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CLIENT ALERT: FLORIDA'S NEW CHOICE ACT TAKES IMMEDIATE EFFECT

Major Change to Florida's Non- Compete Law: What Employers Need to Know

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Florida has passed into law the "Florida Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth" Act, mercifully shortened to the "CHOICE Act." It authorizes two new structures for qualifying non-compete agreements signed on or after July 1, 2025. Both new options are available only for **highly-compensated employees who are not health care practitioners**. For those employees, the Act authorizes covered employers to set up "garden leave" agreements as well as non-compete agreements that do not provide payment during the non-compete period, **for up to 4 years post-separation**.

Critically, in addition to extending the permissible duration of non-compete periods compared to the duration otherwise allowed under Florida law, the CHOICE Act mandates issuance of preliminary injunctions for alleged breaches of agreements covered by the Act, and also creates a "clear and convincing" standard of proof for former employees and new employers to have such injunctions dissolved. With its authorization for longer non-compete periods, arguably less rigorous (other than the compensation threshold) standards for enforceable agreements, its provisions for mandatory injunctions, and increased difficulty in defeating or dissolving preliminary injunctions, the CHOICE Act creates very different alternatives in Florida to the restrictive covenants and enforcement mechanisms that have been available to this point.

The CHOICE Act defines "covered employees" to include both employees and independent contractors as those categories are defined by other laws, as long as they are highly compensated, but again, it excludes health care practitioners from its coverage.

1. **What is garden leave?**
    1. Garden leave is the term used for an arrangement under which an employee ceases working, but the employer continues paying their base salary and providing benefits for a specified duration.
2. **What is the compensation measure for determining an individual's eligibility for the CHOICE Act?**
    1. The individual must earn or be reasonably expected to earn a salary greater than twice the annual mean wage of the applicable Florida county—either the county in which the employer has its principal place of business, or if the employer does not have its principal place of business in Florida, then the county in which the individual resides.
    2. For purposes of this calculation, "salary" excludes the value of health care and retirement benefits, bonuses, tips, commissions, and profit-sharing.
    3. The "annual mean wage" is defined as "the most recent annual mean wage as calculated by the [U.S.] Department of Labor Bureau of Labor Statistics…for all occupations in [Florida]."
3. **Which employers may take advantage of the Act?**
    1. Employers with a principal place of business in Florida.

2. Employers based outside of Florida, for employees with a primary place of work in Florida.

4. **Which individuals may be presented with an agreement under the CHOICE Act, if sufficiently compensated?**
    1. Employees or individual contractors with a primary place of work in Florida.
    2. Employees or individual contractors who work for an employer that maintains a primary place of business in Florida.
5. **What are other requirements for a permissible agreement under the CHOICE Act?**
    1. The employee must be advised in writing of the right to seek counsel before execution of the agreement, and have at least 7 days to consider the agreement (and any associated job offer).
    2. The employee must acknowledge in writing the receipt of confidential information or customer relationships.
    3. For a "garden leave" agreement, additional provisions are required.
6. **What restrictions are authorized by the CHOICE Act?** For a period up to 4 years post-termination of employment or post-commencement of the garden leave period, within a defined geographic area, covered employees may be prohibited from:
    1. Providing services to another business, entity, or individual similar to the services they provided to the former employer with whom they signed a covered agreement; and
    2. Undertaking a role with another business, entity, or individual in which it is reasonably likely that the covered employee would use the confidential information or customer relationships of the former employer with whom they signed a covered agreement.
7. **What enforcement mechanisms does the CHOICE Act provide?**
    1. The Act provides that a court who is asked to enforce a covered garden leave or noncompete agreement must issue a preliminary injunction, which could affect the covered employee, a new or potential new employer of that employee, or both. In order to modify or dissolve the injunction, the covered employee or enjoined engaging party must then establish a basis by clear and convincing evidence, based on nonconfidential information.
    2. Prevailing parties are entitled to their attorneys' fees and costs. While current 542.335, Fla. Stat. allows for a discretionary award of prevailing party attorney's fees in the context of restrictive covenant disputes between companies and their former employees, the CHOICE Act adds the component of prevailing party attorneys' fees where the dispute is between a former employer and a new employer.
    3. The injunctive relief authorized by the Act is non-exclusive, meaning monetary damages are also available.
8. **Does the CHOICE Act also allow for 4-year non-solicitation restrictions?**
    1. No, it only provides for non-compete terms of up to 4 years. We expect that non-solicitation covenants will still be governed in Florida by section 542.335, Fla. Stat., which provides that employment-related restrictive covenants with a duration of more than 2 years post-separation are presumed unreasonable.

To summarize, section 542.335 of the Florida Statutes, which has governed restrictive covenants in Florida for decades, remains in effect, and continues to provide a legal presumption that the duration of most employment-related restrictive covenants is limited to 2 years post-employment. The CHOICE Act now offers a separate, current-employer-friendly structure under which highly-compensated individuals may be restricted from competing for up to 4 years post-employment. Additionally, it should be easier to obtain injunctive relief under the CHOICE Act than under existing law.

Employers should review their current and anticipated use of non-compete and garden leave agreements, particularly with highly-compensated employees, to determine whether the CHOICE Act provides new strategic opportunities or compliance obligations. For more information on how the CHOICE Act may affect your business, please contact Leonard K. Samuels, Ruth Vafek, or any other member of Berger Singerman's Labor & Employment Practice.

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