

# FLORIDA'S PROPOSED CHOICE ACT TO ADD SIGNIFICANT TEETH TO ENFORCEMENT OF NON-COMPETE AGREEMENTS

## PEOPLE

S. Gordon Hill

Kevin Paule

## CAPABILITIES

Employment Law

Advisory

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Recently, the Florida legislature passed the "Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth (CHOICE) Act." For certain employees earning higher salaries, the CHOICE Act will make it much easier to enforce non-compete agreements in Florida and allow companies to enforce longer non-compete periods. It is expected that Governor DeSantis will sign the legislation soon, and the new law will take effect on July 1, 2025.

### Highlights of the New Law:

- It applies to "Covered Employees" which includes employees and independent contractors who either:
  1. Work primarily in Florida; or
  2. Work for an employer whose principal place of business is in Florida and their agreement is expressly governed by the Florida law.
- A "Covered Employee" must also earn or be 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

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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.

- "Health care practitioners" are exempted, but remain subject to current law, section 542.335.
- The Act permits non-compete agreements up to four years in length. In contrast, under Florida's current non-compete statute, employee-based non-competes lasting longer than 2 years are presumed to be unreasonable and unenforceable.
- To fit under the Choice Act:
  1. The employee must be advised in writing of the right to seek counsel before signing;
  2. The employee must acknowledge in writing that the employee will receive confidential information or customer relationships during their employment;
  3. 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
  4. 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.
- The CHOICE Act also addresses Covered Garden Leave Agreements, which require employers to 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. Similar to Covered Non-compete Agreements, the Covered Garden Leave Agreements also require a seven-day notice period prior to signing, notice that advises the employee of the right to seek counsel, and an acknowledgment that the employee will receive access to confidential information or customer relationships.
- For those covered, the CHOICE Act requires strict enforcement and makes it much easier for employers to obtain injunctions. 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

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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.
- Notably, the Choice Act does not modify existing law, including Florida's current non-compete law in section 542.335. Employees who are not "Covered Employees" under the CHOICE Act or who otherwise have not signed a non-compete that complies with the new Act can still have enforceable restrictive covenants under existing Florida law. But because section 542.335 places a significantly higher barrier on enforcing restrictive covenants, employers relying on non-compete agreements should obtain legal advice to determine whether to modify their agreements to take advantage of this new law.

### Next Steps for Employers:

- Anyone with employees in Florida or with non-compete agreements that choose Florida law should contact an attorney to determine whether existing agreements should be revised in light of the CHOICE Act, and whether new agreements should take advantage of its provisions. It is likely that current agreements do not have certain language or meet the new notice requirements required under the 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.

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- Companies should review employee compensation to ensure that the employees whom the company desires to be subject to non-compete 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.