Podcast Transcript

The Emerging New Era for Noncompetes and Trade Secrets: Legislating Fairness: The National Movement Toward Legislation Regulating the Use of Noncompetes

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Rubenking: The restriction and legislation of noncompete agreements is gaining traction around the country. In July, President Biden signed an executive order that discussed the regulation of noncompete agreements which in the past has only been the province of the states. To stay ahead of the game, both employers and executives need to know what changes to expect and how to best prepare for the future. To help bring all this into focus, we've created a six-part series called The Emerging New Era of Noncompetes and Trade Secrets. I'm Randall Rubenking and you are listening to BakerHosts. Our fourth episode, Legislating Fairness, The National Movement Toward Legislation Regulating the Use of Noncompetes, explores the recently adopted or amended laws in ten states and the District of Columbia that are aimed at taking steps to curb the use of noncompetes for low wage workers. Our guests today are partners Marc Antonetti and Sabrina Shadi and associate Chardaie Charlemagne, members of BakerHostetler's Noncompete and Trade Secrets team. Let's listen in.

Siegal: My name is John Siegal, and together with my co-group lead Joyce Ackerbaum Cox, today's topic is probably the most current and the most rapidly changing area, which is changes in state legislation governing noncompetes. As you'll hear, since the adoption of the Defend Trade Secrets Act in 2016, over a dozen states have passed statutes regulating the use of noncompetes, and as you'll hear, this is an area where there's a real regionalization of law and economy with great variations between states and even between regions, and is really a classic current version of what Justice Brandeis referred to as the states being the laboratories of democracy, where legislative and regulation changes are being tried out on the state level, and we'll see over time the impact of those changes on the law and on the economy.

We have three of our noncompete lawyers today with us, Marc Antonetti, Chardaie Charlemagne, and Sabrina Shadi, who will each speak to legislative changes in particular regions of the country, starting with Marc, who is an employment litigator and counselor in the BakerHostetler Washington, D.C. office, and then we'll continue to Chardaie, who's going to speak about Massachusetts and Illinois, and then out to Sabrina in LA, who's going to cover the entire Pacific Rim. And we're going to do all this in 30 minutes, so buckle up and here we go. Marc, what's going on with noncompete legislation in the mid-Atlantic states?

Antonetti: Hi John. Here in the DMV, which is to say the District of Columbia, Maryland and Virginia, it could be the Department of Motor Vehicles. We have, or at least each jurisdiction has, enthusiastically embraced the idea of limiting noncompetes, with Maryland and Virginia implementing total bans on noncompetes depending on income levels, and D.C. pursuing fitfully over the course of last year a total near-total ban of noncompetes regardless of income levels.

Siegal: So, let's start with Maryland. What's happening there?

Antonetti: Well, Maryland was the state that got us kicked off on this jag of going after noncompetes in the region, and they did that on October 1, 2019 with the implementation of a ban on noncompetes being used with low wage workers. In Maryland, noncompetes can be used with employees, cannot, cannot be used with employees who earn less than $15 an hour or less than $31,200 per year.

Siegal: So, one of the things we're going to do as we travel across the country is look at the common elements of these statutes, and then the particular quirks in each jurisdiction. Are there any quirks about the Maryland law that people should know about?

Antonetti: Yeah. Most significantly, the Maryland law applies retroactively, and it renders noncompetes that violate the law null and void as being against the public policy of the state. Additionally, the Maryland statute applies whether or not the employer and employee entered into the employment contract or a similar document or agreement in the state. Thus, you can see by using the words null and void that there is a strong public policy provision in the statute against the noncompetes being used with low wage workers, and that was probably in reaction to the well-known Jimmy Johns case that's out there. And the other part of it that's significant there is that it addresses whether or not the employee and the employer entered into the contract within the state of Maryland.

That means that a contract entered into outside of the State of Maryland also can run afoul of this Maryland provision, so if you're an employer, let's say in West Virginia, and somebody comes across the Potomac River and is now working in Maryland and you're attempting to enforce your noncompete against them, that could be an issue. And Maryland might say even if you choose West Virginia law to govern your noncompete, given the strong public policy of the law in Maryland, it might not enforce that even with your choice of law clause given that strong public policy.

Siegal: Mark, does the Maryland law restrict agreements with respect to other employer proprietary or property interests such as a client list or the other kinds of things that, you know, a lot of…

Antonetti: Right.

