CLIENT ALERTS & INSIGHTS

Ohio Senate Deliberates Ban on Noncompete Agreements for All Employees

MAY 16, 2025

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Summary of Bill

Bipartisan legislation was recently introduced in the Ohio Senate that would ban employee noncompete agreements in Ohio. Ohio Senate Bill 11 would prohibit any restriction on an employee's or independent contractor's ability to: (i) perform work for another employer for a specified period of time; (ii) perform work within a specified geographical area; or (iii) perform work in a similar capacity for another employer, after the termination of the employment relationship. There are currently no exceptions to the types of employees encompassed by the ban, which currently covers any individual who provides services for an employer, including an employee, independent contractor, and volunteer. The bill would also disallow agreements providing for damages, fees, reimbursements, costs or other payments owed by an employee to an employer if the employee terminates the employment relationship. The bill would also allow employees to bring a civil action against an employer for violations of this ban. The employee could be awarded damages, including costs and reasonable attorney fees, as well as injunctive relief against the noncompete restrictions.

What This Bill Does Not Address

The bill is not likely to pass in its current form. Some key issues that arise in the context of noncompete agreements that the bill fails to address include the following:

1. While the Ohio Constitution prohibits the passage of retroactive laws, the bill seems to prohibit employers from attempting to enforce any noncompete agreements after the effective date, regardless of the date on which the noncompete agreement was effective.
2. The bill does not appear to address the enforceability of non-solicitation agreements. The fact that the current bill does not address non-solicitation agreements suggests that non-solicitation agreements would remain enforceable, although rarely do you see a noncompete agreement without a non-solicitation provision.
3. Protections should be added to align with Ohio's Uniform Trade Secrets Act and stand-alone confidentiality agreements, as well as other actions taken by businesses to prevent the misappropriation of trade secrets.

4. The bill fails to address the enforceability of noncompete agreements that arise in the context of a business sale. Currently, under common law, it is most practitioners' understanding that courts treat noncompete agreements related to the sale of a business differently than those noncompete agreements entered into solely because of an employer/employee relationship, as an example. The current bill does not make a distinction.

In sum, the bill as currently written would have a dramatic and detrimental effect on many Ohio businesses. In addition to the substantive improvements that are needed, technical amendments to ensure the statute is clear and unambiguous should be pursued to ensure a strict construction of the statute and eliminate the need for courts to analyze the legislature's intent.

Opposition to Bill

The Ohio Senate Judiciary Committee has held three hearings on S.B. 11. Numerous opponents testified against the measure, including the Ohio Chamber of Commerce, the Ohio Hospital Association, and the Ohio Business Roundtable. The Ohio Hospital Association, specifically, advocated against this bill as noncompete agreements allow hospitals to protect the critical, and often costly, investments a hospital makes to bring and maintain health care providers in communities, especially in rural areas with an already limited amount of providers and reduced access to care.

The Ohio General Assembly is in the throes of deliberating Ohio's biennial budget, which passed the House last month and is now pending in the Senate. The sponsors of S.B. 11 are expected to work with interested parties over the summer, with the goal of releasing a substitute bill in the fall.

Practice Note: Parties should take notice of this bill and the fact that it was presented as bipartisan. For Benesch medical and dental practice owners, as an example, if this bill were to pass in its current form, it would have a detrimental effect on those physician and dentist practice owners that are looking to protect their practices from formerly employed doctors competing with them. A noncompete agreement restricts former employees from competing against their employer within a certain time frame and geographic area. The noncompete restrictions are necessary to maintain the practice's overall value and patient base by preventing the former employee from directly competing and potentially taking away patients or staff from their former employer, which directly impacts the future expected cash flow of that particular business.

A link to the current draft of the bill can be found here.

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