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Client Alert

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Florida Poised To Enact Employer-Friendly Noncompete and Garden Leave Law

By Julie Levinson Werner and Amy C. Schwind

A bill recently passed by the Florida House and Senate and poised to become law effective July 1, 2025, will substantially change the noncompete landscape for employers doing business in Florida. If Gov. Ron DeSantis signs the bill into law as expected, the Florida Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth (CHOICE) Act will provide employers with increased confidence in the likelihood of enforcing two types of noncompete-related provisions under Florida law. While in recent years, many states have moved toward curbing – or in some cases outright prohibiting – noncompete agreements with employees, Florida has taken a substantially different approach that is much more pro-business.

First, the CHOICE Act provides that a noncompete agreement will be fully enforceable if all the following apply:

- The post-employment noncompete period is for four years or less and is confined to the geographic area "defined in the agreement."
- The covered employee agrees not to assume a role with or for another business in which the employee would provide services similar to the services provided to the employer during the three years prior to the end of employment, or in which it is reasonably likely the employee would use the employer's confidential information or customer relationships.
- The employer informs the covered employee in writing of the right to seek counsel before signing the agreement and the employee has at least seven days to review the agreement before signing it.
- The covered employee acknowledges in writing that in the course of employment, the employee will receive confidential information or customer relationships.
- The noncompete period is reduced day-for-day by any nonworking portion of a garden leave period, if applicable.

Under the CHOICE Act, a "covered employee" is an employee or contractor who earns or is reasonably expected to earn a salary greater than twice the annual mean wage of the county in Florida in which the employer has its principal place of business or, if the employer's principal place of business is not in Florida, the county in Florida in which the employee resides. Health care practitioners are subject to a different Florida statute and are excluded from the CHOICE Act.

Second, the CHOICE Act also specifically addresses garden leave – a period of time in which an employee remains employed but generally is not required to perform any work and is still paid the employee's salary and benefits in return for not accepting competitive employment elsewhere. The CHOICE Act provides that an employer may place an employee on garden leave for up to four years (the Notice Period) and such agreement will be fully enforceable if all the following apply:

- The employer continues to pay the covered employee the same salary (excluding incentives like bonuses or commissions) and benefits during the Notice Period; however, the employer can reduce salary or benefits during the Notice Period if the covered employee engages in "gross misconduct."
- The employer informs the covered employee, in writing, of the right to seek counsel before signing the agreement and the employee has at least seven days to review the agreement before signing it.
- The covered employee acknowledges, in writing, receipt of confidential information or customer relationships.
- The garden leave agreement provides that (1) after the first 90 days of the Notice Period, the covered employee does not have to provide services to the current employer; (2) the covered employee may engage in nonwork

activities at any time, including during normal business hours, during the remainder of the Notice Period; (3) the covered employee may, with the employer's permission, work for another employer in a non-competitive capacity while still employed by the current employer during the remainder of the Notice Period; and (4) the Notice Period may be reduced during the Notice Period if the employer provides at least 30 days' advance notice.

In other words, if the bill becomes law, an employer could theoretically place an employee on garden leave and pay the employee for up to four years not to work in a competitive capacity or could implement a post-employment noncompete of up to four years without payment if the above statutory requirements are satisfied.

Employers are entitled to significant protection under the proposed new law. In the case of either a noncompete or a paid garden leave clause, the CHOICE Act *requires* courts to issue an injunction against a breaching employee or his/her new employer, and the court may only modify or dissolve the injunction if the covered employee or new employer can prove certain elements. A prevailing employer is also entitled to recover all available monetary damages and reasonable attorneys' fees and costs.

The CHOICE Act applies to covered noncompete and garden leave provisions with (1) a covered employee who maintains a primary place of work in Florida, regardless of any applicable choice-of-law provisions, or (2) a covered employer whose principal place of business is in Florida if the agreement is expressly governed by Florida law. The CHOICE Act further states that if any provision of the CHOICE Act is in conflict with any other law, the CHOICE Act will govern. This has the potential to create a complex situation if, for example, the employee lives in a state that does not permit noncompetes.

To be clear, the CHOICE Act does not amend Florida's current noncompete statute, which generally permits noncompetes if they are reasonable in time, area, and line of business. Instead, the CHOICE Act adds new protections for employers to gain greater certainty regarding enforcement of noncompete and garden leave provisions. If the restrictive covenant doesn't meet the specific requirements of the CHOICE Act, the restriction would then be analyzed and assessed under Florida's existing law, which also is employer friendly.

If enacted, the CHOICE Act will provide a substantial shift in noncompete law and allow those employers with a nexus to Florida – either because the employer is based in Florida or because the employee lives there – to considerably improve their chances of restricting an employee from being able to work in a competitive capacity for up to four years.

Lowenstein Sandler's Executive Compensation, Employment & Benefits Group is readily available to assist employers with updating their restrictive covenants and with any other employment law matters.

Contacts

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