

Washington Implements a Salary History Ban and Restrictions to Non-Compete Covenants

by Aaron Goldstein

Last week, Washington signed into law two new employment laws that may have significant impacts on many Washington employers: a salary history ban and restrictions on non-compete covenants.

Salary History Ban

On May 9, 2019, Governor Inslee signed into law HB 1696, or the Equal Pay and Opportunities Act, which makes Washington the ninth state to ban employers from asking applicants about their prior salaries. The new law also makes Washington the second state (following California) to require employers to provide pay scale information when asked. The law applies to employers with 15 or more employees and goes into effect July 28, 2019.

The key components of the law include:

- **Salary History Ban:** Employers cannot seek the wage or salary history of an applicant from the applicant or the applicant's current or former employer.
- **Confirmation of Prior Salary Allowed:** Employers can confirm an applicant's prior salary if:
 - The applicant has voluntarily disclosed the information; or
 - The employer has made an offer of employment with compensation.
- **Pay Range Disclosure:** After an employer has given an offer and an applicant asks, employers are required to provide the wage scale or salary range for the position for which the applicant is applying. This also applies to current employees who are offered an internal transfer or promotion.
- Employers cannot require that the applicant's prior wage or salary history meet certain criteria.

The law clarifies that if no wage scale or salary exists for the position, the employer must provide the salary expectation prior to posting the position.

Remedies for violations of this new law are provided under RCW 49.58.060 and RCW

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49.58.070 and include damages, interest and reasonable attorney's fees.

You can see the new law [here](#).

Non-compete Restrictions

On May 8, 2019, Governor Inslee signed into law HB 1450, which adds important restrictions to the use of non-compete agreements in Washington. The law goes into effect January 1, 2020 and applies to all employers doing business in Washington if they employ one or more employees.

The new law is the first of its kind to implement a salary threshold for the enforceability of non-competition provisions. Key components of the new law include:

- **Salary Threshold:** Noncompetition clauses will be void and unenforceable against any employees earning less than \$100,000 annualized. They will be void and unenforceable against independent contractors who make less than \$250,000 annualized. These amounts will be adjusted yearly.
- **Notice:** Employers must disclose the terms of a non-compete covenant in writing no later than the prospective employee's acceptance of the offer. If an agreement becomes enforceable at a later date because of a change in the employee's compensation, the employer must disclose that the agreement can be enforceable in the future.
- **Independent Consideration:** Independent consideration is required for any covenant entered into after the commencement of employment.
- **Anything Over 18 Months is Presumed Unreasonable:** Covenants longer than 18 months are presumed unreasonable and unenforceable. An employer can overcome the presumption with "clear and convincing" evidence that a longer period is necessary.
- **Moonlighting:** Employees earning less than twice the state minimum wage cannot be restricted from working an additional job so long as the additional job does not raise issues of safety or interfere with the employer's normal scheduling expectations.
- **Garden Leave:** If an employee is terminated because of a layoff, a non-compete covenant is void unless enforcement includes compensation equivalent to the employee's base salary at the time of termination less any compensation earned through subsequent employment during the enforcement period.
- **Retroactive Application:** The new law applies to any actions or proceedings commenced after January 1, 2020 regardless of when the noncompetition covenant was entered into by the parties.

Under the new law, if a court reforms, rewrites or only partially enforces a non-compete provision, it *must* require the employer to reimburse the employee for reasonable attorney's fees, costs and other expenses, plus damages.

The law does not address the use of employee or customer non-solicitation provisions or other restrictive covenants.

You can see the new law [here](#).

Takeaways:

Many employers in Washington will be affected by these new laws. Employers should

take note of the salary history ban and train any hiring committees and individuals involved in the interviewing process about the new law. Employers should also expect more applicants to ask about salary ranges, and should ensure they have pay range information handy. Finally, employers who currently have non-compete covenants in their agreements should revisit their application to employees and consider whether to redraft them to ensure enforceability.