Siegal: …us try to use noncompetes to protect against?

Antonetti: No, it doesn't, and in fact the statute itself specifically carves out those kind of confidentiality clauses as something that is still potentially valid in Maryland. Now I think what you're going to hear today across the program is that you can't just use a cookie cutter agreement. You're going to have to look at each state's specific laws.

Siegal: Right. So okay, let's cross over now to Virginia. What's happening there?

Antonetti: Virginia wasn't going to be outdone by Maryland, and the year after the Maryland statute came out, Virginia in 2020 implemented a similar ban based on wage levels, but it's more expansive and sets the wage level a lot higher.

Siegal: What is the Virginia wage level threshold and the statute for prohibiting lower income in noncompetes?

Antonetti: Well, I'll read to you what the statute says. The Virginia law says no employer shall enter into, enforce, or threaten to enforce a covenant not to compete with any low wage employee, but it doesn't quite say what the low wage number is. Instead, what they do, and it's a different concept than Maryland, they don't use a fixed number. Instead, they say low wage employee means an employee whose average weekly earnings calculated by dividing the employee's earnings during the 52 weeks immediately preceding the date of termination of employment by 52, or if the employee worked fewer than 52 weeks, by the number of weeks the employee was actually paid during the 52-week period, are less than the average weekly wage of the Commonwealth as determined pursuant to Subsection (b) of Section 65.2-500. So, that's the answer to your question specifically, John.

Siegal: Yes, so I'm not sure that any employee or probably even almost any employer who's not an accountant could understand that. Can you translate that so the people that we're teaching here who are in business can figure out what the heck they should do?

Antonetti: Right, completely impractical is the answer that the Virginia statute provides. So, you have to actually do a little bit of digging, and that does involve going onto the different websites, and the target constantly changes because every year they recalculate what the average weekly wage is in Virginia. So for this year, the number is actually quite high because Virginia's actually got very high wage earners here in the northern part of the state.

It's $1,195 per week, which comes to $62,140 per year for the year 2021, and Virginia actually puts together a little notice, and you can find it on their website, and you're supposed to actually post this thing that talks about how you can

figure out what the low wage earner is making. And on one of the websites you can then get what the average weekly wage is for Virginia in that particular year, so it's a moving target and it's a pretty high number for a what is otherwise called a low wage worker.

Siegal: Does the Virginia law apply retroactively?

Antonetti: Now, that's one of the ways in which the Virginia law is better than the Maryland law. It is proactive in approach so that it applies to contracts that are entered into on or after July 1, 2020, so if you have an existing agreement that existed before July 1, 2020 you should be okay, but you wouldn't be able to discern this from the statute. The only place you see that fact about retroactivity is in the legislative history, and you have to look at what it was actually passed as. There's a little footnote there, and that's where you get that's only prospective in scope.

Siegal: Are there other requirements that employers should know about in Virginia?

Antonetti: Right. As I mentioned earlier, there are some posting requirements about the law, and employers can't retaliate against employees under the law.

Siegal: What does that mean? I mean, can employees bring a private right of action for violations of this law?

Antonetti: Yes, they can, and they have two years to do it, and there are four different time periods that the statute of limitations can run from, and it is the latter of whatever one of those would apply. And there are, in addition to the private right of action, there are civil penalties available to the Commission of Labor in Virginia, which include $10,000 for each violation of the law, and if you don't make the posting, there are additional penalties that are lower, but for failing to make the required posting. So, there can be actually quite high consequences to violating the Virginia law.

Siegal: Is there anything else that people should know about Virginia?

Antonetti: Yes. Well, first off, given that there are civil penalties in the act, you know you might infer from that again, that Virginia might not honor a choice of law clause given the strong public policy in the state, as reflected by that $10,000 per violation penalty. But even leaving the statute aside, Virginia was already a hard place to enforce a noncompete agreement, so for even those contracts that you have that are more than the $62,000 or $63,000, let's say, per year, you know, you have the potential with judicial decisions eviscerating both the blue pencil rule. You don't get the blue pencil rule in Virginia, so the court's not going to help you out by correcting what the noncompete says.

There has even been some decisions which suggest that if you have a blue pencil provision in the contract, that might itself make it unenforceable, some controversy around that. But it was already difficult to enforce the noncompete in Virginia, because if you make it too broad, like you say you can't work with our competitor, the Virginia court might strike that down because they'll say well,

you're saying that this lawyer can't go work as a janitor for the competitor? Well, Virginia's not going to enforce that, you know. It has to be like, a similar job that you're banning that noncompete for.

