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Massachusetts Passes New Law Governing Non-Competition Agreements

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On August 10, 2018, the Governor of Massachusetts signed “An Act relative to the judicial enforcement of noncompetition agreements,” otherwise known as [the Massachusetts Noncompetition Agreement Act](#) (“Act”), § 24L of Chapter 149 of the Massachusetts General Laws.¹ The Act limits the ability of Massachusetts employers to enter into non-competition agreements and applies to all non-competition agreements entered into on or after October 1, 2018.

Although the Act imposes new and sometimes stringent requirements on non-competition provisions, it still leaves room for employers to continue protecting their legitimate business interests through other means, including non-solicitation and confidentiality provisions.

New Requirements

The Act creates the following checklist of requirements non-competition agreements need to satisfy in order to be valid and enforceable in Massachusetts:

1. **Ten Days’ Written Notice:** Agreements entered into on commencement of employment must be provided to the employee at the earlier of the formal offer of employment or 10 business days prior to commencement of employment. Agreements entered into after commencement of employment must be supported by consideration independent from continuation of employment and the employee must be provided the agreement at least 10 business days before the agreement is effective. Regardless of when the agreement is entered into, it must be in writing, signed by both the employer and the employee, and expressly state that the employee has the right to consult counsel prior to signing.
2. **No Broader Than Necessary:** Agreements must be no broader than necessary to protect the interests of the employer. Legitimate business interests of the employer include trade secrets, confidential non-trade secret information, and the

¹ The law was passed as part of a larger bill and can be found on pages 56-62 of the hyperlinked document.

employer's goodwill. A non-competition agreement is presumed necessary if the employer's legitimate business interest cannot be adequately protected by an alternative restrictive covenant, such as a non-solicitation agreement or a confidentiality agreement.

3. **Maximum Duration of One Year:** Restrictions on competition ordinarily cannot exceed 12 months. The Act also allows this one-year period to be extended to two years if the employee breached his or her fiduciary duty to the employer or engaged in misconduct, such as theft of employer property or breach of fiduciary duty.
4. **Payment During Non-Compete Period:** Non-competition provisions shall provide for "garden leave" pay to the employee of at least 50 percent of the employee's highest annualized base salary paid by the employer within the two years preceding the employee's termination. Alternatively, the Act provides for the possibility that the non-competition agreement can be supported by "other mutually-agreed upon consideration between the employer and employee, provided that such consideration is specified" in the agreement.
5. **Limited Geographic Scope:** Agreements must be limited in their geographic scope. Agreements limited to geographic areas where the employee "provided services or had a material presence or influence" during the last two years of employment are presumptively reasonable.
6. **Reasonable Scope of Prohibited Activities:** The scope of proscribed activities must be reasonable in relation to the interests being protected. Restrictions that protect an employer's legitimate business interest and are limited to the types of activities that the employee performed at any time during the last two years of employment are presumptively reasonable.
7. **Public Policy:** Agreements must be consistent with public policy.

Non-Competition Agreements Unenforceable Against Certain Classes of Employee

The Act renders non-competition agreements unenforceable with respect to four classes of employees: (1) employees classified as non-exempt under the Fair Labor Standards Act, (2) undergraduate or graduate student interns, (3) employees terminated without cause, and (4) employees age 18 or younger. The term "cause" is not defined in the Act.

Coverage Under the Act

The Act is carefully worded to protect people who perform work in Massachusetts and makes it difficult to avoid its protections by classifying workers as independent contractors or through choice-of-law clauses. The Act's definition of an "employee" includes independent contractors. Choice-of-law provisions that purport to "avoid the

requirements” of the Act are void if enforced against Massachusetts residents, or non-residents who performed work in Massachusetts during the 30 days immediately preceding cessation of employment.

The Act purports to limit venue to certain specific courts—either in the county where the employee resides or, if mutually agreed upon, in Suffolk County (provided that, if any such action is brought in Suffolk County, the superior court or the business litigation session of the superior court will have exclusive jurisdiction), but the Act makes no mention of a state’s inability to divest a federal court of otherwise lawful jurisdiction or proper venue.

