CPAs Beware: Proposed Legislation Would Impact Enforceability of Non-Compete and Non-Solicit Agreements

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For CPAs, restrictive covenants — in the form of non-competition and non-solicitation agreements — are part of life. Most firms, and most CPAs, understand that these restrictive covenants are enforceable to varying degrees. Currently, under New Jersey law, courts will enforce restrictive covenants as long as they are "reasonable" in duration, territory and scope. Generally, the court will weigh the employer's legitimate business interest against the hardship on the employee. In recent years, courts have generally trended toward not enforcing restrictive covenants, and in New Jersey, courts have utilized the "blue pencil rule" to narrow overly broad agreements to make them more reasonable. Thus, all CPAs and accounting firms should be aware of pending legislation that would statutorily limit the enforceability of non-competition and non-solicitation agreements. The pending legislation (A3715) would, among other things, make the following changes:

- **Limitations as to the scope of non-competition agreements.** The legislation would statutorily limit the temporal scope of a non-competition agreement to one year and would limit the geographic scope to the state of New Jersey. This is significant to employees and businesses that provide services in New Jersey and neighboring states. Under the proposed legislation, if the employee works in Bergen County and provides services to clients in New York, a non-compete could only preclude him or her from competing in New Jersey. Additionally, non-competition agreements would not be enforceable against any employee who has been employed by the firm for less than one year.
- **Garden leave requirement.** Under the proposed legislation, in order to enforce a non-competition agreement, the firm would be required to pay the employee 100 percent of his or her pay and benefits for the duration of the period of non-competition.
- **Creation of statutory cause of action against employers**. Agreements that violate the proposed legislation would be declared void and unenforceable. Courts would no longer have the ability to "blue pencil" an overly broad non-compete in order to make it reasonable and enforceable. Additionally, employees would have a newly created statutory right to sue an employer imposing a "prohibited agreement." The employee would be entitled to up to $10,000 in liquidated damages, lost compensation, damages, reasonable attorney's fees and costs.

- **Non-solicitation**. While the bulk of the proposed legislation is aimed at limiting non-competition agreements, it would also impact the enforceability of non-solicitation agreements. Specifically, non-solicitation agreements — agreements that restrict a former employee from soliciting business from the firm's clients — would be unenforceable "if the employee does not initiate or solicit the customer or client." This provision is extraordinarily vague and, if enacted, will likely lead to disputes as to whether former employees "initiated" the contact when they began providing service to their former employers' clients.

If the legislation is enacted it will not apply retroactively to existing agreements, but firms should be cognizant of the impact that it could have on the standard restrictive covenants that are often executed at the outset of a CPA's employment.