You know, the only other thing I might add, is like the Maryland law, the Virginia law has the saving grace of protecting nondisclosure agreements that protect against the disclosure of trade secrets, confidential information, and the like. You know, I'd rather be in Maryland than Virginia, but between the two, I regard this region as potentially a good environment to pirate employees from your competitors.

Siegal: So, what about the state law in the District of Columbia?

Antonetti: Yeah.

Siegal: D.C. offer a safe haven for employers or how does it treat these issues at this point?

Antonetti: Right. Well John, you're completely right. Taxation without representation, and here in the District is wrong. You know, we're waiting to get our representation too, but for now, D.C. is a safe haven in that it has a statute that is not yet in effect. D.C. this past year looked to implement what would though be the strongest perhaps noncompete ban in the country, and earlier this year we were set to have a total ban on noncompetes except for some very, very limited carve-out with some additional aggressive provisions in it that we're going to talk about. Business interests got a little bit upset, I think with this. Often, the D.C. City Council does things under the radar, and then all of the sudden a new law is on the books and then people are worried about what it means. So, the date for its effective date has been pushed back to April 1 of 2022, so there are a few months left in which you could still have the noncompetes because it's generally regarded the D.C. law won't be retroactive.

Siegal: So, when it does go into effect, if and when, are there other requirements under the D.C. ordinance that folks should know about?

Antonetti: Yes, a number of them. First off, there is a carve-out for medical professionals, medical specialists, if they make more than a quarter of a million dollars a year. That's one. Two, employers must provide a notice about the D.C. law within 90 days of the statute becoming applicable, within 7 days of an employee joining the company, and within 14 days of an employee requesting to receive a notice.

So you know, when an employee starts, you're supposed to hand them something that talks about the D.C. noncompete law. They actually have specific language in the statute and you need to do that. A place where an employer might get tripped up in April is that they forget that they need to do this within 90 days of implementing it, and so, you know, this is something you've got to gear up for, for April 1, is to hand out these notices to all your employees.

Siegal: And what happens if you're an employer and you don't do that?

Antonetti: Well, there is a civil penalty, and you know, it ranges between $350 and $1,000 per violation, and there are higher amounts that are out there in retaliation cases. Like Virginia, D.C. has an anti-retaliation provision in the statute.

Siegal: Are there any other quirks about the D.C. law prospectively that should be on people's radar screens?

Antonetti: Yeah, and this is a big one, that people, you know, might not expect, and it may be this provision that stirred up the most controversy. Under D.C. law, there is a moonlighting provision. Now, you might know what a moonlighting provision is. It's, you know, where you forbid people from working for other employers when they're working for you. Under the D.C. law as written, no employer may have a workplace policy that prohibits an employee from one, being employed by another person, two, performing work or providing services for pay for another person, or three, operating the employee's own business.

Thus, an employee could work both for you and your competitor at the same time under this provision. You know, employers who have offices in D.C., and many companies do, need to check the handbook. This is another example where cookie cutters just don't work, and see what their policies say about moonlighting. And if they have an anti-moonlighting policy in it, they probably need to carve that out for D.C.

Siegal: So as we're seeing, this stuff is complicated state-by-state, and fair warning, we're probably going to go over the half an hour just to run through all these states, but we want to try to cover everything and do it quickly. You mentioned a couple times about the possibility of the statute being modified or not taking effect until next April. What does that mean? What is the situation, and is it a done deal, or what?

Antonetti: Right. Well, the city council probably will be holding some additional hearings on this and the business interests have put some pressure especially on the moonlighting provision to make it such that there is a conflicts of interest type of carve-out on that. So, you will not have one law firm employing, say, a legal secretary during daytime hours and then they go across the street in the evening and work for another law firm. I mean, that creates problems from conflicts perspectives and otherwise, so there will probably be something like that. I would anticipate though, that the full-on ban will stay in effect but the moonlighting clause might change. In short, stay away from this area if you want to enforce a noncompete.

Siegal: Alright, let's head northeast, and Joyce, do you want to take it up from there?

