FLORIDA'S CHOICE ACT BECOMES LAW, ENHANCING CERTAIN NON-COMPETE AGREEMENTS

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Recently, the Florida legislature passed the Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth (CHOICE) Act, which gives employers the option to pursue more robust and longer non-compete agreements with certain more highly compensated employees.

Eligible/"Covered" Employees

- The CHOICE Act only applies to certain "Covered Employees" – i.e., employees and independent contractors who meet both of the following two basic requirements:

1. Either: (a) work primarily in Florida; or (b) work for an employer whose principal place of business is in Florida and their agreement is expressly governed by the Florida law; and
2. Earn or are reasonably expected to earn a salary greater than twice the annual mean wage of the county in this state in which the covered employer has its principal place of business, or the county in this state in which the employee resides if the covered employer's principal place of business is not in this state.

- Notably, "salary" includes the annualized base wage, salary, professional fees, and "other compensation for personal services" as well as "the fair market value of any benefit other than cash." But "salary" does not include things such as health care benefits, severance pay, retirement benefits, expense reimbursement, discretionary incentives/awards, "distribution of earnings and profits not included as compensation for personal services," or anticipated but indeterminable compensation such as tips, bonuses, or commissions.

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- "Health care practitioners" are exempted but remain subject to existing law (Section 542.335).

What Does the Act Do?

- The CHOICE Act permits much longer non-compete agreements – up to four years in length – for "Covered Employees." In contrast, under Florida's existing non-compete statute, employee-based non-competes lasting longer than 2 years are presumed to be unreasonable and unenforceable.
- The CHOICE Act makes it much easier for employers to obtain injunctions. Specifically, courts are required to preliminarily enjoin a Covered Employee from providing competing services to any business, entity, or individual during the non-compete period. Covered Employees can only modify or dissolve the injunction if they prove by clear and convincing evidence that (1) they are not in a competing role or will not use the employer's confidential information or customer relationships, (2) the employer failed to pay or provide the consideration provided in the non-compete agreement following a reasonable opportunity to cure, or (3) the new employer seeking to hire the covered employee is not engaged in and is not planning or preparing to engage in business activity similar to the enforcing employer in the geographic area specified in the non-compete agreement.
- The statute also requires courts to enjoin the new business or individual employing the employee subject to a non-compete or garden leave agreement, at which point the burden shifts to the new employer in the same manner as it shifts to the employee (although the new employer may not be allowed to claim "failure to pay" – i.e., the second defense noted above). Thus, businesses that are not parties to the non-compete agreement can still be subject to lawsuits and injunctive relief.
- The Act also addresses Covered Garden Leave Agreements through which employers keep paying an existing employee for a certain period of time (up to 4 years) even though the employee is not required to perform any work. Garden Leave Agreements are common in sales and other customer relationship-based jobs as a way for employers to solidify and secure a departing employee's client relationships before he or she starts a new job.

The Act's Strict Technical Requirements

- To take advantage of the CHOICE Act, employers must strictly comply with the following technical requirements:

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1. The agreement must be signed on or after July 1, 2025;
2. The employee must be advised in writing of the right to seek counsel before signing;
3. The employee must acknowledge in writing that the employee will receive confidential information or customer relationships during their employment;
4. If the employee has a garden-leave agreement, the non-compete period is reduced day-for-day "by any non-working portion of the notice period"; and
5. The employer must provide at least 7 days' notice of the non-compete before an offer of employment expires or 7 days' notice before the date that an offer to enter into a "covered non-compete agreement" expires.

- Notably, the Choice Act does not modify existing law (Section 542.335). Employees who are not "Covered Employees" under the CHOICE Act or who otherwise have not signed a non-compete that strictly complies with the new Act can still have enforceable restrictive covenants under existing Florida law, which is not affected by this new law.

Next Steps for Employers

- Anyone with employees in Florida or with non-compete agreements that choose Florida law should consider implementing new non-compete agreements for their highly compensated employees to take advantage of the CHOICE Act.
- Parties contemplating corporate transactions involving Florida businesses or Florida employees that include restrictive covenants may now wish to rely on a Florida choice-of-law provision (if applicable) rather than the law of a foreign jurisdiction, such as Delaware, which would not be affected by the CHOICE Act.
- Companies should carefully review their current confidentiality policies and procedures to ensure that they are properly documenting employees' receipt of and agreements to protect company confidential information and customer relationships.
- Companies should review employee compensation to ensure that the employees whom the company desires to be subject to non-competes under the new law meet the "salary" threshold.

Please do not hesitate to contact our attorneys if you have any questions relating to these issues.