If You Have Employees Who Live or Work in Massachusetts, You Need to Relearn Non-Competes Right Now.

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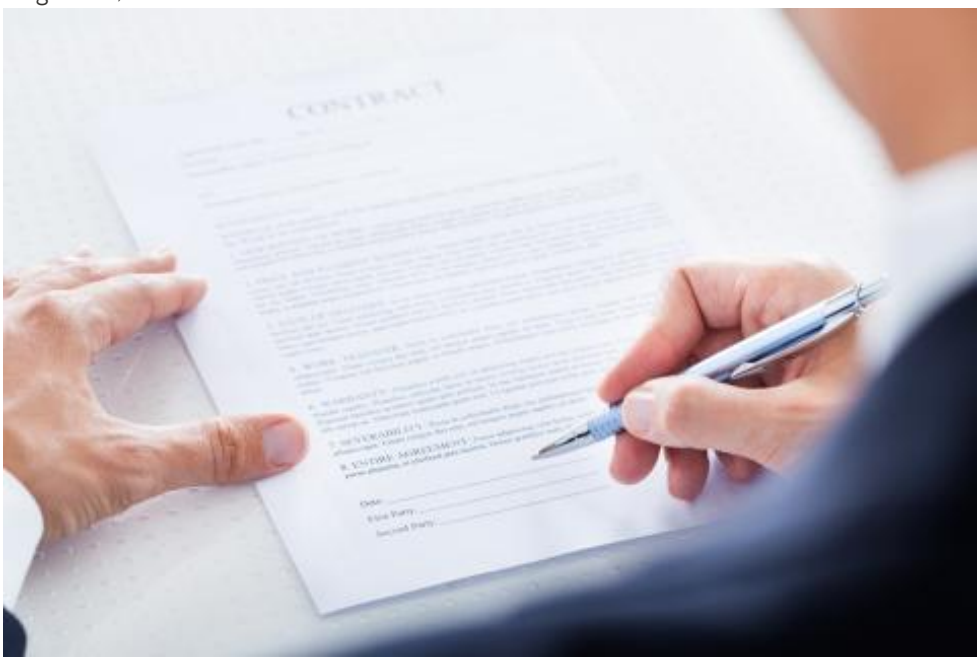

For companies with employees or contractors who live or work in Massachusetts, a recently passed law has significantly changed how covenants not to compete in that state may be used. The new law, which will take effect in October 2018, contains major changes to the state's non-compete law, including:

For certain classes of employees, non-compete agreements will always be prohibited.

Non-competes will only be enforceable against employees who voluntarily quit or who are fired for cause, a term not defined in the law.

The law puts clear limits on how, when, and for how long an employer can restrict an employee's post-employment activities.

During the period of the non-compete, the employer may have to pay the former employee "garden leave."

Other restrictive covenant agreements, such as non-solicitation agreements, are unaffected by the new law.

The law's most significant provisions, and how they are likely to impact employers, are discussed below.

To whom does the new law apply?

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The law applies to covenants not to compete entered on or after October 1, 2018 by any employee or any independent contractor living or working in Massachusetts. The law also prohibits the use of non-competes with certain types of employees, including:

Employees classified as non-exempt under the Fair Labor Standards Act;

Undergraduate or graduate students who are engaged in short-term employment;

Employees who have been terminated without cause or laid off; or

Employees who are 18 years old or younger.

Notably, what it means to be terminated with "cause" is not defined in the law.

What type of agreements does the new law govern?

The law governs "noncompetition agreements," which are defined as:

> *An agreement between an employer and an employee, or otherwise arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees that the employee will not engage in certain specified activities competitive with the employee's employer after the employment relationship has ended.*

The law also applies to "forfeiture for competition" agreements, which is any agreement which "imposes adverse financial consequences on a former employee as a result of the termination if the employee engages in competitive activities."