Cox: Sure, and I think Marc, just from the few examples that you gave in the three localities that you discussed, it really reinforces what we're gonna continue to hear, which is every state, not only can we not do cookie cutter, but every state is going to have to be individualized with respect to these agreements, and it's going to bleed over into employer handbooks and other policies and procedures. So, I'll pick it up here and I would like to turn to you, Chardaie, to talk about

Massachusetts. Let's start there, and how does that law, how is it similar or different in anyway to the laws that Marc just discussed in the DMV area?

Charlemagne: Yeah, so Massachusetts has also taken steps to limit noncompetes. However, unlike Maryland or Virginia they have not implemented a wage-based noncompetition ban. Instead, Massachusetts has a comprehensive statute that provides for very specific requirements for valid and enforceable noncompetes. That statute is the Massachusetts Noncompetition Act, the MNCA. It applies to all noncompetes entered into, on, or after October 1, 2018. Given our limited time, I am only going to provide a high-level overview of some of the important key requirements under this statute, and first we're going to start with under the MNCA. If a noncompete is entered into at the start of an employee's employment, the noncompete must be in writing, it must be signed, and it must expressly state that the employee has the right to consult with counsel prior to signing the agreement.

If the noncompete is entered into after the commencement of employment, consideration is required. It still has to be in writing, it still has to be signed, it still has to expressly state that the individual, the employee, has the right to consult with counsel. However, there is a consideration requirement. The consideration must be fair and reasonable and it must be independent from the continuation of employment. So I guess the sense, the thought is, that after you've already started working you need a separate form of consideration outside of the continuation of your employment, whereas if you enter into the noncompete prior to starting your work, that is considered the consideration.

Previous requirements that noncompetes be no broader than necessary to protect the legitimate interests, that still applies. Noncompetes still must be reasonable in scope and geographic reach. That still is applicable, and importantly, noncompetes cannot be longer than 12 months. There are some exceptions for employee breaches if an employee breaches a fiduciary duty or if the employee has unlawfully taken some physical or electronic property of the employer. The noncompete restricted period can be extended by an additional 12 months so it can go up to two years. However, generally, noncompetes cannot be longer than 12 months.

Cox: And 12 months is a pretty short period of time, certainly shorter than a lot of our other states, including the one I sit in, in Florida have on the books and I think it's very interesting certainly that you have to set forth a requirement that counsel needs to be consulted prior to signing. It also has some very interesting carve-outs with respect to categories of employees. Can you talk about who can be subject to noncompetes in Massachusetts under this law?

Charlemagne: Yes. The MNCA banned noncompetes entirely as to non-exempt employees under the FLSA. Students who are interning while they are in school cannot fall under the noncompetes, cannot be subject to a noncompete. Employees aged 18 or younger are not subject to noncompetes, and employees that are laid off or otherwise terminated without cause cannot be subject to noncompetes.

Cox: Okay, what other interesting, as John used, the words quirks, or things should we know about under the MNCA?

Charlemagne: Yeah, similar to what Marc mentioned, employers cannot avoid limitations with choice of law provisions specifically in the MNCA, so an employer cannot just enter a choice of law provision saying another states law applies if the employee has been a resident of Massachusetts for 30 days at the time of termination. Additionally, going back to the consideration point, noncompetes must be supported by either a garden leave clause or other mutually agreed upon consideration. The garden leave clause essentially provides a guaranteed payment throughout the restricted period of at least 50% of an employee's average base salary in the last two years that they were employed, so, there is some form of consideration. Either it's coming the garden leave clause, which is ensuring that during the restricted period the employee is still receiving at least 50% of their average base salary, or there has to be some other mutually agreed upon consideration. The interesting thing with the other agreed upon consideration, mutually agreed upon consideration, it's undefined by the statute. It hasn't been interpreted by any of the case law yet, and so it is unclear what would be considered sufficient to sufficiently mutually agreed upon consideration.

There is a question as to whether or not the garden leave clause which guarantees a 50% payment throughout the restricted period, it's questionable whether or not that 50% is the baseline that's required for all consideration whenever you enter into a noncompete, and whether or not the other mutually agreed-upon consideration thus has to meet that 50% threshold, or if the other agreed-upon consideration can be something less than 50%. It's unclear. The statute doesn't define it and the case law hasn't had a, the courts haven't had a chance to go at it yet. So, that's going to be an interesting area to explore in the future.

