New Hampshire, Pennsylvania, Vermont May Restrict Use of Non-Compete Agreements in Employment

By Martha Van Oot and Erik J. Winton

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Proposals to restrict the use of non-compete agreements in employment have been introduced in New Hampshire, Pennsylvania, and Vermont.

This appears to be the continuation of a trend that started nearly a year ago. On January 23, 2017, the Massachusetts Legislature introduced six separate bills seeking to curb employers' use of non-compete agreements in the Commonwealth. The New York City Council followed approximately six months later with a non-compete proposal of its own and, approximately three months later, the New Jersey Legislature offered a similar proposal designed to protect workers from the perceived dangers of non-compete agreements.

Of the three new bills, the New Hampshire bill proposes a limited ban on non-compete agreements with "low-wage employees." The Pennsylvania and Vermont bills aim at banning all non-competes in ordinary employment relationships.

New Hampshire: Partial Ban

Labeled as "AN ACT relative to noncompete clauses for low-wage employees," New Hampshire's SB 423 would prohibit employers from "requir[ing] a low-wage employee to enter into a noncompete agreement."

A "noncompete agreement" is defined as an agreement that:

> restricts [a] low-wage employee from performing:
>
> 1. Work for another employer for a specified period of time;
> 2. Work in a specific geographic area; or
> 3. Work for another employer that is similar to such low-wage employee's work for the employer who is a party to the agreement[.]

A "low-wage employee" is one who earns less than or equal to $15.00 per hour (unless and until the federal minimum wage eventually exceeds that rate, whereupon the federal minimum wage would control).

Under SB 423, any non-compete agreements imposed on such employees would be void and unenforceable.

The bill's focus on low-wage employees is curious as employers rarely pursue judicial enforcement actions against low-wage workers. Indeed, most low-wage workers likely are not required to agree to non-competition agreements. However, a few studies suggest that a small percentage of low-wage employees are subject to non-competes. Critics of the practice argue that employers are forcing low-wage employees to sign non-competes the employers know cannot be enforced, but hoping the prospect of an enforcement action will discourage employees from joining a competitor.

Similar protections for low-wage employees were included in the New Jersey and New York City Council bills, as well as two of the bills pending in Massachusetts. Given the rarity of non-compete enforcement actions against low-wage employees, SB 423 should have a relatively high likelihood of passage.

Vermont, Pennsylvania: General Bans

The Vermont and Pennsylvania bills would abolish all non-competes, with limited exceptions for the

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sale of a business or the dissolution of or dissociation from a partnership or limited liability company.

The description of a prohibited agreement under the Vermont bill is broad, broader than that under the bills in New Hampshire and Pennsylvania. Whether the Vermont bill also would prohibit non-solicitation covenants, as opposed to just non-competes, is unclear.

Vermont House Bill 556

Pursuant to Vermont House Bill 556, "an agreement not to compete or any other agreement that restrains an individual from engaging in a lawful profession, trade, or business is prohibited."

Where the prohibited covenant is simply one component of a larger agreement, HB 556 would nullify only the provision(s) containing the prohibited covenant, leaving the remainder of the agreement intact.

The proposed ban would not apply to restrictive covenants formed in connection with the sale of an ownership interest in a business entity or the dissolution of a partnership or limited liability company.

HB 556 further qualifies the non-compete ban by stating, "Nothing in this section shall be construed to prohibit an agreement that prohibits the disclosure of trade secrets as defined [under Vermont law]."

Significantly, HB 556 does not mention customer non-solicitation covenants. In its current form, it is unclear whether such covenants would fall within the ban.

Pennsylvania House Bill 1938

Like the Vermont legislation, Pennsylvania House Bill 1938 generally prohibits all "covenant[s] not to compete," other than those arising out of the sale of a business or the dissolution of or dissociation from a partnership or limited liability company.

While HB 1938 differs from the Vermont Bill by failing to expressly safeguard agreements that prohibit disclosure of trade secrets, it effectively establishes the same point by defining a prohibited "covenant not to compete" more narrowly. A "covenant not to compete" under HB 1938 is "[a]n agreement between an employer and an employee that is designed to impede the ability of an employee to seek employment with another employer." Therefore, both non-disclosure and non-solicitation covenants appear to fall clearly outside the ban.

In addition, HB 1938 includes provisions regarding judicial recourse, as well as choices of law and venue. The Vermont bill does not address these.

With respect to judicial recourse, HB 1938 provides that "[a]n employee shall ... receive an award of attorney fees [and be] entitled to damages, including punitive damages, after prevailing in a suit against an employer related to the enforcement of a covenant not to compete." Currently, this provision appears to mandate attorney's fees for the employee, regardless of whether he or she is a plaintiff or defendant and even if the employee's attorney's fees are being covered by a subsequent employer (a common occurrence in non-compete litigation). Further, HB 1938 offers no guidance on the appropriate standard courts should follow to determine whether to award punitive damages, and, if so, what amount of such damages should be awarded.

Further, HB 1938 provides that any non-compete litigation involving a Pennsylvania resident must be decided in Pennsylvania state court, under Pennsylvania law. Consequently, parties would be unable to negotiate a conflicting choice of law or venue provision into the restrictive covenant. Moreover, if enacted, HB 1938 appear to prevent either party from initially filing in, or removing a non-compete enforcement action to, federal court, even if the controversy meets the necessary conditions for federal jurisdiction.

To date, only California, North Dakota, and Oklahoma have enacted non-compete bans as broad as those under consideration by the Vermont and Pennsylvania legislatures. Others have tried and failed. Passage in the Vermont and Pennsylvania legislatures is uncertain.

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The Jackson Lewis Non-Competes and Protection Against Unfair Competition Practice Group will continue to monitor these and other non-compete developments and provide updates. Employers should regularly review their restrictive covenant agreements with employment counsel to ensure they continue to address specific organizational needs effectively and comply with applicable law. Please contact a Jackson Lewis attorney with any questions.

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