Massachusetts Non-Compete Reform – What Employers Need To Know

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By Lindsey A. Gil on August 20, 2018

After several years of consideration, non-compete reform is finally coming to Massachusetts. Governor Baker recently signed into law the Massachusetts Noncompetition Agreement Act, which will become effective on October 1, 2018 ("the law"). While the law does not abolish non-competes, it imposes many new requirements on employers seeking to enter into valid and enforceable agreements that restrict competitive activities by former employees. For example:

- The law includes new consideration requirements that will make non-competes more expensive for employers.
- In most circumstances, the restricted period cannot exceed one (1) year from the employee's separation of employment.
- The law restricts the categories of employees with whom employers can enter into enforceable non-competes.
- Non-competes entered into before the separation of employment will not be enforceable against employees who are terminated without cause or laid off.

While the law codifies many existing common law principles, the examples above highlight the ways in which the landscape of non-compete law in Massachusetts has shifted. Employers should be aware of the law's new requirements and evaluate their standard non-compete agreements for compliance before October 1.

Below is a summary of the key provisions of the law and related considerations for employers.

Scope of the Law

The law has broad reach and covers all employers, regardless of their size. It applies to employees and independent contractors.

Employers Can No Longer Enforce Non-Competes Against Certain Categories of Employees

Non-compete agreements will not be enforceable against employees who are non-exempt under the Fair Labor Standards Act; undergraduate and graduate students working part-time or as interns; and employees who are eighteen (18) and younger.

In addition, non-compete agreements will not be enforceable against an employee who has been terminated "without cause" or "laid off." This is a significant change to existing practice. The text of the law suggests that a non-compete included in a severance agreement with an employee terminated without cause will be valid and enforceable. Employers should note, however, that the law is somewhat ambiguous on this issue. In addition, it is unclear whether courts will look to the language of the

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agreement itself to determine whether an employee was terminated with or without cause. As a result, employers should carefully consider how "cause" is defined in their employment agreements because in some circumstances courts could look to the contractual definition of "cause" to determine the enforceability of a non-compete.

Types of Agreements That Are Not Covered by the Law

The law only applies to "noncompetition agreements." Several types of agreements are explicitly exempted from the law, such as:

- Covenants not to solicit or hire employees.
- Covenants not to solicit or transact business with customers, clients, and/or vendors.
- Confidentiality and non-disclosure agreements.
- Invention assignment and intellectual property agreements.
- Severance agreements, provided an employee is expressly given seven (7) business days to rescind acceptance.
- A forfeiture agreement, which imposes financial consequences on the employee as a result of termination of employment.
- Certain non-compete agreements made in connection with the sale of a business.

In light of these exemptions, employers should consider ways in which business objectives served by non-competes might alternatively be achieved through confidentiality agreements, non-solicitation agreements, severance agreements, and the like.

Requirements for Enforceable Non-Compete Agreements After October 1, 2018

Heightened Consideration Requirements

The law makes significant changes to the nature and amount of consideration that employers must pay in order to enter into an enforceable non-compete agreement. These provisions are ambiguous and will likely require judicial interpretation.

First, the law requires consideration beyond continued employment for non-compete agreements with existing employees. The law states that the agreement must be supported by "fair and reasonable consideration independent from continuation of employment." The law does not offer guidance on what would be considered "fair and reasonable" consideration to support a non-compete agreement with an existing employee.

Second, regardless of whether the employee signed the agreement before or during employment, the law requires employers to pay employees for the non-compete agreement through either "garden leave pay" or "other mutually agreed-upon consideration."

- Garden Leave: The non-compete can contain a "garden leave" provision, which would require the employer to continue paying the former employee during the restricted period on a pro rata basis an amount defined as "at least 50 percent of the employee's highest annualized base salary paid by the employer within the 2 years preceding the employee's termination."

- Other Consideration: In lieu of garden leave, the non-compete can provide for "other mutually-agreed upon consideration between the employer and the employee." The law does not provide guidance regarding the nature of such consideration, including whether it must be equal to or exceed the value of garden leave.

While the law appears to contemplate allowing the parties to agree to less valuable consideration than garden leave (a significant savings for employers that widely use non-competes) and which could be provided to the employee at any time, including as a signing bonus, whether courts will interpret the new law to allow consideration of this nature is unclear at this time.

If an employer elects to provide garden leave, payments to the employee may be unilaterally discontinued if an employee is deemed to have breached the non-compete agreement. However, we would advise employers to consult with counsel regarding potential implications under the Massachusetts Wage Act before discontinuing garden leave pay.

Non-Competes Must Be Reasonably Tailored to Protect Business Interests

Consistent with a long line of Massachusetts cases construing non-compete agreements, the law requires non-compete agreements to be reasonable with respect to duration, geographic scope, and restricted activities. The law provides the following guideposts:

- Duration: A non-compete generally cannot exceed one (1) year. The restricted period may be increased to two (2) years in the event of breach of fiduciary duty by the employee or theft of the employer's property.

- Geographic Scope: A non-compete will be presumptively valid if the agreement is limited to the locations in which the employee provided services or had a material presence or influence in the last two (2) years of his or her employment.

- Restricted Activities: A non-compete will be presumptively valid if the proscribed activities protect a legitimate business interest and are limited to the specific types of services provided by the employee during his or her employment.

In sum, the law provides that non-competes be "no broader than necessary to protect the legitimate business interests of the employer," which include the employer's trade secrets, other confidential information, and goodwill.

The law also codifies the existing Massachusetts practice of "blue-penciling," which refers to a court's ability to reform or revise invalid non-competes to render them enforceable.

Other Requirements

All non-compete agreements entered into after October 1st must expressly notify the employee that he or she has the right to consult with counsel prior to entering into the agreement and be signed by the

employee and employer.

For new employees, a non-compete agreement must be presented before a formal offer of employment is made or ten (10) business days before an employee begins work, *whichever comes first*.

For existing employees, a non-compete agreement must be presented at least ten (10) business days before the effective date of the agreement.

Choice of Law Provisions

The law applies to all employees and independent contractors who lived or worked in Massachusetts for the last thirty (30) days before termination of their employment. The requirements of the law cannot be avoided through a choice of law provision.

What Does the Law Mean for Employers?

Employers have less than three months to prepare for these changes. We recommend that employers begin reviewing their non-compete agreements and procedures for presenting these agreements to new and existing employees now to ensure they comply with the law.

This post provides a high-level overview of the new requirements of the law. There may be other provisions of the law that apply to the unique circumstances of your business. The attorneys in Peabody & Arnold's Employment Law and Litigation Practice group are ready to assist your organization as you prepare for these changes. Please contact us for additional information about the new law, how it may impact your organization, and what steps you can take to protect your organization moving forward.

