

Client Advisory 2019-05: Maine Restricts Non-Competes

- 18% of all workers in the US are covered by noncompete agreements.
- 37% of workers are asked to sign a noncompete only after accepting a job offer.¹

It is within this milieu that, in “An Act to Promote Keeping Workers in Maine”, effective September 19, 2019 Maine joins a small but growing number of states restricting non-competition agreements.

This Advisory will highlight the components of Maine Ch. 513 (2019), a new law which will appear at 26 M.R.S. §599-A.

Other State Non-Comp Laws

Since 1872 **California** has declared void “...every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind”. Cal. Bus. & Prof. Code §16600.

Since 2012 **New Hampshire** has required that any non-comp be provided a prospective employee before accepting a job offer. N.H.R.S. §275.70. Effective September 8, 2019 New Hampshire has a new statute which voids any non-comp entered with an employee not earning over 200% of the federal minimum wage.

Massachusetts in 2018 passed legislation mandating that a non-comp be supported by a “garden leave clause” – during the restricted period employee must be paid at least 50% of the employee’s highest annualized salary. Mass. Gen. Laws Ann. Ch. 149, § 24L. “Garden leave” is borrowed from British employment contract practice – enabling a restricted employee to garden instead of competing.

New Maine Law

1. Non-comp Agreement Prohibited for Lower Wage Employees

An employer may not require or permit an employee earning wages at or below 400% of the federal poverty level to enter a non-comp. Currently, 400% of the federal poverty level is \$48,560.00 per year. The poverty level benchmark is adjusted annually.

2. Non-Competition Defined

Restricted non-comps include those which:

- Prohibit an employee from working in the same or similar profession; or
- In a specified geographic area for a certain period after termination.

3. Non-Comp must Protect Legitimate Business Interest

It has long been recognized in Maine that “protecting the employer simply from business competition is not a legitimate business interest” to be advanced by a non-comp. *Chapman & Drake v. Harrington*, 545 A.2d 645, 647 (Me. 1988).

¹ March 2016 US Department of the Treasury Study accessed at:

<https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>

The following are recognized as legitimate business interests which an employer has a right to protect using a non-comp, if not adequately protectable otherwise:

- a. Employer's trade secrets;
- b. Employer's confidential information; and
- c. Employer's good will.

4. Non-Solicitation Covenants Not Regulated

The statute carves out the following which are not restricted:

- a. A non-solicitation agreement;
- b. A non-disclosure agreement; and
- c. A confidentiality agreement.

We have long favored non-solicitation agreements (restricting who can be contacted) to prevent a departing employee from misappropriating what the employer paid him or her to develop for the company.

5. Disclosure and Time to Consider Required

An employer must disclose prior to making an offer that a non-comp will be required.

Employees must be given 3 business days' notice before being required to sign a non-comp. This is intended to allow review of the agreement and negotiation.

6. Effectiveness of Non-comp Delayed

Except for MDs and DOs, non-comps do not become effective until the later of:

- a. One year of employment; or
- b. 6 months from the date the agreement was signed.

7. Penalties

An employer who requires a non-comp of an employee below the wage threshold or who fails to disclose that a non-comp will be required commits a civil violation for which a fine of not less than \$5,000.00 may be assessed. The Department of Labor is responsible for enforcement.

8. No-Poach Provisions Prohibited

Such provisions often appear in franchise agreements – they restrict another franchisor from poaching employees. Such restrictions are also encountered in contractor-subcontractor agreements. Anti-poaching provisions are prohibited, and their use is subject to the above penalties.

This No-Poach law will appear at 26 M.R.S. §599-B.

Parting Thoughts

None of the above restrictions apply to non-comps entered before September 19, 2019.

The law does not include, as it arguably should, a carveout for non-competition covenants entered in conjunction with the sale of a business or the dissolution of a partnership or LLC.

Employers should carefully review any customarily used non-competition agreement to ensure compliance with this new law.

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