

Virginia's New Non-compete Laws

New prohibition on “low-wage” non-competes, including financial liability to employers who violate the prohibition

Employers who require all employees to agree to non-compete agreements are required to change their practice. Non-competes are unenforceable against “low-wage employees” (including some independent contractors), Requiring or enforcing such non-competes may expose the employer to substantial monetary liability. The law applies only to covenants not to compete entered into on or after July 1, 2020.

Under this new law, a prohibited “covenant not to compete” is any contractual provision that “restrains, prohibits, or otherwise restricts an individual’s ability, following the termination of the individual’s employment, to compete with his former employer.” The legislature intended for this new law to limit both traditional “noncompete” clauses and “non-solicitation” provisions. This new law specifically notes that employees must be allowed to continue servicing former clients or customers under any “covenant not to compete” so long as the employee “does not initiate contact with or solicit” the customer or client.

Employers may, however, still enter confidentiality agreements with employees to protect trade secrets or other confidential information.

Prohibition on “low-wage employee” non-compete agreements. An employer may not enter into, enforce, or threaten to enforce a “covenant not to compete” against any “low-wage employee.”

- A “low-wage employee” is an employee or independent contractor (if paid by the hour) whose average weekly earnings are less than the average weekly wage in Virginia. NOTE: Effective July 1, 2020, that amount is \$1,137 per week (or \$59,124 per year).
- Low-wage earners include interns, students, apprentices or trainees employed “in order to gain work or educational experience,” as well as independent contractors who receive hourly compensation that is less than the overall median hourly wage for the state.
- Low-wage employees do not include employees paid in whole or predominant part from sales commissions, incentives, or bonuses.
- A “covenant not to compete” is an agreement “between an employer and employee that restrains, prohibits, or otherwise restricts an individual’s ability, following the termination of the individual’s employment, to compete with his former employer.”

Public enforcement. The Commissioner may impose a civil penalty of US \$10,000 for each violation of the prohibition on low-wage worker non-competes.

Private right of action. If an employer tries to enforce a non-compete against a “low-wage employee,” the employee may sue the employer in court and receive an order voiding the covenant, along with “all appropriate relief,” which can include an injunction, liquidated damages, lost compensation, attorneys’ fees, expert fees, and costs.

Confidentiality agreements. The law does not affect the enforceability of standard confidentiality agreements, such as those designed to prohibit sharing and misappropriation of trade secrets and proprietary or confidential information.

Unsolicited business restrictions. A covenant not to compete may 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.”

Anti-retaliation. The law prohibits retaliation as a result of an employee bringing a civil action to enforce rights under this law. Employers may be liable for a civil penalty of \$10,000 per violation for entering, enforcing or threatening to enforce any prohibited restrictive covenant.

Posting requirement. Employers must post a copy of Virginia Code Section 40.1-28.7:7 (or a summary approved by the Department of Labor and Industry) in the same location where other required workplace posters are posted.