Understanding and Complying with the Virginia Statute Banning Covenants Not to Compete with Low-Wage Employees
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Post-employment restrictive covenants, such as confidentiality, non-solicitation, and non-competition covenants, are important tools used by insurance agencies to protect their legitimate business interests. Restrictive covenants play a crucial role in safeguarding the agency's confidential, proprietary, and competitively sensitive information. These covenants also help maintain and protect valuable relationships with clients, employees, contractors, vendors, and suppliers – relationships agencies invested great amounts of money, time, and other resources to develop.

The landscape of laws and regulations governing the use of non-competes and other restrictive covenants in the employment context is complex and continuously evolving. Earlier this year, a court blocked the FTC's nationwide ban on most noncompete agreements. In Virginia, non-competes and other restrictive covenants in employment are generally enforceable if they are narrowly tailored to protect the employer's legitimate business interests, do not unduly burden the employee's ability to earn a living, and are not against public policy. Courts evaluate these agreements based on their function, geographic scope, and duration.

However, Virginia law also includes a statute, Virginia Code Section 40.1-28.7:8, that prohibits the use of non-compete agreements with low-wage employees. Below is an overview of the statute, some compliance challenges, and a few practical considerations.

Overview

Low-Wage Employee. A "low-wage employee" is defined as someone whose average weekly earnings are less than the average weekly wage in Virginia. According to a Virginia Department of Labor and Industry (DOLI) notice, the average weekly wage in Virginia for 2025 is $1,463.10 per week (approximately $76,000 per year).[1] The definition applies to independent contractors, interns, students, apprentices, and trainees.

Covenant Not to Compete. A "covenant not to compete" is defined as "a covenant or agreement . . . that restrains, prohibits, or otherwise restricts an individual's ability, following the termination of the individual's employment, to compete with his former employer."

Prohibition. Employers are prohibited from entering into, enforcing, or threatening to enforce covenants not to compete with low-wage employees.

Exceptions. The statute expressly provides several exceptions that are useful to insurance agencies.

- *Commissions and Bonuses.* The statute expressly excludes from the definition of a low-wage employee, "any employee whose earnings are derived, in whole or in predominant part, from sales commissions, incentives, or bonuses." This likely exempts most

[1] Notice of the Average Weekly Wage for 2025 | DOLI

insurance producers, but likely does not exempt most validating producers and client service personnel whose compensation is predominantly a fixed salary or hourly rate, even if they receive some commissions and bonuses.

- *Non-Solicitation Covenants.* The statute states that a "'covenant not to compete' shall not restrict an employee from providing a service to a customer or client of the employer if the employee does not initiate contact with or solicit the customer or client." This appears to permit narrowly tailored "non-solicitation" covenants, but prohibits strict "non-acceptance" covenants.

- *Non-Disclosure Covenants.* The statute expressly states that it does not, "limit the creation or application of nondisclosure agreements intended to prohibit the taking, misappropriating, threating to misappropriate, or sharing of certain information, including trade secrets . . . and proprietary or confidential information."

Enforcement. The statute permits a low-wage employee to bring a civil lawsuit against a former employer that attempts to enforce a covenant not to compete in violation of the statute. In such a lawsuit, the court may void any covenant not to compete, enjoin its enforcement, and order payment of lost compensation, damages, and reasonable attorney fees. Employers are prohibited from retaliating against a low-wage employee for bringing a such a lawsuit.

Timing Challenge

Low-wage employee status is based on the employee's average earnings during the period of 52 weeks (or shorter period if the employee worked fewer than 52 weeks) "immediately preceding the date of termination of employment." From the date an employee is hired and signs a non-compete agreement, to the date his or her employment terminates, the employee's compensation amount may change, the proportion of compensation from commissions and bonuses may change, and the average weekly wage in Virginia may change. This creates a challenge for employers because it is impossible to predict with certainty when an employee is hired and signs a non-compete whether or not the employee will be a "low-wage employee" years later when their employment terminates.

Strategies to Address The Timing Challenge

Regular Monitoring and Adjustments. Employers should regularly monitor the average weekly wage updates from the Virginia DOLI, and avoid executing non-competition covenants with new employees whose compensation is unlikely to be exempt or exceed the average weekly wage. For employees with a non-compete, when the employee's employment terminates, evaluate whether or not they meet the definition of "low-wage employee" at that time, and if they do, provide them with written notice that their covenant not to compete is null and void and will not be enforced.

Proactive Compensation Planning. Employers can design compensation packages that are exempt from the statute because they are "derived, in whole or in predominant part, from sales commissions, incentives, or bonuses."

Auto-Adjusting Covenants. Consider implementing non-compete covenants that automatically adjust to be null and void and unenforceable if the employee meets the definition of "low-wage employee" when their employment terminates. Be aware that the effectiveness of such clauses has yet to be tested in Virginia courts, and written notice to the employee when employment terminates confirming that a non-compete covenant is null and void and will not be enforced may be advisable.

Forgo Non-Competes and Rely on Non-Disclosure and Non-Solicitation Covenants. With all the recent federal and state efforts to ban, limit and restrict the use of non-competes, many employers are forgoing non-competes and relying exclusively on other restrictive covenants, such as non-disclosure, non-solicitation, non-piracy and non-acceptance covenants. This can be an effective strategy, but those other restrictive covenants need to be carefully reviewed to ensure they are not so restrictive that they effectively operate as prohibited non-compete covenants.

Conclusion

By understanding all the various federal and state statutes, regulations and common law that govern post-employment restrictive covenants, and implementing the strategies described above, insurance agencies can effectively protect their valuable confidential, proprietary and competitively sensitive information and relationships with clients, employees, contractors, vendors and suppliers, and avoid costly, burdensome and distracting litigation with former employees.

For more information or assistance understanding and implementing effective and compliant post-employment restrictive covenants, contact Mel Tull, at Mel@TullLawPLC.com or (804) 404-7748. Mel advises insurance agencies and other companies on general business law matters, regulatory compliance issues, and buying and selling businesses, agencies, and books of business.

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