Notably, the law does not impact other types of restrictive covenant agreements, including:

Non-competes made in connection with the sale of a business;

Non-competes made in connection with the cessation or separation of employment (provided that the employee is given seven days to revoke acceptance);

Agreements prohibiting post-termination solicitation of employees, customers, and/or vendors; and

Non-disclosure of confidential information agreements.

The law governs any noncompetition agreement entered into on or after October 1, 2018.

What steps does the law require when entering into a non-compete?

The law imposes some familiar requirements for valid execution of a non-compete, but also distinguishes between non-competes entered at the beginning of employment versus those entered into after employment has begun.

All non-competes must be:

In writing;

Signed by both the employee and employer; and

Expressly state the employee's right to consult with counsel prior to signing.

If a non-compete is signed at the commencement of employment, it must be presented to the employee either when the employment offer is made to the employee or 10 days before the employee starts work, whichever comes first.

If a non-compete is signed after employment has begun, it must be supported by "fair and reasonable consideration," a term not defined in the law.

What is the permissible scope of a non-compete under the new law?

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The law proscribes limits on the geographic scope, duration, and protectable interests an employer may use to justify the non-compete. Specifically:

Geographic Scope: The geographic scope will be presumed reasonable as long as it is limited to the geographic areas in which the employee "provided services or had a material presence or influence" at any time in the employee's last 2 years of employment.

Duration: The law puts an outer limit of one year on non-competes, unless the employee is shown to have breached a fiduciary duty or has unlawfully taken the employer's physical or electronic property; the exception would allow tolling of the restriction period for up to two years.

Employer's Legitimate Business Interests: A non-compete must be no broader than necessary to protect one or more of the employer's legitimate business interests as defined in the statute, which include the employer's trade secrets, confidential information that would not qualify as a trade secret, and goodwill. A non-compete will be presumed to satisfy this element if the employer can demonstrate that no other type of restrictive covenant (such as a non-solicitation agreement or non-disclosure agreement) would be sufficient to protect the legitimate business interest at issue.

Employee's Proscribed Activities: a non-compete must be reasonable in what employee activities it proscribes; the law presumes as reasonable a non-compete that limits an employee from providing to a new employer "only the specific types of services provided by the employee at any time during the last 2 years of employment."

What other requirements does the law create to enforce a non-compete?

Employers will have to make at least some type of payment to an employee to enforce a non-compete. The law requires a non-compete to be supported by a "garden leave clause" or "other mutually agreed upon consideration." A "garden leave clause" would require an employer to pay, throughout the restriction period, at least 50% of the employee's highest annual base salary in the 2 years preceding termination. It is unclear whether an employer and employee may agree to consideration *less than* the garden leave as defined in the law.

What other considerations does the law implicate for an employer seeking to enforce a non-compete?

The law permits, but does not require, courts to "blue pencil" an overbroad non-compete to render it valid and enforceable to the extent necessary to protect an employer's legitimate business interests.

Any civil action brought to enforce a non-compete subject to the law must be brought either in the county in which the employee resides or, if mutually agreed upon by the employer and employee, in Suffolk County. Notably, employers may not use a choice of law provision to avoid the new law's requirements. Indeed, the law prohibits the use of a choice of law provision that would avoid the law's requirements if the employee "is, and has been for at least 30 days immediately preceding his or her cessation of employment, a resident of or employed in Massachusetts at the time of" the employee's termination.

What should employers do in response to this new law?

Many employers have non-competes in place for employees across the country, often choosing to use a standard agreement with an election to use the law of the jurisdiction of their company headquarters. That approach may put at risk the enforceability of non-competes entered with those employees that live or work in Massachusetts, and employers should take care to review their noncompetition agreements to ensure that they comply with the new law. Additionally, employers should work with counsel to craft non-competes that substantively comply with the new law, and should also review their onboarding and hiring procedures to ensure that their non-competes meet the new law's requirements for how such agreements must be entered.