

The statute consists of only the following two sentences:

"Prior to or concurrent with making an offer of change in job classification or an offer of employment, every employer shall provide a copy of any non-compete or non-piracy agreement that is part of the employment agreement to the employee or potential employee. Any contract that is not in compliance with this section shall be void and unenforceable."

The language appears to mean that if an applicant or employee must sign a "non-compete" or "non-piracy" agreement as a condition of an offer of employment or an offer of change in job classification, then the employer must give the applicant or employee a copy of the agreement *before or at the time the offer is made.*

Ambiguities in language

The brevity of the new statute creates numerous ambiguities for New Hampshire employers.

In particular, like the other terms used in the statute, the term "non-piracy agreement" is not defined. The term is not commonly used in employment agreements, raising questions as to whether "non-piracy agreement" refers to (i) an agreement restricting solicitation of customers, (ii) an agreement restricting solicitation of employees, (iii) an agreement relating to disclosure of trade secrets or other confidential information, (iv) some combination of the above, or (v) something else altogether.

The more familiar term "non-compete agreement" typically refers to an agreement that restricts an employee's right to work for a competitor for a period of time after the termination of his employment. Presumably, that is the meaning the Legislature had in mind in using this term.

However, because the statute does not actually define "non-compete agreement," the term might encompass not only post-employment non-competes, but also agreements that restrict competitive activities *during* an individual's employment.

Likewise, while the term "change in job classification" was presumably intended to encompass an offer of a promotion to an employee, the term might also apply to reorganizations, horizontal transfers, demotions or even mere changes in job title.

Accordingly, New Hampshire employers should ensure that *any* job change requiring a non-compete or non-piracy agreement comply with the statute.

Implications for multi-state employers

For employers doing business in multiple

states that include New Hampshire, the new law is another patch in the quilt of increasingly employee-protective state laws on restrictive employment covenants.

This growing body of disparate state law is making it more difficult for multi-state employers to use a "one size fits all" non-compete agreement, or to administer their non-compete programs the same way across the board.

For example, in Oregon, applicants must be given two weeks' advance written notice that signing a non-compete is a condition of employment. Additionally, non-compete agreements can be used only with employees properly classified as exempt under the wage-and-hour laws and whose annual gross compensation exceeds a certain threshold.

In fact, Oregon non-competes have a maximum duration of two years and generally must provide for the employee to be paid 50 percent of his salary during the restrictive period.

Idaho law contains a variation of the requirement that an employee be properly classified as exempt in order to be subject to a non-compete. Only "key" employees may be required to sign such agreements. An employee is presumptively "key" if he is among the company's highest paid 5 percent of workers.

Similarly, in Colorado, non-competes can generally be used only with "executive" or "management" employees or members of their "professional staff."

Various other unique state-law requirements within this patchwork are Louisiana's mandate to specify the parishes, municipalities or parts thereof where the restriction will operate; South Dakota's strict two-year maximum restrictive period; and Nebraska's "all or nothing" rule, which prevents courts from reforming or "blue-penciling" non-competes deemed to be overbroad.

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In this larger context, New Hampshire's new law raises more than just a local compliance issue. It also raises the bar for employers seeking to use a uniform non-compete agreement and/or to administer a uniform non-compete program in a collection of states that includes New Hampshire.

Recommendations for employers

In light of the new statute, New Hampshire employers should ensure that if an applicant or employee will be asked to sign any type of restrictive employment covenant — whether styled as a non-compete, non-solicit, non-disclosure, assignment-of-inventions or other kind of agreement — in connection with an offer of employment or an offer of change in job classification, he be given a copy of the agreement at or before the time the offer is made.

Otherwise, the agreement, even if freely signed, may be deemed "void and unenforceable."

Employers with employees in New Hampshire also should construe the term "change in job classification" as applying broadly to any type of promotion, demotion, transfer, reassignment, change in title or other change in job status, if execution of a non-compete or non-piracy agreement will be required as part of the change.

Otherwise, the employer will run the risk that some or all of the restrictive covenants signed by employees in such circumstances will be found "void and unenforceable" by a reviewing court.

Finally, New Hampshire employers should remember that, even without the new law, non-compete, non-solicit and similar agreements will be enforced only if found to be reasonable temporally, geographically and relative to the scope of the activity sought to be restricted.

Accordingly, it is advisable to consult with experienced employment counsel when drafting, administering and seeking to enforce non-compete agreements and similar kinds of restrictive employment covenants, in New Hampshire and elsewhere. NEIH