LEGAL UPDATES

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Wisconsin Legislators Propose Near-Total Ban on Noncompete Agreements

Services

Labor & Employment

Non-Competes & Restrictive Covenants

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Key points

Democrats in the Wisconsin Legislature introduced a bill which would ban most noncompete agreements.

The bill would still allow employers to use nondisclosure agreements and restrict use of customer lists and intellectual property.

Given the bill's sponsors and current makeup of the Wisconsin Legislature, it appears unlikely that the bill will become law.

On October 12, 2023, several Democrats in the Wisconsin Legislature introduced AB481, a bill which, if enacted, would make most post-employment noncompete agreements illegal, void, and unenforceable.

Current Wisconsin law on noncompetes

Under current Wisconsin law, a noncompete agreement is legally enforceable if it:

1. Is necessary for the employer's protection.
2. Lasts a reasonable time period.
3. Covers a reasonable territory.
4. Is reasonable to the employee.
5. Is reasonable to the general public.

The current law treats noncompete agreements the same whether they apply during or after an employee's term of employment. Both are subject to an analysis based on the above factors.

The proposed bill – AB481

AB481, if enacted, would upend the current legal regime.

First, the bill would distinguish between restrictions imposed during employment versus those applying after an employee has left an employer.

Noncompetes that apply during a term of employment would be subject to largely the same factors currently applied. However, the bill now adds an additional phrase, stating that any noncompete which imposes an unreasonable restraint "on trade" is illegal, void, and unenforceable. The statute does not define "trade," so it is unclear how this additional phrase would change the application of the law. However, given the overall purpose of the bill, one can speculate that the added language is intended to provide courts more leeway to strike down overly aggressive noncompetes.

On the other hand, noncompetes applying after an employee has left a company would become illegal, void, and unenforceable, regardless of whether they are otherwise reasonable under the current standard.

The bill does carve out a few exceptions for nondisclosure agreements and agreements which restrict the use of customer lists or the former employer's intellectual property. The bill defines "nondisclosure agreement" as an agreement that prohibits the "disclosure of personal information about an employer or principal or a customer of an employer or principal." A "customer list" is broadly defined under the bill as "any information about a customer that is not available to a competitor of an employer or principal" and includes "personal information and past purchases of goods or services from the employer or principal." These exceptions, especially the exception for "customer lists," would allow employers to still protect some business interests after an employee's termination.

The proposed bill is silent as to whether other exceptions currently recognized in Wisconsin— such as noncompetes entered into in connection with the sale of a business or in equity grants—would remain available.

Second, the bill imposes a notice requirement upon employers. If enacted, employers would be required to post a government-approved notice in a conspicuous place at the workplace and on their website. The notice would explain that noncompete agreements are illegal, void, and unenforceable, except as to the small exceptions for nondisclosure agreements, customer lists, and intellectual property.

The bill would not apply retroactively but would apply to all agreements entered into, extended, modified, or renewed on or after the date that the legislation takes effect.

Federal and state interest in regulating noncompetes

This bill comes on the coattails of other efforts to ban or restrict noncompete agreements at the federal and state level. At the federal level, the Federal Trade Commission (FTC) has proposed a rule which would ban or heavily regulate noncompete agreements. The FTC's final rule is expected in 2024. With similar intent, the National Labor Relations Board has issued guidance which states their view that some noncompete agreements violate the National Labor Relations Act.

States have also seen increased legislation on the subject. Currently, four states—California, Minnesota, North Dakota, and Oklahoma—have completely banned noncompetes. New York could join these states as a new bill banning noncompetes is currently waiting for Governor Hochul's signature. Other states limit noncompetes under a certain salary threshold or prohibit them in certain professions, like medicine or law. For example, Illinois bans noncompetes for employees earning less than $75,000.

Likelihood of passage

While similar legislation recently went into effect in neighboring Minnesota, AB481—which is sponsored solely by Democrats—faces an uphill battle in the Republican-controlled Wisconsin legislature. At this time, without substantial changes in the political landscape, it appears unlikely that this bill will become law.

What this means for you

However, given the potential for rapid change in this area on the federal level and in other states, it continues to be our recommendation that employers take stock of their current noncompete strategies to ensure they have flexibility to quickly adapt if proposed bans do take effect.

Contact us

If you have any questions about your business's strategies, contact Scott LeBlanc, Tom O'Day, Eric Locker, or your Husch Blackwell attorney.