Avenues Still Open to Employers

The Act is carefully drafted to cover only true non-competition agreements between employers and employees. It does not limit the use of other types of restrictive covenants, and employers seeking to protect their legitimate business interests should give greater consideration to such covenants, perhaps in preference over non-competition provisions.

The Act carves out 10 types of restrictive covenants *not* subject to its restrictions. The 10 categories of agreements excluded from the definition of “noncompetition agreement” are as follows: (1) covenants not to solicit employees, (2) covenants not to solicit customers, (3) non-competition agreements made in connection with the sale of a business where the parties bound by the agreement have an ownership interest in the business to be sold, (4) non-competition agreements outside of an employment relationship, (5) forfeiture agreements, (6) non-disclosure or confidentiality agreements, (7) invention assignment agreements, (8) garden leave agreements, (9) non-competition agreements made in connection with cessation of employment where the employee is expressly given seven business days to rescind acceptance, and (10) agreements not to reapply for employment to the same employer after termination of the employee.

Unresolved Issues

Several provisions of the Act raise issues that seem likely to be litigated in the future. Such issues include the following:

1. What will be sufficient as “mutually agreed upon consideration” to support a non-compete? Mere nominal consideration likely would not pass muster, even if “mutually agreed upon.” But 50 percent of base salary or its equivalent does not seem to be an absolute required minimum. If an employer chooses to offer something that equates to less than 50 percent, it will be important to show that the consideration was still significant, real, and valuable—the more value, the better. Additionally, it would be helpful to show that it was truly mutually agreed upon and not a product of coercion or unequal bargaining power.
2. If an employer chooses to waive all or part of the non-compete period, must it provide the required consideration for the restricted period for the full period of time originally specified, or can it be cut off when the restricted period is waived? As the

Act states that an employer may not “unilaterally discontinue or otherwise fail or refuse to make the payments,” there is some statutory ambiguity regarding whether that requirement would only apply during an active (non-waived) restricted period.

3. As the Act purports to apply to employees and independent contractors who reside or are employed in Massachusetts for at least 30 days immediately preceding cessation of employment, how will it apply to sales personnel with multi-jurisdictional territories, of which Massachusetts is just one state? Or to persons who move in to Massachusetts after the commencement of employment, perhaps voluntarily, with the intention of eluding an otherwise enforceable non-compete?
4. If an employer would have terminated an employee without cause but instead enters into a severance agreement with that employee containing a non-compete, will the non-compete be enforceable?
5. Under what circumstances is a termination “without cause” within the meaning of the Act?
6. Will the notion of “exclusive jurisdiction” for claims brought in Suffolk County be contested in claims brought in the Massachusetts federal court under the Act, or in other states in matters governed by Massachusetts law? It would seem that the Commonwealth of Massachusetts cannot divest a federal court, in Massachusetts or elsewhere, of otherwise lawful jurisdiction or proper venue. Such a provision, however, could provide a jumping-off point for creative abstention arguments that fall short of a full deprivation of a federal court’s jurisdiction, and for comity and *forum non conveniens* assertions if such issues are joined in state courts outside the Commonwealth.

Key Takeaways

Despite imposing stringent requirements on who can be subject to non-competition agreements and the conditions imposed in them, the Act leaves employers with a number of tools to protect their legitimate business interests. In addition, the law provides a number of safe harbors and presumptions that allow employers to draft non-competition agreements that are more likely to be enforced.

What Employers Should Do Now

Employers, particularly if they employ individuals in Massachusetts, should do the following:

- Review form non-competition agreements to ensure that they comply with the various elements of the Act as they become applicable to agreements signed on or after October 1, 2018.

- If any form non-competition agreements are not in compliance, amend those forms and consider reviewing existing agreements governed by Massachusetts law to determine whether they should be amended as well, or at least consider any risks associated with seeking to enforce those existing agreements in the new climate.
- Review non-competition agreements and forms in use for employees in other states, given the evolving legal landscape nationally and locally, which has led to more stringent rules and attitudes with regard to non-competes.
- Consult with knowledgeable local legal counsel throughout this review process.

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