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Labor and Employment Law Update

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Is the Washington Legislature Caching Out Noncompete Agreements? How This Change Might Affect Your Ability to Protect Your Business

For tech giants like Microsoft and Amazon, and any number of emerging tech companies, tech professionals are a hot commodity in the state of Washington. No doubt, the competition is fierce here in Seattle and within the greater tech industry. As a result, companies in Washington have routinely used noncompetition agreements to protect against potentially damaging or unfair competition by their former executives, engineers and other key employees.

These noncompete agreements generally limit the type of activity a departing employee can engage in, typically within a specific geographic region for a limited period of time. These noncompete agreements generally provide protections from competition that would otherwise not be covered by state or federal trade secret statutes. Accordingly, these agreements have been a useful tool in guarding a business beyond those minimum statutory protections.

One bill currently pending in the Washington state legislature, however, seeks to do away with this crucial protective mechanism and the tech industry needs to know about it. House Bill 2931 seeks to rewrite the noncompete law in the state of Washington.

In its current form, the bill bans noncompete agreements altogether for:

- Temporary or seasonal employees;
- Employees terminated without "just cause" or who were laid off; and
- Independent contractors.

The bill also targets noncompete agreements for employees who are not executives, and which extend beyond a year's time. In those instances, the bill creates a "rebuttable presumption" that the agreements are unenforceable. This creates an even steeper uphill battle for employers in court, unless they can rebut that presumption. As it is currently written, the bill provides no guidance on how an employer can successfully rebut the presumption.

Finally, the bill prohibits a court from rewriting, or "blue-penciling," a noncompetition agreement. This is a dramatic change for Washington courts, which have long had the ability to reform an agreement so that only the unenforceable portion is stricken and the remaining agreement is enforced. If this bill passes, an entire noncompete agreement will fail even if only a portion of the agreement is considered unenforceable.

At this time, the bill does not impact the legality or enforceability of confidentiality or nonsolicitation agreements, which is good news for the tech industry. Such agreements can be very effective tools in protecting against unfair competition and, if this bill passes, will become even more critical without the protection of noncompete agreements.

On February 2, the Labor & Workplace Standards Committee voted on and passed this bill. We have seen variations of bills limiting noncompete agreements in recent years, but House Bill 2931 in particular attracts widespread attention because of its potential impact. The bill must proceed through several more phases of the legislative process before it can become law, but it reflects a growing trend of disfavoring noncompete agreements and companies should be aware that there is still more to come.

We will continue to keep you updated as more information is available.

For more information, please contact the Labor and Employment Practice Group at Lane Powell: lanepowellpc@lanepowell.com