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CLIENT ALERT: Massachusetts Noncompete Reform

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August 2018

On July 31, 2018, the Massachusetts Legislature passed "An Act relative to the judicial enforcement of noncompetition agreements" limiting the ability of employers to enforce noncompetition agreements against employees and independent contractors who work in Massachusetts. If Governor Charlie Baker signs the bill, the law will take effect on October 1, 2018 and apply to agreements entered into on or after that date.

Applicability: The Act provides that "noncompetition agreements" shall not be valid or enforceable unless certain requirements are met. Even if such requirements are met, such agreements are not enforceable against certain types of employees, including those that were terminated without cause and those who are non-exempt under the Fair Labor Standards Act.

A "noncompetition agreement" under the Act is an agreement which prohibits competitive activities after employment ends or which imposes adverse financial consequences if an employee competes (a so-called "forfeiture for competition agreement"). The Act excludes from the definition of "noncompetition agreement":

- Covenants not to solicit or transact business with customers, clients, and vendors of the employer.
- Covenants not to solicit or hire employees of the employer.
- Agreements made in connection with the sale of a business when the party restricted by the noncompetition agreement is a significant owner of the business who will receive significant consideration from the sale.
- Agreements outside of the employment relationship.
- Agreements that impose adverse financial consequences on a former employee as a result of employment termination, regardless of whether the employee engages in competitive activities post-employment.
- Nondisclosure/confidentiality agreements.
- Assignment of inventions agreements.
- Agreements by the employer to pay the employee during the restricted period (a so-called "garden leave clause").
- Separation agreements provided that the employee is given 7 *business* days to rescind acceptance.
- Agreements by the employee to not reapply for employment to the same employer after termination.

The Act applies to employees and independent contractors who are, or have been for at least 30 days prior to termination of employment, a resident or employed in Massachusetts. The Act specifically provides that its requirements cannot be avoided through a choice of law provision.

Requirements for Enforceable Noncompetition Agreement: Under the Act, a noncompetition

agreement is not valid or enforceable unless the following requirements are met:

i. If entered into upon commencement of employment, the agreement (a) is signed by *both* employer and employee, (b) expressly states that the employee has the right to consult with counsel prior to signing, and (c) is *provided to the employee before the earlier of a formal employment offer or 10 business days before commencement of employment*.

ii. If entered into after commencement of employment (but not in connection with a separation), (a) the agreement is supported by fair and reasonable consideration besides continuation of employment; (b) *notice of the agreement was provided not less than 10 business days before the effective date of the agreement*; (c) the agreement was in writing; (d) the agreement was signed by both the employer and employee; and (e) the agreement expressly states that the employee has the right to consult with counsel prior to signing.

iii. The agreement is no broader than necessary to protect one of more of the following legitimate business interests of the employer: (a) the employer's trade secrets, (b) the employer's confidential information, or (c) the employer's goodwill. A noncompetition agreement is presumed necessary where those interests cannot be adequately protected through an alternative restrictive covenant such as a nonsolicitation, nondisclosure or confidentiality agreement.

iv. *The duration of the restrictive covenant cannot exceed 1 year from the termination of employment* unless the employee breaches a fiduciary duty to the employer or has unlawfully taken property belonging to the employer, in which case the restricted period may be as long as 2 years.

v. The agreement is reasonable in geographic scope. A limitation to geographic areas in which the employee, during any time within the last 2 years of employment, provided services or had a material presence or influence shall be presumptively reasonable.

vi. The agreement is reasonable in scope of restricted activities. A restriction that is limited to only the specific types of services provided by the employee at any time during the last 2 years of employment shall be presumptively reasonable.

vii. The agreement must include a "garden leave clause" or "other mutually agreed upon consideration between the employer and the employee." Such a permissible garden leave clause under the Act must provide for payment on a pro rata basis during the entirety of the restricted period of at least 50% of the employee's highest annualized base salary within the preceding 2 years. In addition, an employer may not unilaterally discontinue or refuse to make the garden leave payments, except in the event of a breach by the employee. The term "other mutually-agreed upon consideration" is not defined, but it must be specified in the agreement.

viii. The agreement must be consistent with public policy.

Prohibition on Enforcement Against Specified Groups: Even where the foregoing requirements are met, noncompetition agreements shall not be enforceable against:

- Non-exempt (overtime eligible) employees under the Fair Labor Standards Act.
- Undergraduate or graduate students participating in an internship or short-term employment relationship with an employer while enrolled in a full or part-time undergraduate or graduate educational institution.
- *An employee that has been terminated without cause or laid off*. Termination without cause is not defined and employers would be well advised to define cause in their noncompetition agreements.
- An employee that is 18 years old or younger.

Reformation Allowed: A court may revise a noncompetition agreement so as to render it valid and enforceable to the extent necessary to protect the applicable legitimate business interests.

Venue for Enforcement: All civil actions relating to noncompetition agreements must be brought in the county where the employee resides, or, if the employer and employee mutually agree, Suffolk County. The Superior Court or Business Litigation Session shall have exclusive jurisdiction for any such action brought in Suffolk County. It is unclear whether such language is intended to prohibit federal court actions filed in Suffolk County.

Tips for Employers:

Many employers may conclude with counsel that they are adequately protected by covenants prohibiting (i) the solicitation of clients, vendors and employees, and (ii) the disclosure and use of confidential information. In any case, employers should review their post-employment restrictive agreements, and procedures to have them executed, to ensure compliance with the new law. Sufficiency of consideration and termination without cause are issues that will need to be examined closely.

The potential indirect impact of the Act on how courts assess nonsolicitation agreements and noncompetition agreements entered into prior to the October 1, 2018 effective date, even though not directly governed by the law, remains to be seen.

For the full text of the law, please visit: https://malegislature.gov/Bills/190/S2650

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