Additionally, noncompetes under the MNCA, they include forfeiture for competition agreements. So, forfeiture for competition agreements basically just impose any adverse financial consequences on a former employee if the employee goes and works for a competitor. So, those are covered under the statute, but the statute does not include non-solicitation agreements or noncompetition agreements made in connection with a sale of business or an entity. The statute also does not apply to agreements made outside of an employment relationship. It doesn't apply to confidentiality or invention assignment agreements, and it also does not apply to noncompetition agreements entered into as part of a separation agreement from employment. However, the employee does have seven days to revoke acceptance in that instance. So, those are some of the interesting agreements that are not included under the statute. I think the fact that non-solicitation agreements are excluded is interesting because they are treated differently.

Cox: And I think that the issue of how the consideration piece is going to work out is also going to be very interesting, and you mentioned about the garden leave. We're seeing that definitely as a trend in terms of different things that employers are adding to kind of lessen the burden. I think that's one of the kind of more

national trends that we're seeing, but more remains to be seen on that. If we could, Chardaie, let's move on to Illinois. Have they similarly jumped on the bandwagon in terms of putting in significant restrictions like Massachusetts?

Charlemagne: Yeah, so Illinois is interesting. I think it has taken parts of Massachusetts structure, but also parts of like the Maryland and Virginia structure. So in Illinois, there's the Illinois Freedom to Work Act. So, this act was originally past in 2017 and it was very simple, a very narrow statute that was basically a wage-based noncompetition ban. It basically just restricted the use of noncompetes with low wage workers. There have since been edits to the statute. It's been amended and it's going to come into play January of this upcoming year. The new statute, the amended statute will be much more expansive. They've taken out the restrictions with regards to low wage earners and I have just applied it to employees across the board and they've set some certain income thresholds for the ban.

So, currently with the new statute, employers are prohibited from entering noncompetes with employees earning less than $75,000 annually. The earnings include the salaries, bonuses, commissions and any other form of taxable compensation, and the threshold is set to increase to $80,000 in January of 2027, and then every five years thereafter through 2037. The statute also adds a disclosure requirement and consideration period for employees, so like Massachusetts they must advise employees in writing that the have the right to consult with counsel prior to signing, but additionally the employees must be given 14 days to review the agreement prior to signing.

A noncompete under this statute is illegal unless the employee receives adequate consideration, the covenant is ancillary to a valid employment relationship, the covenant is no greater than is required for the protection of a legitimate business interests, the covenant does not impose undue hardships on the employee, and the covenant is not injurious to the public. So similar to Massachusetts, there are some of these factors that we've seen before in cause law in terms of the scope and the noncompete not being overly broad and being related to a legitimate business interest. And similar to Massachusetts, we have this adequate consideration factor again that's included in Illinois.

The statute attempts to define adequate consideration. Adequate consideration is defined as at least two years of continued employment after the agreement is signed or another form of consideration sufficient to support a noncompete. Again, when you get to this phrase, regarding another form of consideration sufficient to support a noncompete, it's undefined. And so it has that similar question mark as Massachusetts in terms of what would be considered sufficient in the future. It's not entirely clear. The statute also specifically gives the Illinois attorney general enforcement powers for civil penalties, so the attorney general can investigate any employee it believes is engaged in a pattern or practice prohibited by the act. The attorney general can request that the court impose civil penalties of $5,000 for each violation or $10,000 for each repeat violation within a five year period.

Unlike Massachusetts, Illinois specifically limits the use of non-solicitation agreements as well under their statute, so Illinois similarly applies an income threshold requirement for non-solicitation restrictions. Non-solicitation restrictions are prohibited for employees who earn less than $45,000 a year and scales up similar to with regards to noncompetition agreements. It scales up to $47,500 in the year 2027 and then increases again every five years thereafter. The last interesting thing about the Illinois statute is, it's coming into play in January. It hasn't quite been applied yet, but it also includes a COVID clause which basically says you can't have a noncompete, a noncompete is unenforceable if it's against an employee who was terminated or furloughed or laid off as a result of COVID-19 or circumstances similar to COVID-19, so…

Cox: That's interesting, and again, a lot of different highlights and things for employers to consider. Okay, well we are going to move out west to our partner Sabrina Shadi who is sitting in LA to kind of talk about the variety of states, California, Nevada, Oregon, and Washington. Sabrina, do you want to pick up here with John?

