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Utah And Idaho Enact Employee-Friendly Amendments To Non-Compete Legislation

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- Labor & Employment
- Idaho
- Utah

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In the past week, two states have made modifications to their respective non-compete laws. On March 27, 2018, Utah imposed special restrictions on the use of non-compete agreements in the broadcasting industry. One day later, Idaho modified the standard of proof that must be followed when a company seeks an injunction against a former employee or independent contractor who is violating a non-compete covenant.

Utah Restricts Use Of Non-Competes In Broadcasting Industry

On March 27, 2018, Utah Governor Gary Herbert signed a bill modifying the State's Post-Employment Restrictions Act to significantly curtail the enforcement of non-compete agreements against employees in the broadcasting industry. The original bill, enacted just two years ago in the 2016 Legislative Session, was covered by us in an article dated April 7, 2016.

Utah's original non-compete bill served two purposes. First, the bill imposed a one-year time limit on post-employment non-compete covenants, other than those included in "reasonable severance agreement[s]" and those "related to and arising out of the sale of a business[.]" Second, the bill authorized employees to seek

attorneys' fees and actual damages against employers that attempted to enforce unenforceable non-competes.

With the new amendment, Utah has imposed special restrictions on the enforcement of non-compete covenants against employees of "broadcasting compan[ies]." Specifically, the amended bill bars the enforcement of non-competes against broadcasting employees unless they are paid a salary of at least $913 per week (i.e., $47,476 per year). Further, for broadcasting employees who meet the salary test, non-compete covenants will be valid only if:

- The covenant "is part of a written employment contract with a term of no more than four years"; and
- The employee is either terminated "for cause," or the employee breaches the employment contract "in a manner that results in" his or her separation.

Finally, although the original one-year time limit on non-competes generally applies in the broadcasting industry, the amended bill prohibits non-competes from extending beyond the original term of the employee's written contract. Consequently, if a broadcasting employee's separation occurs less than one year before his or her contract expires, the restricted period must also end by the contract expiration date.

While curtailing the use of non-compete agreements for broadcasting employees, the Utah amendments stop well short of the broader prohibitions against non-compete agreements for broadcasting employees that exist in Arizona, Connecticut, the District of Columbia, Illinois, Maine, Massachusetts, and New York**.**

As discussed in our 2016 article, Utah's non-compete law does not apply to non-solicitation and non-disclosure/confidentiality agreements. In discussing the broadcasting restrictions, Governor Herbert stated he would oppose any further limitations on the use of non-competes under Utah law.

Idaho Modifies Standard of Proof For Non-Compete Enforcement Actions

On March 28, 2018, Idaho repealed a two-year-old amendment to its non-compete law that had made it easier for employers to obtain injunctive relief against "key employees" and "key independent contractors" who violate their non-compete covenants. However, in approving the repeal, Governor C.L. "Butch" Otter questioned the wisdom of the move.

Under Idaho Code §44-2701 et seq., enacted in 2008, companies may enter into non-compete agreements with "key employees" and "key independent contractors" to protect a legitimate business interest, provided the restrictions are reasonable as to duration, geographic area and type of employment. To be classified as a "key" employee or independent contractor, the statute requires proof that the individual has the ability, based on the nature of his or her position, "to harm or threaten an employer's legitimate business interests." The statute further provides a non-inclusive list of "legitimate business interests," which includes company goodwill, customer relationships, referral relationships, vendor relationships, confidential

information, and trade secrets.

Effective March 30, 2016, the legislature amended the non-compete law to provide that if a company sought injunctive relief against a "key" employee or independent contractor, and the court found a violation of the non-compete covenant, the company would be entitled to a rebuttable presumption of irreparable harm. To rebut that presumption, the key employee or independent contractor had to prove that he or she had "no ability to adversely affect the employer's legitimate business interests."

On March 28, 2018, Governor Otter allowed the repeal of this rebuttable presumption of irreparable harm to take effect without his signature. With this action, Idaho has effectively placed the burden back on companies to establish a likelihood of irreparable harm before an injunction can be issued.

In a letter confirming his decision, the Governor expressed reservations about the repeal, writing that there was "no consensus within the business community" for the change. Further, he expressed his support for a rebuttable presumption of irreparable harm, and suggested that the Legislature seek "a better solution" in the next Legislative Session. Nevertheless, he opined that, "since it is my understanding that the 2016 language has never been tested in court, there seems to be little risk in removing it" for the time being.

Conclusion

These legislative developments reflect that non-compete reform remains a high priority for state legislatures throughout the country (see our recent articles regarding legislative initiatives in Massachusetts, New Jersey, New Hampshire, Pennsylvania and Vermont). Companies with questions about the enforceability of restrictive covenants in their jurisdictions are encouraged to contact a Jackson Lewis attorney for further guidance.