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THE LAST 60 DAYS OF ACTION IN EMPLOYMENT LAW
Part III – Confidentiality, Non-Disclosure, and Non-Compete Agreements and Arbitration

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The courts and legislatures have been busy over the last two months. Thus, this installment of our 60-day newsletter is broken down by subject-matter, with this third one dealing with changes in laws regarding confidentiality, non-disclosure, and non-compete agreements and arbitration. Most notable are the trends to protect lower wage earners from non-competition agreements and to prohibit employers from seeking to conceal sexual harassment or assault with confidentiality agreements.

Federal

The National Labor Relations Board issued a unanimous decision invalidating an employer's mandatory arbitration agreement that was interpreted as preventing employees from filing charges with the NLRB. Although the agreement did not specifically identify claims under the National Labor Relations Act as being covered, it did not explicitly exclude them either. The NLRB ordered the employer to rescind the agreement and notify all employees who signed the agreement that it was no longer in effect. See Prime Healthcare Paradise Valley, LLC, 2019 NLRB LEXIS 351 (N.L.R.B. June 18, 2019).

Kentucky

Effective June 27, 2019, employers may now require employees and applicants to execute arbitration agreements as a condition of employment. This change was a response to the Kentucky Supreme Court's decision last September in Northern Kentucky Area Development District v. Snyder, in which the court held that Kentucky law barred government agencies from requiring mandatory arbitration as a condition of employment. See Ky. Rev. Stat. Ann. § 336.700(3)(A).

Maine

On June 28, 2019, Maine passed an Act to Promote Keeping Workers in Maine. Effective September 19, 2019, the Act (1) prohibits employers from entering into no-poach agreements with one another; (2) bars employers from entering into non-competes with lower wage employees; (3) limits employers' ability to enforce non-competes; (4) mandates advanced disclosure of non-compete obligations; and (5) imposes a delay between the date an employee agrees to the terms of a non-compete and when the non-compete obligations become effective. See Me. Rev. Stat. tit. 26 §§ 599-A, 599-B.

Maryland

On May 25, 2019, Maryland enacted a law prohibiting employers from entering into a non-compete or conflict of interest agreement with any employee earning less than $15 per hour or $31,200 per year. The law is effective October 1, 2019. See 2019 Md. SB 329.

Nevada

On May 25, 2019, Nevada enacted a law that prohibits employers from including in settlement agreements language that requires an employee to keep confidential the facts and circumstances relating to a civil or administrative claim arising from sex discrimination or sexual offenses. The law was effective July 1, 2019. See 2019 Nev. AB 248.

New Hampshire

On July 10, 2019, New Hampshire enacted a law prohibiting non-compete agreements for low wage earners. Effective September 8, 2019, employers cannot require employees who make 200% of the federal minimum wage ($14.50) to sign a non-compete agreement restricting the employee from working for another employer for a specified period of time or within a specific geographic area. See 2019 NH SB 197.

New York

On June 26, 2019, the United States District Court for the Southern District of New York found that New York's law prohibiting mandatory arbitration of sexual harassment claims is preempted by the Federal Arbitration Act. Latif v. Morgan Stanley & Co., LLC, 2019 U.S. Dist. LEXIS 107020 (S.D.N.Y. June 26, 2019).

Oregon

On June 11, 2019, Oregon enacted the Oregon Workplace Fairness Act, which (1) prohibits employers from entering into an agreement with an employee or prospective employee that contains a nondisclosure or other provision preventing the employee from discussing or disclosing discrimination or harassment; (2) requires employers to adopt a written policy preventing discrimination and harassment that meets certain requirements; (3) extends the statute of limitations for discrimination and harassment claims under its employment discrimination law from one to five years; and (4) enables employers to void a separation package if, after a good faith investigation, it determines that the employee engaged in prohibited discrimination that was a "substantial contributing factor" in the separation. See 2019 Ore. SB 726.

On May 14, 2019, Oregon amended its statute governing non-compete agreements to provide that, within 30 days after termination of an employee's employment, an employer must provide a signed, written copy of the terms of the non-compete agreement to the employee. The amendment is effective January 2020. See Or. Rev. Stat. § 653.295.

Utah

Effective May 14, 2019, Utah amended the Post-Employment Restrictions Act, removing the requirement that a valid non-compete provision must be a part of a written contract of no more than four years duration for a broadcasting employee. The statute now states that a broadcasting industry non-compete may be included "as part of a written contract of reasonable duration, based on industry standards, the

position, the broadcasting employee's experience, geography, and the parties' unique circumstances." See Utah Code Ann. § 34-51-201(2)(a)(ii).

Virginia

Also effective July 1, 2019, Virginia enacted a law that prohibits an employer from requiring, as a condition of employment, that an employee execute or renew any provision in a non-disclosure or confidentiality agreement that has the purpose or effect of concealing details related to a claim of sexual assault. See Va. Code Ann. § 40.1-28.01(A).

To discuss any of these changes, contact Patricia Tsipras at 610.408.2029 or ptsipras@rubinfortunato.com.

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