Siegal: I just want add in to response to a question that someone posted. We are talking here by in large about employment-based noncompetes. Noncompetes in the case of the sale of business are going to be in almost every state subjected to different rules, and so if you're dealing with a noncompete ancillary to sell a business, you will need to look specifically at the state law that governs and generally are not going to be affected by these regulations and limitations that we are discussing. Now Sabrina, you know, we typically have not included you in these noncompete discussions because you practice in California, but we might as well start in California before we take the tour of the Pacific Rim. You know, at a high level, what do you need people to know about California starting out?

Shadi: Sure, it is a place that most employers do hold near and dear to their hearts absolutely, and not surprisingly our noncompete laws are the most extreme. The basic law here is that noncompetes are banned except in a very narrow set of circumstances, which to the point you were just making, tied to the sale of a business. So, we do have this narrow exception if someone is selling the good will of the business or all of their ownership in a business. Then, you know, we have this idea that if you are a buyer of the business you do not want the person you just purchased from to set up shop in your backyard and start competing against you, so we do recognize that narrow exception. The idea is that you should get the benefit of the bargain. As you may imagine, we do see disputes regarding how much of much of an ownership interest is enough and whether good will was tied to the sale, and so with employees who sometimes just have some level of stock ownership but it is not necessarily significant enough to also have the good will associated with it.

That is where we tend to see tweaks and litigation over whether or not that noncompete can be enforced even though it was purportedly associated with the sale of an ownership interest in the business. A lot of employers have tried to get around California law with choice of law and venue provisions, and historically our courts would just not apply the out of state choice of law or venue provisions,

if you ended up in a California court, we have a lot race to the courthouse situations. It is considered to be such a strong public policy consideration that those choice of law provisions for an out of state choice of law were being ignored. And so, eventually the legislature took matters into its own hands as it is prone to do here in California, and as of January of 2017 an employer cannot require an employee to sign an employment agreement that requires out of state choice of law or venue, with the exception being that if you have your own individual counsel who is advising you on that agreement with those provisions, then you can. So, you're really looking at a narrow group of people probably high level executives who have counsel of their own helping them negotiate employment agreements if they will be working here in the state.

Another thing for people to know, which I realize that sometimes people don't realize, is that California courts also consider a covenant not to solicit a customer essentially the same as a noncompete, and so those are considered unenforceable here as well. Covenants not to solicit employees in employment agreements historically were considered to be enforceable, and we're starting to see a little bit of change in that area and we do have some courts that are also refusing to enforce those under the same concept, essentially that they feel that it is a form of anticompetitive activity in the labor market, essentially. So, you really have to be careful with a non-solicit of employees. Now you shouldn't assume it will get enforced. It will really depend on the court and the circumstances.

Siegal: Great, that is very helpful. So, crossing over the high Sierras, what is happening in Nevada?

Shadi: So, in Nevada, you know, you have a place where it's very clear who is lobbying and who is getting what they want in the legislation. If you hear some dice rolling and cards being shuffled, that'll be a clue to you who is making things happen in Nevada. It is a state, historically, that has allowed noncompetes and applied reasonableness type standards that we are used to seeing in other states that allow noncompetes. There is a prohibition though, historically, on restricting a former employee from providing services to a former customer or client if the employee did not solicit the former customers or clients, and of course if the customers and clients voluntarily choose to leave one business to go to another, and if the former employee generally complies with other provisions in the noncompetition covenant. Also, similar to what we heard with some other states, if an employer terminates an employee due to a workforce reduction, a re-org, some other type of similar restructuring, then a noncompetition agreement would only be enforceable during the time where you have a salary continuation, severance payment, etc.

So, when those separation related payments are done. then you don't have the enforceable noncompete and the involuntary term that happens under those circumstances. However, effective October 1 of this year, pursuant to a bill AB47, a noncompete agreement can no longer apply to an employee who is paid solely on an hourly wage basis exclusive of any tips or gratuities. So, I wonder who pushed that one through?

In addition, employers under the new recently amended law may not file an action to restrict a former employee from working for a prior customer or client. Again, if the employee did not solicit former customers or clients, the customers and clients voluntarily chose to leave, and the former employee generally is complying with other terms of the noncompetition covenant. Under the new law also, employees can now recover attorneys fees and costs if they challenge a noncompetition covenant or if the employer seeks to enforce one against them that's prohibited by the current law.

Siegal: Okay, what about Oregon?

