

Washington State Adopts New Noncompetition Restrictions



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Governor Jay Inslee signed legislation that will significantly restrict the use of noncompetition agreements. The new law covers Washington-based employees and independent contractors. And, for employers, enforcement of noncompete agreements will be much more challenging and costly. The new restrictions will take effect January 1, 2020, and may apply to pre-existing agreements.

Historically, Washington law has permitted noncompetition agreements, and Washington courts generally enforced them to the extent reasonable and necessary to protect an employer's legitimate business interests. In practice, even if a court concluded that some aspect of a particular noncompete agreement was not reasonable, such as its duration, the court used its authority to "reform" the agreement—narrowing it to fit the court's determination of a reasonable scope.

The new law will prohibit all noncompetition agreements for employees whose W-2 earnings are less than \$100,000 annually and for independent contractors who receive less than \$250,000 per year from the other party to the agreement. Going forward, these dollar thresholds will be adjusted annually for inflation.

The new law will also apply a presumption that any noncompetition agreement that is for longer than 18 months is unreasonable. That presumption will only be overcome by proving with clear and convincing evidence that a longer duration is necessary to protect the employer's business or goodwill.

Employers are required to disclose a proposed noncompetition agreement to a prospective employee no later than the time of acceptance of an offer of employment. If the agreement will not be immediately effective due to the employee's pay level, the employer must specifically inform the person that the agreement may be enforceable in the future.

Noncompetition agreements may not require disputes with Washington-based employees or independent contractors to be adjudicated outside Washington. If a court or arbitrator determines that the agreement violates the new law, or if the judge or arbitrator reforms, rewrites, modifies or only partially enforces it, the employer must pay the employee the greater of \$5,000 or his/her actual damages, plus the employee's reasonable attorneys' fee and costs.

The new legislation does not restrict nonsolicitation or confidentiality agreements, agreements related to trade secrets or inventions, or agreements by a person buying or selling an ownership interest in a business.

Due to the compensation thresholds, this new law significantly reduces the ability of startups to use noncompetition agreements because those startup employers tend to pay relatively low W-2 compensation.

All Washington employers should review their existing business protection agreements and employment policies to be sure they will meet these new requirements.