An Act Concerning Non-Compete Agreements (SB 906)

By: John D. Moran, Principal Analyst
March 15, 2021 | 2021-R-0083

Issue

Provide an analysis of **SB 906**, An Act Concerning Non-Compete Agreements. The bill is before the Labor and Public Employees Committee, and the committee has not yet acted upon it.

Summary

This bill sets limits on the use of covenant not to compete provisions in employment contracts. Under the bill, a “covenant not to compete” (i.e., non-compete agreement) means a contract, provision, or agreement that restrains an employee from, or imposes penalties for, engaging in any kind of profession, occupation, trade, or business in any geographic area for a set time period after employment is terminated. The bill excludes from this definition (1) nonsolicitation agreements, (2) nondisclosure or confidentiality agreements, and (3) agreements not to reapply with the same employer.

Under the bill, a non-compete agreement is enforceable only if specific requirements are met, including that the employee must earn at least three times the minimum wage.

The bill also sets limits on exclusivity agreements, which it defines as an agreement that imposes penalties on or restrains a worker from supplementing his or her income by working for another employer, working as an independent contractor, or being self-employed.

The bill applies to non-compete clauses and exclusivity agreements entered, amended, extended, or renewed on or after July 1, 2021.
The bill’s provisions do not apply to non-compete clauses that current law prohibits in employment agreements for physicians, broadcast employees, and home health aides. It also sunsets, on June 30, 2021, a law that prohibits certain existing non-compete agreements for security guards.

Non-Compete Agreements Requirements
The bill (1) prohibits employers and contractors from requesting or requiring a worker (i.e., employee or independent contractor) to sign or agree to a non-compete agreement and (2) makes any such agreement unenforceable unless a number of conditions are met.

To be enforceable, among other things, a non-compete agreement must:

1. only be applied to (a) exempt employees earning monetary compensation of more than three times the state minimum hourly wage or (b) workers who are independent contractors earning monetary compensation of more than five times the state minimum fair wage;

2. be limited to a period of no more than one year following termination or separation;

3. be necessary to protect the employer’s legitimate business interest, and the business interest could not reasonably be protected through less restrictive means, including a nondisclosure agreement, nonsolicitation agreement, or the business protections under the state Uniform Trade Secrets Act;

4. be no more restrictive than necessary to protect such business interest in terms of the duration, geographic scope, type of work, and type of employer;

5. not require the worker to submit to adjudication outside of Connecticut, or otherwise purport to deprive the worker of the bill’s protections or benefits; and

6. not unreasonably interfere with the public’s interests and be consistent with the bill’s requirements, other state laws, and public policy.

Under the bill, monetary compensation for exempt employees means wages earned over the course of the prior year, or portion of, for which the employee was employed, annualized based on the employment period and calculated as of the earlier of the (1) date enforcement of the non-compete agreement is sought or (2) date of separation from employment. For independent contractors, monetary compensation means payments for services rendered, annualized based on the period during which the contractor provided services and calculated as of the earlier of the (1) date enforcement is sought or (2) date of separation from employment.

Requirements Related to Signing the Contract
To be enforceable, the non-complete agreement must also:
1. be provided to the worker in writing no later than 10 business days prior to the earlier of (a) the deadline for accepting the offer of employment or the offer to enter into an independent contractor relationship or (b) the date contract is signed;

2. expressly state that the worker has the right to consult legal counsel prior to signing;

3. be signed by the worker and the employer or contractor separately from any other agreement underlying the relationship; and

4. be supported by sufficient consideration independent from continuation of the employment or contractor relationship, if the contract is added to an existing employment or independent contractor relationship.

Other General Requirements
Under the bill, even if all the above conditions are met, a non-compete agreement is presumed unenforceable if it applies to (1) geographic areas in which the employee neither provided services nor had a material presence or influence within the last two years of employment or (2) types of work that the employee did not perform during the last two years of employment.

