WINSTON & STRAWN LLP

CLIENT ALERT

# Florida CHOICE Act Allows for Easier Enforcement of Noncompete and Garden Leave Agreements

JULY 8, 2025

Many states have recently passed legislation making it more difficult for employers to enforce restrictive covenants against their departing employees. On April 24, 2025, the Florida legislature bucked this trend by passing the Florida Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth (CHOICE) Act, which allows for easier enforcement of covered garden leave and noncompete agreements and extends the maximum enforceable period for such agreements to four years. Despite some public opposition to the CHOICE Act, Governor DeSantis did not sign or veto it, which resulted in the CHOICE Act becoming law on July 3, 2025.

Employers should evaluate existing garden leave and noncompete agreements and determine whether such agreements should be amended to comply with the CHOICE Act. To take advantage of the CHOICE Act's protections moving forward, employers should consider modifying new agreements to ensure they meet the statutory requirements. Employers should also seek advice and additional analysis before hiring any employee or independent contractor who has worked for a competitor in the prior four years. Please reach out to your Winston & Strawn LLP contact if you have any questions or would like our assistance.

## OVERVIEW OF THE CHOICE ACT

The CHOICE Act creates a presumption that both "covered garden leave agreements" and "covered noncompete agreements" are enforceable and do not violate public policy as a restraint of trade if certain technical requirements are met. The CHOICE Act also allows employers to require covered employees to (1) provide advance notice of up to four years before they terminate their employment or contractor relationship; and (2) refrain from working for another employer for up to four years after the separation of their employment or contractor relationship—which is double the amount of time allowed under Florida's current restrictive covenant statute, Fla. Stat. § 542.335.

Perhaps most notably, the CHOICE Act *requires* courts, upon a covered employer's application, to issue a preliminary injunction to enforce a covered agreement and only permits the modification or dissolution of the injunction if certain facts are established with clear and convincing evidence. This significantly departs from Fla. Stat. § 542.335 which places the burden of proof on the employer to enforce a restrictive covenant.

The CHOICE Act does not amend or replace Fla. Stat. § 542.335. If a garden leave or a noncompete agreement does not satisfy the CHOICE Act's requirements, the agreement may still be enforceable under Fla. Stat. § 542.335, which requires an employer to show that the agreement (1) is in writing signed by the employee; (2) protects a legitimate

business interest (e.g., trade secrets, customer goodwill, and confidential business information); and (3) is reasonably limited in time, area, and line of business.

## APPLICABILITY

The CHOICE Act only applies to two types of agreements between a "covered employee" and "covered employer": (1) a "covered garden leave agreement" and (2) a "covered noncompete agreement."

The CHOICE Act defines a "covered employee" to mean an employee or *individual contractor* who earns or is reasonably expected to earn a salary greater than twice the annual mean wage of the Florida county where (1) the covered employer has its principal place of business; or (2) the covered employee resides if the covered employer's principal place of business is outside Florida. The CHOICE Act expressly excludes bonuses, commissions, and health and retirement benefits from the determination of an employee's or individual contractor's "salary." Any entity or individual who employs or engages a covered employee is considered a "covered employer" under the CHOICE Act.

### 1. Covered Garden Leave Agreements

A "covered garden leave agreement" is defined as a written agreement between a covered employee and covered employer in which (a) each party agrees to provide the other party up to four years of advance, express notice before terminating the employment or contractor relationship (known as the "notice period"); (b) the covered employee agrees not to resign before the end of the notice period; and (c) the covered employer agrees to continue paying the covered employee's regular base salary and benefits during the notice period.

To be enforceable under the CHOICE Act, a covered garden leave agreement must:

- advise the covered employee in writing of the right to seek counsel and provide the covered employee with at least seven days to consider the agreement;
- include a written acknowledgement by the covered employee of the receipt of the covered employer's confidential information or customer relationships; and
- provide that after the first 90 days of the notice period:
  - the covered employee does not have to provide services to the covered employer;
  - the covered employee may engage in nonwork activities at any time during the remainder of the notice period;
  - the covered employee may, with permission from the covered employer, work for another employer for the remainder of the notice period; and
  - the notice period may be reduced if the covered employer provides at least 30 days' advance written notice to the covered employee.

### 2. Covered Noncompete Agreements

A "covered noncompete agreement" is defined as a written agreement that restricts a covered employee from working for another employer for up to four years from the termination of the employment or contractor relationship within the geographic area defined in the agreement if the covered employee (1) is expected to provide services similar to the services provided to the covered employer during the three years preceding the noncompete period; or (2) is reasonably likely to use the covered employer's confidential information or customer relationships.

To be enforceable under the CHOICE Act, a covered noncompete agreement must:

- advise the covered employee in writing of the right to seek counsel and provide the covered employee with at least seven days to consider the agreement;
- include a written acknowledgement by the covered employee that the covered employee will receive the covered employer's confidential information or customer relationships; and

- provide that the noncompete period is reduced “day-for-day” by any nonworking portion of a notice period pursuant to a covered garden leave agreement, if applicable.

### ENFORCEMENT OF COVERED AGREEMENTS

If a covered employer seeks injunctive relief for an alleged violation of a covered agreement, the court *must* preliminarily enjoin the covered employee and/or the business, entity, or individual seeking to employ or engage the covered employee. The court may modify or dissolve the injunction only if the covered employee and/or the business, entity, or individual seeking to employ or engage the covered employee establishes by clear and convincing evidence that:

- the covered employee will not perform, during the notice or noncompete period, any work similar to the services provided to the covered employer during the three-year period preceding the commencement of the notice or noncompete period or use confidential information or customer relationships of the covered employer;
- the covered employer has failed to pay or provide the salary and benefits or consideration provided for in the covered agreement during the notice or noncompete period and has had a reasonable opportunity to cure the failure; or
- the business, entity, or individual seeking to employ or engage the covered employee is not engaged in and is not planning or preparing to engage in, during the noncompete period, business activity similar to that engaged in by the covered employer in the geographic area specified in the noncompete agreement.

In addition to injunctive relief, a prevailing covered employer is entitled to monetary damages for all available claims. The CHOICE Act further provides that the “prevailing party” is entitled to reasonable attorneys’ fees and costs.

Moreover, the CHOICE Act allows a covered employer to reduce the salary or benefits of a covered employee or “take other appropriate action” during the notice or noncompete period if the covered employee engages in gross misconduct against the covered employer. Such a reduction would not be considered a breach of the covered agreement under the CHOICE Act.

5 Min Read

## Authors

Michael Roche

Kara E. Cooper

Shannon Lemajeur Miller

## Related Topics

The CHOICE Act | Non-Compete | Florida

## Related Capabilities

Labor & Employment

# Related Professionals

Michael Roche

Kara E. Cooper

Shannon Lemajeur Miller