Shadi: The Oregon's laws kind of look and feel a little bit more like some of the laws we heard about on the other side of the country that Marc spoke about. So, and they've had some recent legislation in Oregon to update, so the current statute provides that a noncompetition agreement is voidable, and this is important because it's where part of the change is tied to. So, currently it's voidable and may not be enforced by a court unless the employer advises the employee in a written employment offer at least two weeks before the first day of employment and a noncompetition agreement is required, or if it's signed upon a bonified advancement, a promotion by the employer, if the employee is exempt from minimum wage and overtime laws.

So again, we're looking a little bit like the way Illinois was in terms of protecting those lower wage earners, those hourly earners. They can't be held to a noncompete if the employer has a protectable interest such as when an employee has access to trade secrets or competitively sensitive confidential information. So, they want to make sure you're really limiting it to people who do have the potential to actively compete with you because what they know, what they've had access to. Also, the employee has to make more than the median family income for a family of four, as determined by the U.S. Census Bureau. The duration of the noncompete couldn't exceed 18 months, and the employer has to provide a signed, written copy of the noncompetition agreement to the employee within 30 days after the termination of employment, if that's the context it's being provided.

Earlier this year, Oregon passed Senate Bill 169, and it's effective as to agreements that are signed on or after this coming January 1. So, it reduces the maximum length of the post-termination noncompete to 12 months, so it went from 18 to 12 as of January 1. And with limited exceptions, it requires that the employee subject to the noncompete has to be earning at least $100,533, so essentially, you know, that the person has to be making at least six figures is an easy way to think about it. And this rate will be adjusted annually for inflation, which is something we see in other states as well. I'll just note finally that the statute does not apply to a covenant not to solicit employees or to solicit or transact business with customers.

Siegal: I don't want to imply that we're comprehensively covering every state that has a new statute. For instance, we're not covering Hawaii, although we're certainly glad to go there for you, but you know, this is a sampling of the states that have

new statutes. And then of course, there are states like Florida, Georgia, that you know, have had prior statutes and active previously, where they're also very specific statutory regulations. But at least last for today's tour, Sabrina, can you talk about Washington and what people need to know about noncompetes in the state of Washington?

Shadi: You bet, and you're going to see similar trends here in Washington as we've heard in other parts of the country, particularly with income based restrictions. So you know, Washington, which often follows California's lead on employment laws, does limit noncompetes, but I think takes a somewhat more reasonable approach. So, a noncompete in Washington can only bind a Washington employee who earns more than thresholds that are established by the statute, and those are adjusted by inflation. This year, that amount is $101,390, and it will go up for 2022 to $107,301 and change, so a little over $107,000 for 2022.

One way in which Washington is similar to California though, is that a provision in a noncompete agreement signed by a Washington based employee is void and unenforceable when it requires an out-of-state choice of venue or choice of law. Washington state also just has a few other additional interesting provisions that I thought were worth noting. Franchisors, they cannot prevent franchisees from hiring employees of the franchisor or other franchisees of the same franchisor, so that's an interesting twist in the state of Washington.

Employers are also generally not permitted to prohibit employees who are earning less than twice the state minimum wage from having additional employment. I know Marc had spoken about this moonlighting provision, so you cannot keep someone based on their income potentially from working for another employer unless you can show that the services that the employee is going to perform raise safety issues or interfere with the reasonable and normal scheduling expectations of the employer.

Cox: Well, that is enough to make mine and I'm sure everyone else's head spin. I'm glad a lot of you stayed with us through the conclusion of the program. I think what is very clear is that international employers are going to have a lot of work to do to either amend agreements, individualize them per state, make a choice to keep a national agreement with an understanding that it's not going to be enforceable in many different locations, or try to parse out into particular regions where they're able, but there's a lot of different considerations that go into place here. Certainly, one size does not fit all.

Rubenking: Thank you Marc, Sabrina, and Chardaie. If you have any questions for them, their contact information is in the show notes. Please join us next time for Episode 5, Nationalizing Competitiveness and Noncompete Law, Criminal Antitrust, and Federal Efforts to Curtail No-Poach and Noncompete Agreements. Partners Anne O'Brien and John Siegal will discuss the executive order issued on July 9, 2021 aimed at promoting competition in the American economy, specifically encouraging the Federal Trade Commission to regulate noncompetes. As always, thanks for listening to BakerHosts.

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