Ownership Interests and Non-Compete Agreements
The bill defines “covenant not to compete predicated on ownership interest” as a non-compete agreement made (1) in anticipation of a sale of the goodwill of a business or all of the seller's ownership in a business or (2) as part of a partnership or ownership agreement and the contract or agreement expires and is not renewed, unless, prior to such expiration, the employer makes a bona fide offer to renew the contract on the same or similar terms and conditions.

The bill permits non-compete agreements predicated on ownership interest unless (1) the employer or contractor terminates the employment or contractual relationship or (2) the worker terminates the relationship for good cause attributable to the employer or contractor.

Exception to the Duration Limit for Non-Competes
The bill allows a non-compete agreement to be enforceable for up to two years if the worker is paid his or her base salary and benefits, minus any outside compensation, for the entire period of the non-compete agreement.

Existing Non-Compete Laws
The bill leaves non-compete laws in effect for three professions (1) physicians, (2) broadcast employees and (3) homemaker, companions, or home health aides. It creates an end date for another one (security guards), thus sunsetting existing limitations on the use of non-compete
clauses in security guard employment agreements. (In practice, most security guards earn less than the wage threshold necessary to have a non-compete agreement, at least three times the state hourly minimum wage.)

**Exclusivity Agreements**

The bill permits exclusivity agreements under certain conditions. It defines an “exclusivity agreement” as a contract or agreement entered or renewed on or after July 1, 2021, that restrains a worker from, or imposes penalties on a worker for, supplementing his or her income by working for another employer, working as an independent contractor, or being self-employed.

An employer or contractor may request or require a worker to sign or agree to an exclusivity agreement only if the worker is an exempt employee earning more than three times the state’s minimum fair wage or is an independent contractor earning more than five times the state’s minimum fair wage.

The bill’s conditions do not apply when the worker supplementing his or her income by working for another employer, working as an independent contractor, or being self-employed would (1) imperil the safety of the worker, the worker's coworkers, or the public or (2) substantially interfere with the employer or contractor’s reasonable and normal scheduling expectations.

The bill specifies the exclusivity agreement provisions cannot be construed to alter an employee’s obligations to an employer under existing law, including, but not limited to, the common law duty of loyalty and laws preventing conflicts of interest and any corresponding policies related to the obligations.

**Enforcement on Behalf of the Worker**

Under the bill, the attorney general, on behalf of a worker or workers, or any worker aggrieved by an alleged violation of the bill may bring a civil action as plaintiff in Superior Court for any and all relief the bill provides. In such actions, the plaintiff’s burden of proof is by a preponderance of the evidence.

If a court or arbitrator determines that a non-compete agreement or an exclusivity agreement violates the bill, the violator is liable for the greater of the aggrieved worker's actual damages or a $5,000 statutory penalty, in addition to reasonable attorney's fees, expenses, and court costs. Violators under the bill are not liable to the Labor Department for a civil penalty.
The party required to continue to compensate an employee or independent contractor in an agreement for up to two years, as permitted under the bill, has the burden of proof in a proceeding to enforce the requirement to continue to compensate the employee or independent contractor.

**Enforcement on Behalf of the Employer**

In a proceeding to enforce an agreement, the bill places the burden of proof on the party seeking to enforce a non-compete agreement or an exclusivity agreement against a worker.

**Severability**

Since non-compete agreements may be part of a larger employment contract that also addresses other issues, such as compensation, the bill includes provisions on severability.

**Non-Compete and Exclusivity Provisions**

The provisions of a contract that constitute a non-compete agreement or exclusivity agreement may be held partially enforceable only to the extent that the provisions constitute a combination of several distinct covenants. A covenant intended by the parties to be an entirety may only be held fully enforceable or unenforceable.

**Other Provisions of the Contract or Agreement**

Any severable provisions of a contract or agreement that includes a non-compete agreement or an exclusivity agreement that is held unenforceable under the bill’s provisions will remain in full force and effect, including, but not limited to, any provisions that require the payment of damages due to any injury suffered by reason of employment termination or separation.

JM:kc